Recognition and enforcement of foreign or international arbitral awards in Latin America

By María Beatriz Burghetto

I- The importance of the issue

Although according to the statistics in international arbitration, most awards are voluntarily enforced, the effectiveness of the procedure for recognition and enforcement of awards remains a key aspect of the attractiveness of arbitration as an alternative in the field of international business. Hence the importance of facilitating and harmonizing the "exequatur procedure" whereby a State Court recognizes a foreign (or “non-domestic”) arbitral award as such and renders it enforceable on the territory of the State to which the request is made.

II – Partial unification of the procedural rules through international conventions.

The most important treaty in this area, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York in 1958 under the auspices of the United Nations (the "New York Convention"), specifically set out common standards governing certain aspects of enforcement, such as documents to be provided by the applicant (Article IV), the possible grounds for refusal of enforcement (Article V) and the option enabling the enforcement judge to order a stay of proceedings against a foreign arbitral award suspended or set aside in the jurisdiction of origin (Article VI).

Although there are also regional treaties that address this issue in Latin America, the New York Convention remains the most favorable and the most specific convention.

---

1 Attorney at law, Paris Bar, Hughes Hubbard & Reed LLP, counsel. The opinions expressed in this article reflect those of the author alone. Hughes Hubbard cannot be held liable for any inaccuracies contained in this article.

2 An award rendered in the territory of a State in an international arbitration may be considered by domestic law as a "non-domestic" or "international" award and be subject to a separate regime (in the case of Chilean legislation, for example).

3 This Convention currently has 149 Contracting States in the world (including all Spanish-speaking countries on the American continent). Argentina, Cuba, Ecuador, Guatemala, Honduras and Venezuela, however, have expressed reserves limiting the application of the Convention, (i) only to recognition and enforcement of awards made in the territory of another Contracting State (reciprocity), and (ii) only to disputes arising out of legal relationships -whether contractual or not- that are considered commercial under the domestic law.

4 (i) Convention on Private International Law ("Code Bustamante") (1928); (ii) Inter-American Convention on International Commercial Arbitration (Panama, 1975), whose provisions are similar to those of the New York Convention; (iii) Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (CIDIP II) (Montevideo, 1979); and, within Mercosur, (iv) the Protocol of Cooperation and Jurisdictional Assistance in Civil, Commercial, Labor and Administrative Matters (Las Leñas, 1992) and the Agreement on Cooperation and Judicial Assistance in Civil, Commercial, Labor and Administrative Matters

(Footnote continued on next page)
III. General observations regarding the enforcement procedure in Latin America

(i) Court with jurisdiction and type of proceedings: Bolivia, Brazil, Chile, Colombia, Panama, Peru and Uruguay have centralized jurisdiction for dealing with applications for enforcement in their respective Supreme Courts (the Superior Tribunal of Justice in the case of Brazil). In Ecuador, the provincial courts have jurisdiction for this purpose, while Argentina, Mexico, Paraguay and Venezuela prefer to apply common rules on jurisdiction, according to which the application for enforcement must be made before the courts of first instance with jurisdiction depending on the subject and the territory. In all these jurisdictions, the enforcement procedure is adversarial.

(ii) Evidence requested from the applicant: while in all the jurisdictions studied, the rules on this subject have been unified by the Convention, in practice, according to a study recently published by the International Chamber of Commerce, only Ecuador and Mexico have remained faithful to the New York Convention on this aspect. However, most jurisdictions in Latin America are more formalist than the New York Convention: in some countries such as Argentina, Bolivia and Panama, the applicant is required to produce the entire contract which contains the arbitration clause.\(^5\) In others, such as Brazil and Chile, this is not required, but these jurisdictions impose, however, other administrative requirements that go beyond the letter of the Convention (although they are not considered to be substantial).\(^6\) Colombia, Peru and Uruguay require not only the production of the entire contract containing the arbitration clause, but also add some administrative requirements beyond those included in the text of the Convention.\(^7\) Finally, Venezuela seems to be less demanding than the Convention, as the production of the arbitration agreement signed by the parties to the arbitration is not systematically required.\(^8\)

IV. Brief overview of the application of the New York Convention in Latin America

The New York Convention assumes the binding force of foreign arbitral awards: Article V exclusively lists however, two types of grounds for refusal of enforcement: (a) those whose existence must be raised and proven by the party opposing enforcement (paragraph 1), relating to the invalidity of the arbitration agreement, to non-compliance with the adversarial principle,


among others, and (b) those that can be raised \textit{ex officio} by the enforcement judge (paragraph 2), such as non-arbitrability of the subject-matter of the dispute according to the law of the State of the enforcement judge or violation of the public policy of that State.

With respect to the application of these grounds for refusal, the case law overview of the countries in the region studied can be summarized as follows:

(i) The exclusive and limited nature of the grounds for refusal listed in the New York Convention is generally upheld by the case law\textsuperscript{9} which rejects applications for enforcement based on grounds involving a review of the merits of the arbitrators’ decisions.

(ii) However, it can be noted that the case law is very much attached to its own domestic legislation,\textsuperscript{10} which occasionally leads some domestic courts to apply restrictions or conditions not included in the New York Convention, under the pretext that the Convention refers to the procedural law of the forum,\textsuperscript{11} or in other cases, to admit appeals based on constitutional law against foreign arbitral awards.\textsuperscript{12} It should, however, be noted that most countries in the region


\textsuperscript{10} In Colombia, in the Sunward Overseas case, the foreign award was enforced on the grounds that it fulfilled the conditions of both the Convention and Colombian law - Sunward Overseas SA v. Servicios Marítimos Limitada Semar (Ltda.), Supreme Court of Justice, 20 November, 1992 (Yearbook Commercial Arbitration 1995 - Volume XX, pp. 651 – 655). In Argentina, the Court of Appeal relied exclusively on the National Code of Procedure to order enforcement of a foreign arbitral award (Court of Appeal of Buenos Aires, Commercial Chamber, Branch D, 5 November, 2002, Reef Exploration Inc. v. Compañía General de Combustibles S.A., Revue Jurisprudencia Argentina 2003-III-90). This decision, however, is commendable, as it recognized an arbitral award rendered in the United States without regard to a prior decision of another Argentinian court which had enjoined the arbitral tribunal to declare itself as lacking jurisdiction (which is known in English as an “anti-arbitration injunction”).

\textsuperscript{11} For example, the requirement to provide evidence of the enforceability of the said awards (“double exequatur”), in Pollux Marine Services Corp. v. Colfletar Ltda, Supreme, Supreme Court of Justice of Colombia, 12 May, 2011 (Yearbook Commercial Arbitration 2012 – Volume XXXVII, pp. 198 – 199).

\textsuperscript{12} In Corporacion Todosabor, the Constitutional Chamber of the Venezuelan Supreme Court considered that it had jurisdiction to set aside an arbitral award rendered in the United States, in order to guarantee the protection of constitutional rights (known as “\textit{amparo}” proceedings) (Corporación Todosabor C.A. (Venezuela) v. Hågen-Dazs International Shoppe Company, Inc., Supreme Court of Justice of Venezuela, Constitutional Chamber, 14 February, 2006 (Yearbook Commercial Arbitration 2007 - Volume XXXII, pp. 995 – 1001). In contrast, Argentinian and Chilean jurisprudence do not allow appeals of constitutional origin made directly against an award (Cacchione, Ricardo C. v. Urbaser Argentina SA, Supreme Court of Argentina, 11 March, 2008, DJ16/04/2008,997; Recurso de queja promovido por Felipe Barrera Sancho – Appeal lodged by Felipe

(Footnote continued on next page)
have modernized their legislations on arbitration, and therefore the standards governing the enforcement of foreign arbitral awards generally promote the recognition and enforcement of the latter.\textsuperscript{13}

(iii) Although the courts refuse enforcement of awards made in the absence of evidence of the contract or arbitration clause, they grant it when there is evidence of implied consent to arbitration by the parties.\textsuperscript{14}

(iv) In order to determine the existence of a lack of consent or non-arbitrability of a subject, the courts use a conflict of laws approach, that is to say, they base their findings on the law they consider as applicable in the case at issue, be it the \textit{lex contractus} or the \textit{lex fori},\textsuperscript{15} or the law of the seat for the capacity of a company.

(v) Allegations of improper constitution of the arbitral tribunal will be rejected if the court finds that the parties were able to choose the arbitrators,\textsuperscript{16} that the institutional rules chosen by the parties had been complied with,\textsuperscript{17} or that the alleged ignorance of the applicable law by the arbitrators did not prevent the party from proving the existence and content of the law.\textsuperscript{18}

(vi) There are examples of reasonably broad interpretation of the scope of the arbitrators’ mission\textsuperscript{19} allowing the enforcement of the awards in question.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{13} Regarding the grounds for refusal of enforcement, for example, Bolivian, Paraguayan and Peruvian legislation refer to the New York Convention and those of Brazil, Chile and Venezuela contain identical or very similar grounds of refusal to those of the Convention.
\item \textsuperscript{14} Itiquira Energética S/A v. Inepar S/A – Indústria e Construções, Court of Justice of the State of Paraná, Brazil, 7 December, 2011 (Yearbook Commercial Arbitration 2012 – Volume XXXVII, pp. 193 – 194); the court held that signing the agreement was not necessary as the parties had signed a complete arbitration clause which referred to the ICC Rules and the Terms of Reference had the same function as the arbitration clause.
\item \textsuperscript{16} Aff. Gold Nutrition (Chile, 2008), cited in fn. 9 above.
\item \textsuperscript{17} In this case, it was the ICC Rules (YPFB Andina S/A v. UNIVEN Petroquímica Ltda, Superior Tribunal of Justice of Brazil, No. SEC No. 4.837 – BO (2010/0089053-1), 15 August, 2012, ITA Board of Reporters.
\item \textsuperscript{19} Aff. Petrotesting (Colombia, 2011, n. 9): The domestic court found that the clause included in one of the contracts signed by the parties also submitted some issues relating to another contract signed by the same parties to
\end{itemize}
\end{footnotesize}
(vii) Case law allows for enforcement of arbitral awards rendered *in absentia* if the defendant was duly informed of the arbitration proceedings and was not physically unable to be represented before the arbitral tribunal sitting abroad;°20 and distinguishes the parties’ objections as to the substantive review, which it dismisses.°21

(viii) Judges generally admit that international public policy of the forum is more restrictive than that of its domestic public policy.°22 Furthermore, they refuse enforcement for awards that are

---

°20 A foreign award rendered *in absentia* was enforced in Brazil, where the Superior Tribunal rejected the argument put forward by the Brazilian defendant on the invalidity of the notification of the procedure by letter, considering that Brazilian law does not require notification of Brazilian Parties by letters rogatory, as the defendant alleged (Union Europeéenne de Gymnastique – UEG v. Multipole Distribuidora de Filmes Ltda, Superior Tribunal of Justice of Brazil, SEC No. 874 -EX (2005/0034908-7), April 19, 2006 (Yearbook Commercial Arbitration 2012 – Volume XXXVII, pp. 173 – 174). In other cases, the Brazilian Superior Tribunal dismissed objections on this subject, on the grounds that there was no violation of the adversarial principal as this party had chosen not to participate in the arbitration (Bouvery International S/A v. Irmãos Pereira Comercial e Exportadora Ltda, Superior Tribunal of Justice of Brazil, SEC no. 887-EX (2005/0034903-8), 6 March, 2006 (Yearbook Commercial Arbitration 2012 – Volume XXXVII, pp. 171 - 172), or that Brazilian law only required for notification purposes, a reasonable length of time so that the party summoned may exercise its right of defense (Devcot S/A v. Ari Giongo, Superior Tribunal of Justice of Brazil, SEC No. 3.660-GB (2008/0218282-4), 28 May, 2009 (Yearbook Commercial Arbitration 2012 – Volume XXXVII, pp. 187 – 188).

°21 In the Gold Nutrition case, (cited in fn. 9) the unsuccessful party opposed enforcement of the foreign award, alleging that the arbitration was conducted in Portuguese and that it had been prevented from carrying out an expert appraisal and inspections): The Chilean Supreme Court dismissed these allegations, as Portuguese was the language agreed by the parties and the ban on production of evidence related to the merits, which prevented the parties from raising it within the framework of enforcement. The same Supreme Court also dismissed allegations of violation of the adversarial principle by a party which, despite having participated in the arbitration, lodged a counterclaim, considering that the allegations by this party involved a review of the arbitrators’ decision on the merits which was not subject to judicial review (Comverse Inc. v. American Telecommunication, Inc. Chile S.A., Supreme Court of Chile, Rol 3225-2008, 8 September, 2009, Journal: Revista de Arbitraje Comercial y de Inversiones, (IproLex 2012 Volume 5, No. 2, pp. 591 - 601, Kluwer Law International).

°22 As far as procedural public policy is concerned, Uruguayan courts recognized that the uruguayan procedural public policy for domestic cases may under no circumstances constitute a parameter to assess whether the enforcement of a foreign arbitral award should be granted (Enersis SA et autres c. Pecom Energía SA et autre, Court of Appeal of civil affairs, 2nd round (Uruguay), 18 June, 2003 (Journal : La Justicia Uruguay, Vol. 128, No. 14 744, cited by C. Fresnedo de Aguirre, Guía Práctica para la Ejecución de Laudos en América Latina (http://www.fadyc_uanl.mx/alumnos/); note of P. Arrighi (Uruguay Bar Publication No. 134, August/September 2003, pp.8-10) ; regarding public policy in relation to the merits, the Supreme Court of
contrary to a domestic judgment on the same issue,\textsuperscript{23} or if there are proceedings pending on the same issue (\textit{lis pendens}).\textsuperscript{24}

\textbf{V- Conclusion}

This brief overview of the legislation and case law of Latin America jurisdictions regarding the enforcement of foreign (or non-domestic) arbitral awards reveals generally positive developments in these countries, which nevertheless involve some exceptions, driven by an increasing awareness of the courts of the limited scope of the judicial review of such awards, which enables them to avoid falling into the “traps” set out for them in many cases by the parties challenging the enforcement.
