

INSIDE ARBITRATION: ENFORCEMENT OF FOREIGN ARBITRATION AWARDS IN LATIN AMERICA

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Legal Briefings

Enforcement proceedings can be of the utmost significance in international arbitration. If a losing party does not make voluntary payment after an award has been made against it, the award will be meaningless if it cannot then be enforced against the losing party's assets. To avoid such a pyrrhic victory, domestic laws and international treaties - of which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention**" or the "**Convention**")¹ is the most important and successful instrument - provide for enforcement mechanisms which assist the prevailing party to collect the awarded sums.

When negotiating an arbitration agreement the parties remove the resolution of any potential dispute from national courts. However, at the stage of enforcement, they cannot be avoided: the local courts of the place where the losing party has assets have a fundamental role to play.

THE NEW YORK CONVENTION

The New York Convention offers a very straightforward method to ensure the enforcement of foreign arbitral awards provided that its requirements are met. Although the losing party may object to the attempted enforcement of the award, the grounds to resist enforcement under the New York Convention are very limited. In particular, Articles V(1) and (2) of the Convention provide that recognition and enforcement may be refused if:

- the arbitration agreement is not valid or the parties to the agreement were under some incapacity;
- the respondent was not given proper notice of the appointment of the arbitrator or of the proceedings or was otherwise unable to present its case;
- the award deals with a difference not contemplated by or outside the terms or beyond the scope of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, absent such agreement, not in accordance with the law of the country where the arbitration took place;
- the award is not yet binding on the parties, or has been set aside or suspended at the seat of the arbitration;
- the subject matter of the dispute is not arbitrable under the law of the enforcement country; or
- enforcement would be contrary to the public policy of that country.

Despite these limited grounds, there are cases where a party seeking to resist enforcement may turn the enforcement proceeding into an adversarial process that can be both costly and time consuming.

THE ENFORCEMENT FRAMEWORK IN LATIN AMERICA

In general, Latin America has been a late-adopter of the New York Convention compared to other regions of the world.² It might be for that reason that in some Latin American jurisdictions, local courts have applied the Convention alongside with provisions of domestic law, even when these provisions should not play a role in the enforcement of foreign arbitral awards. In some worst case scenarios, some domestic courts have "forgotten" about the New York Convention's existence or interpreted its provisions incorrectly.

Being aware of the approach of specific domestic courts to the New York Convention, and the application can be key to a successful outcome for a client in enforcement proceedings in Latin America. It is also crucial to be aware of procedural and substantive requirements necessary in a specific jurisdiction as well as other practicalities characterising the enforcement process there.

COMPARISON

In this article we have selected five jurisdictions in Latin America (Brazil, Argentina, Chile, Colombia, and Peru)³ whose courts have been regularly asked to enforce foreign arbitral awards and sought to highlight the key features of the enforcement process in each jurisdiction.

From a comparative standpoint:

- Each of these jurisdictions have recently modernised their arbitration laws, promulgating national arbitration laws that are based (to greater or lesser extent) on the UNCITRAL Model Law on International Commercial Arbitration ("**UNCITRAL Model Law**"). This means that even if a local court fails to apply the New York Convention when deciding a recognition and enforcement application, there is some fall back as the modern domestic legislation reflects the provisions of the Convention.
- The normative framework suggests that these jurisdictions share a commitment to the regime of enforcement and recognition of arbitral awards. In fact, there is very little difference between these countries in terms of the nature of the recognition and enforcement process and the grounds to oppose to it.
- Whatever differences exist in terms of enforcement, these relate more to the local legal regime dealing with the attachment or liquidation of assets.⁴
- Although the limited grounds to resist enforcement operate as a way to limit the scope of any review of the merits of the award, there is still a window for the local courts to do it, especially considering that issues such as arbitrability and public policy have to be assessed by the enforcing courts according to their own laws. Most of the jurisdictions have recently attempted to limit the scope of these grounds by defining public policy from a restrictive perspective, only covering the most basic and fundamental principles of the legal system.
- It is also remarkable that each of these jurisdictions (with the exception of Argentina) still require a decision on recognition by a different court before any enforcement order is issued. This is a procedural step that most "arbitration-friendly" jurisdictions around the world do not require and is likely to cause delays when the successful party attempts to collect the sum awarded.

BRAZIL

DOMESTIC LEGAL FRAMEWORK FOR ENFORCEMENT

- Brazilian Arbitration Act (1996) - Articles 34 to 40
- Brazilian Code of Civil Procedure - Articles 513, 515(VII) and (VIII), 523 to 538
- Internal Rules of the Superior Court of Justice

COMPETENT COURT

- The Superior Court of Justice ("STJ") recognises the foreign award
- After recognition, Federal Courts are competent for enforcement

SUBSTANTIVE REQUIREMENTS

- The award must have been issued by a competent authority and upon a valid arbitration agreement
- Parties must have been properly served with a summons
- The award must be a final and binding decision
- The award must not violate national sovereignty, human rights or public policy

PROCEDURAL REQUIREMENTS

- The award must be authenticated by the Brazilian consulate and accompanied by an official or sworn translation only in cases where the 1961 Hague Convention does not apply⁵

- Updated statement of the amount due
- All necessary documents to prove the sums awarded

ADVERSARIAL PROCEEDING?

- Yes – a party can resist enforcement on very limited grounds⁶

PUBLIC POLICY STANDARD

- Restricted version of public policy – the fundamental principles of its jurisdiction, including the political, legal, moral and economic aspects of the country
- It has to be interpreted in harmony with the best international standards, avoiding any reference to an internal perspective

ARBITRABILITY REQUIREMENT

- Limited to cases involving "negotiable rights" (direitos disponíveis). Therefore, certain matters may not be arbitrated even by agreement of the parties (family matters, certain public policy matters and, arguably, individual employment-related matters)
- However, most commercial disputes may be arbitrated, including many disputes involving government-controlled entities.

CHILE

DOMESTIC LEGAL FRAMEWORK FOR ENFORCEMENT

- Chilean Law on International Commercial Arbitration – Articles 35 and 36

- Civil Procedural Code

COMPETENT COURT

- The Chilean Supreme Court recognises the foreign award by exequatur
- After recognition, the court that would have had jurisdiction to rule on the case, if that case had been brought in court instead of in arbitration is competent for enforcement

SUBSTANTIVE REQUIREMENTS

- The requirements are identical to the New York Convention

PROCEDURAL REQUIREMENTS

- Original award or a duly certified copy
- The original arbitration agreement or a duly certified copy must be submitted

ADVERSARIAL PROCEEDING?

- Yes – during the exequatur proceedings

PUBLIC POLICY STANDARD

- Restricted version of public policy – fundamental basic rules of the country

ARBITRABILITY REQUIREMENT

- Parties cannot submit to arbitration disputes related to family law issues, felonies or criminal violations; cases that should be heard by specific lower courts; and all matters in which the law requires a public prosecutor.
- Cases involving public policy issues are not arbitrable such as capacity or civil status; antitrust; employment and labour law; disputes between legal representatives and individuals the former act on behalf of; and disputes concerning foreign investment agreements executed under Chilean Foreign Investment Statute.

COLOMBIA

DOMESTIC LEGAL FRAMEWORK FOR ENFORCEMENT

- Colombian Arbitral Statute (2012) - Articles 111 to 116
- General Code of Procedure

COMPETENT COURT

- Civil Chamber of the Supreme Court of Justice
- Third section of the Administrative Chamber of the Council of State, when public entities or entities with administrative functions are parties to the dispute

SUBSTANTIVE REQUIREMENTS

- The requirements are identical to the New York Convention

PROCEDURAL REQUIREMENTS

- Original or a copy of the award, along with a translation of the award in Spanish
- Case law has recently requested the original arbitration agreement or a duly certified copy under Article IV of the New York Convention

ADVERSARIAL PROCEEDING?

- Yes - a party can object to enforcement on limited grounds identical to the New York Convention
- However, the court is also allowed to refuse enforcement under certain circumstances, such as arbitrability and public policy

PUBLIC POLICY STANDARD

- Restricted version of public policy - most basic and fundamental principles of Colombian juridical institutions

ARBITRABILITY REQUIREMENT

- The principle is that disputes related to non-mandatory (waivable) rights are arbitrable.
- The law also provides for specific matters that cannot be settled by arbitration: disputes that involve marital status, the legality of administrative acts, insolvency and some issues regarding antitrust law and intellectual property.

DOMESTIC LEGAL FRAMEWORK FOR ENFORCEMENT

- Peruvian Law on Arbitration (2008) – Articles 74 to 77
- Civil Procedure Code

COMPETENT COURT

- The Civil Court specialised in commercial matters recognises the foreign award
- After recognition, the First Instance Commercial Court is competent for enforcement

SUBSTANTIVE REQUIREMENTS

- The requirements are identical to the New York Convention but with further clarifications as to their interpretation⁶

PROCEDURAL REQUIREMENTS

- Original or copy of the award, authenticated according to the laws of the place where the award was rendered, and certified by a Peruvian diplomatic or consular official
- If the award was not rendered in Spanish, a translation should be provided

ADVERSARIAL PROCEEDING?

- Yes – a party can object to enforcement on limited grounds identical to the New York Convention
- The court is also allowed to refuse enforcement under certain circumstances, such as

arbitrability and public policy

PUBLIC POLICY STANDARD

- Restricted version of public policy - a group of principles and institutions that are considered essential in the organisation of a state and that inspire its legal system

ARBITRABILITY REQUIREMENT

- Matters not of 'free disposition' of the parties (matters like criminal law) cannot be arbitrated. Contractual disputes (even with the state) are of 'free disposition' and can be arbitrated.
- Furthermore, the law provides that disputes on matters authorised by law or international treaties or agreements can be referred to arbitration. This provision leaves the door open to national laws and treaties to provide for arbitration on certain matters even if they are not freely disposable by the parties.

ARGENTINA

DOMESTIC LEGAL FRAMEWORK FOR ENFORCEMENT

- Argentinean Law on International Commercial Arbitration (2018) – Articles 102 to 105

COMPETENT COURT

- First Instance Commercial Courts

SUBSTANTIVE REQUIREMENTS

- The requirements are identical to the New York Convention

PROCEDURAL REQUIREMENTS

- Original award or duly certified copy
- If the award was not rendered in Spanish, the court may request the party to submit a translation

ADVERSARIAL PROCEEDING?

- Yes – a party can object to enforcement on limited grounds identical to the New York Convention
- However, the court is also allowed to refuse enforcement under certain circumstances such as arbitrability and public policy

PUBLIC POLICY STANDARD

- Restricted version of public policy – the basic and fundamental principles that underpin the domestic legal system
- In the past courts have included in the public policy exception norms that were not specially protected by other courts in the region (for instance, an award imposing a particular type of interest has been considered against Argentinean public policy). This practice has allowed courts to exert a certain control over foreign awards. However, courts have recently reversed these types of decisions with the priority given to arbitration through the enactment of a new arbitration law passed in 2018 based on the UNCITRAL Model Law.

ARBITRABILITY REQUIREMENT

- The following matters cannot be submitted to arbitration: matters referring to the civil status or capacity of persons, family affairs, those involving the rights of users and consumers, contracts of adhesion and those derived from labour relations, those involving rights in relation to properties located in Argentina, matters related to the validity of registrations made in a public register in Argentina; and issues regarding intellectual property registration.
 - Furthermore the domestic code of Civil and Commercial law which governs domestic arbitrations provides that matters affecting public policy issues and disputes with the state are not arbitrable. These provisions have been subject to strong criticism and the current Government has sent a bill to the parliament to remove them. In any case, it is unclear if these provisions would be applicable to international arbitration and if these provisions were to be tested in the courts it is to be expected that they would be interpreted restrictively in line with the pro-arbitration trend that courts have recently adopted in Argentina.
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THE FUTURE

The adoption of the New York Convention as well as the fact that domestic arbitration laws in these jurisdictions are based on the UNCITRAL Model Law demonstrate the legislative efforts already made by these Latin American jurisdictions to become an arbitration friendly forum.

There is more to be done, particularly in cutting down the procedural steps involved in enforcement and in improving judicial education on the enforcement process in particular on concepts such as public policy and arbitrability; but most of the Latin American countries are generally on the right track following the global modernisation trends in arbitration.

Notes:

1. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959).

2. For instance, Chile ratified the Convention on 4 September 1975; Colombia on 25 September 1975; Peru on 7 July 1988; Argentina on 14 March 1989; and Brazil on 7 June 2002. In addition to the New York Convention, Latin American countries have ratified the Inter American Convention on International Commercial Arbitration of 30 January 1975.

3. All parties to the New York Convention, as mentioned in footnote 2.

4. Attachment proceedings are triggered by recognition and enforcement orders. Once the enforcement is granted, the courts will have to attach the enforcement debtor's assets. These proceedings are governed not by national arbitration laws but local procedural rules, which provide for the requirements for enforcement measures against immovable and movable property. These rules certainly vary from one jurisdiction to the other – and even within each jurisdiction.

5. The Hague Convention abolishes the requirement of legalisation for foreign public documents. Therefore, where awards are issued in countries that are signatories of the 1961 Hague Convention, there is no need to authenticate the award, but simply to apostille it.

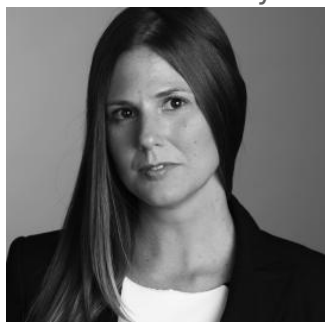
6. Such as improper service of the arbitral proceedings; the debt arising from the award has not yet accrued; there is an error in the seizure of assets or a wrongful evaluation of these assets; lack of standing to enforce the award; lack of jurisdiction for enforcement of the award (Article 525 of the Brazilian Code of Civil Procedure).

7. For instance, a party cannot invoke that the arbitration agreement is not valid or the parties to the agreement were under some incapacity, or that it was not given proper notice of the appointment of the arbitrator or of the proceedings or was otherwise unable to present its case if, having appeared before the arbitral tribunal, it did not raise it during the arbitration proceedings (Article 75, paras. 4 and 5 of the Peruvian Law on Arbitration).

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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