

ANALYSIS OF CHILEAN CASE LAW ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

ANÁLISIS DE JURISPRUDENCIA CHILENA EN RELACIÓN CON EL RECONOCIMIENTO Y EJECUCIÓN DE LAUDOS EXTRANJEROS

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ABSTRACT: Chilean law has been supportive of arbitration as a dispute resolution mechanism. Law No. 19,971 of 2004 extended such support to international arbitration and introduced a clear pro-enforcement bias in favour of foreign arbitral awards. However, court decisions remain rooted in requirements and analysis that are inconsistent with Law No. 19,971 of 2004 and applicable international treaties, which may affect the Chilean pro-arbitration profile.

Keywords: Foreign arbitral awards, exequatur, defences, Law No. 19,971 of 2004, New York Convention.

RESUMEN: *La ley chilena ha sido favorable al arbitraje como un mecanismo de resolución de conflictos. Ese apoyo fue extendido al arbitraje internacional mediante la Ley 19.971 y, en particular, con la clara parcialidad a favor de la ejecución de laudos extranjeros. Sin embargo, las decisiones judiciales se mantienen ancladas en requisitos y análisis que son inconsistentes con la Ley 19.971 y con los tratados internacionales aplicables, lo cual puede afectar el perfil pro arbitraje de Chile.*

Palabras clave: *Laudo extranjero, exequátur, defensas, Ley N° 19.971 de 2004, Convención de Nueva York.*

On 2004, Chile enacted Law No. 19,971 (09/29/2004), International Commercial Arbitration¹ following the UNCITRAL Model Law². Law No. 19,971 of 2004 alongside with the New York Convention on the Recognition and Enforcement of Arbitral Awards³ has fostered a pro-arbitration and a pro-enforcement environment in Chile, as shown by the decisions of the Supreme Court. However, it is still necessary to take into account some reminiscences of a parochial approach towards international arbitration.

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¹ Law No. 19,971 of 2004.

² LAGOS (2003) p. 1.

³ CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, New York (June 10, 1958) (hereinafter, the "NEW YORK CONVENTION").

In such regard, this article aims to review the rationale behind those decisions and show how the Supreme Court has adopted a uniform approach in favor of the enforcement of foreign awards.

In doing so, this article shows how the Supreme Court has interpreted the grounds of enforcement refusal outlined in the New York Convention in favor of the enforcement of foreign awards and promotes the direct application of Law No. 19,971 of 2004 in conjunction with the New York Convention to address the requirements to recognize and enforce a foreign award. Finally, this article also proposes that a proper approach towards this subject should lead the Supreme Court to reject any attempt to circumvent the limited grounds of refusal established in the Law No. 19,971 of 2004 and the New York Convention, by means of resorting to exceptions or defences that are established relating to domestic proceedings.

1. LEGAL OVERVIEW: THE CHILEAN PRO-ARBITRATION APPROACH

Since the enactment of the Chilean Code on the Organization of Tribunals⁴, domestic arbitration has been recognized as an alternative dispute resolution mechanism⁵. Accordingly, awards rendered by arbitrators are as enforceable as courts' judgments⁶, subject to the provisions set forth in the Chilean Civil Procedure Code⁷.

Following this approach, Chile has also historically recognized the enforceability of international awards. Thus, Article 246 of the Civil Procedure Code provides that "the rules of the previous articles [on the enforcement of foreign judgments] are equally applicable to decisions rendered by arbitrators."

The Chilean favour towards arbitration continued with the ratification of the New York Convention on 1975 and the Inter-American Convention on International Commercial Arbitration on 1976⁸. However, Chilean *lex arbitrii* remained focused in domestic arbitration.

To fill such "legal vacuum [...] in connection with the international commercial arbitration"⁹, Chile enacted Law No. 19,971 of 2004 to provide "a special and autonomous set of rules, procedurally and substantially, for the international commercial arbitration."¹⁰

As per the recognition and enforcement of foreign awards (and the grounds to refuse them), Law No. 19,971 of 2004 replicated the UNCITRAL Model Law and the New York

⁴ Arbitration has been considered as a dispute resolution mechanism since the first Organic Law on the Organization of Courts (1875) and, then, it was also included in the Code on the Organization of Tribunals, enacted in 1943, and in the Civil Procedure Code.

⁵ IRARRAZABAL states that "our legal system has early given a structure to arbitration as an alternative form of state justice, which has been strongly accepted by the legal community." IRARRAZABAL (2012) p. 1.

⁶ Article 222 of the CODE ON THE ORGANIZATION OF TRIBUNALS in connection with Article 174 of the CIVIL PROCEDURE CODE.

⁷ Article 635 of the CIVIL PROCEDURE CODE.

⁸ INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION, Panama City (January 30, 1975) (hereinafter, the "PANAMA CONVENTION").

⁹ LAGOS (2003) p. 4.

¹⁰ LAGOS (2003) p. 5.

Convention¹¹, which allegedly intended to foster a universal understanding¹² and a pro-enforcement bias¹³.

In Chile, such pro-enforcement bias springs up from the decisions on enforcement of foreign arbitral awards which, uniformly, grant exequatur over foreign awards¹⁴. Nevertheless, further analysis is needed to correctly understand the rationale behind those decisions, and the alternatives that seem to remain open regarding an international arbitration proceeding.

2. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN CHILE

A. OVERVIEW OF APPLICABLE RULES

In Chile, the recognition and enforcement of foreign arbitral awards are jointly governed by the Civil Procedure Code, Law No. 19,971 of 2004, the New York Convention and the Panama Convention¹⁵.

Under the Civil Procedure Code, a final and conclusive arbitral award would be recognized and enforced, primary, in accordance with any treaty between Chile and the country where the arbitral award was rendered concerning the enforcement of arbitral awards (Article 242 of the Civil Procedure Code). Absent a treaty; the foreign award will only be enforced if there is reciprocity as to the enforcement of arbitral awards (i.e., the relevant foreign court would enforce an arbitral award rendered in Chile). As a last resort, the foreign award would be enforced if it complies with the requirements outlined in Article 245 of the Civil Procedure Code.

Since Chile enacted the New York Convention without reservations, the Chilean Supreme Court has applied (or referred) such Convention when recognizing and enforcing foreign arbitral awards¹⁶, in accordance with Article 242 of the Civil Procedure Code¹⁷.

¹¹ LAGOS (2003) p. 5. Indeed, Articles 35 and 36 are similar to the provisions of the UNCITRAL Model Law and were not modified during the congressional discussion.

¹² BORN has stated that the NEW YORK CONVENTION is “best understood as prescribing mandatory international standards that ensure the binding character of awards.” BORN, Gary (2014) p. 3743.

¹³ “As discussed elsewhere, one of the principal purposes of the NEW YORK CONVENTION and most modern national arbitration statutes was to make it easier to enforce international arbitral awards [...] The same objectives are also accomplished by most modern national arbitration statutes, including the UNCITRAL Model Law. These statutes were generally drafted with the express purposes of facilitating the recognition and enforcement of international awards, including both foreign awards (made in other jurisdictions) and international arbitral awards that are made locally.” BORN (2014) p. 2916.

¹⁴ As per our research, the Chilean Supreme Court has granted 10 out of 11 enforcement requests that have been filed in connection with foreign awards after the enactment of the NEW YORK CONVENTION. Considering that the eleventh judgment was rendered while this article was under edition, its detailed analysis is not included herein.

¹⁵ In addition, international arbitration proceedings may be governed by bilateral treaties or the ICSID CONVENTION to which Chile is a party.

¹⁶ As provided by Article I of the NEW YORK CONVENTION.

¹⁷ In general, such conclusion has been the consequence of applying Article 242 of the CIVIL PROCEDURE CODE in order to conclude that the NEW YORK CONVENTION must apply because it is an international treaty on

Law No. 19,971 of 2004 is consistent with this approach since Article 35 (1) provides that “[a]n arbitral award, irrespective of the country in which it was made, shall be recognized as binding.”

As per the proceeding to be followed, according to the New York Convention, the enforcing party must comply with “the rules of procedure of the territory where the award is relied upon.” In such regard, the Supreme Court has understood that such “rules of procedure” are the rules provided by the Civil Procedure Code in connection with the *exequatur*.

It is necessary to note that such conclusion may be contested in light of Article III of the New York Convention because the application of the *exequatur* rules might be considered as a “more onerous condition” over the enforcement of foreign awards than the ones applicable to the recognition or enforcement of domestic arbitral awards. However, in this article such issue is not addressed because it departs from its original intent (the analysis of existing *exequatur* decisions in connection with foreign awards) and from its limited extension.

B. THE CHILEAN EXEQUATUR PROCEEDING

As it has been understood by the Chilean Supreme Court, foreign arbitral awards may only be enforced in Chile if the Supreme Court issues an “*exequatur*” in connection thereof and subject to the rules established by the Civil Procedure Code. The application for an *exequatur* must be in writing and accompanied by the arbitral agreement and the arbitral award in the form prescribed by the law and, if applicable, duly translated.

Before granting the *exequatur*, the Supreme Court will allow the party against whom the award is being enforced the opportunity to be heard, but such hearing will be limited to the enforcement of the award and not about substantive issues. Additionally, the Supreme Court receives the opinion of the fiscal judicial in connection with the enforceability of the award. After that, the Supreme Court can grant or deny the enforcement depending upon its finding on the grounds for refusal established in Article V of the New York Convention and Article 36 of Law No. 19,971 of 2004.

If the Supreme Court grants the *exequatur*, the execution of the foreign arbitral award would be subject to the same rules that apply to the execution of local awards or judgments, that is, a summary collection proceeding to be carried out before the Chilean courts.

C. FORMALITIES TO BE SATISFIED

The Civil Procedure Code, the New York Convention and Law No. 19,971 of 2004 establish the formal requirements that the enforcing party must comply with when request-

the subject. FERNÁNDEZ and JIMÉNEZ criticize this approach because the Supreme Court should apply LAW No. 19,971 of 2004 directly. FERNÁNDEZ AND JIMÉNEZ (2009) p. 5. The critic is sound under Chilean law, however, as the authors recognize, this reasoning has no practical consequence because the grounds for refusal established in the NEW YORK CONVENTION and LAW No. 19,971 of 2004 are the same. However, in a recent decision, the Supreme Court applied LAW No. 19,971 of 2004 directly, stating that it contains special provisions that must be preferably applied. *QISHENG RESOURCES LIMITED v. SOCIEDAD CONTRACTUAL MINERA “MINERA SANTA FE”* (2016).

ing an *exequatur*¹⁸. However, their interpretation has not been uniform and, worse still, it has been inconsistent with the objectives of the New York Convention.

In such regard, Article 246 of the Civil Procedure Code provides that, to request enforcement, the prevailing party “must prove the authenticity and efficacy of an arbitral award by means of a sign of approval granted by a superior court of the country in which the award was rendered.” That sign of approval is a requirement equivalent to the “double *exequatur*.”

As the New York Convention intended to facilitate the enforcement of awards, it eliminated such requirement¹⁹ by providing that “the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof.” Article 35 (2) of Law No. 19,971 of 2004 contains a similar provision which, in turn, mimics the same provision of the UNCITRAL Model Law. As the Law No. 19,971 is a special rule in comparison with the Civil Procedure Code, the former should prevail and no authentication should be requested.

However, the approach of the Supreme Court has not been consistent with such intention and the specialty criterion. In fact, it has required the compliance with the “double *exequatur*,” requesting “a proper sign proving the authenticity and efficacy of the arbitral award.”²⁰

This unique approach deserves proper attention as an unwritten ground for refusing the enforcement of a foreign award (*infra* III(a)(ii)). Indeed, although “in arbitration, such requirement [double *exequatur*] should have been discarded since the ratification of the New York Convention,”²¹ the Supreme Court has ruled against this assertion.

3. THE APPROACH OF THE SUPREME COURT TOWARDS THE GROUNDS FOR REFUSING THE RECOGNITION OR ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

As expressed above, the Supreme Court has historically been supportive of arbitration and the enforcement of foreign awards. In doing so, and as proposed in this article, the Supreme Court has uniformly granted the authorization to enforce foreign awards after interpreting the limited grounds for refusal established in the New York Convention and Law 19,971 with a pro-enforcement bias. However, Chilean case law shows that, exceptionally, enforcement has been denied based on reasons other than those expressly established in the New York Convention or Law No. 19,971 of 2004. A decision in this last regard departs from the uniformity that the Supreme Court has historically shown and deserves proper attention to avoid similar future understandings.

¹⁸ Article 246 of the CIVIL PROCEDURE CODE, Article IV of the NEW YORK CONVENTION, and Article 35 of LAW No. 19,971 of 2004.

¹⁹ “The New York Convention eliminated the double *exequatur* requirement, with the objective of making foreign and nondomestic awards more readily enforceable and subject to fewer opportunities for judicial challenge.” BORN (2014) p. 3424.

²⁰ See *MAX STUBRIN ET AL. V. SOC. INVERSIONES MORICE S.A.* (2007).

²¹ FERNÁNDEZ AND JIMÉNEZ (2009) p. 5.

A. “UNWRITTEN” GROUNDS FOR REFUSING THE RECOGNITION OR ENFORCEMENT OF A FOREIGN AWARD

Articles 35 and 36 of Law No. 19,971 of 2004 exclusively govern the recognition and enforcement of foreign awards. However, in practice, the decisions of the Supreme Court show that this tribunal has heard oppositions to enforcement requests based on the lack of personal jurisdiction, the lack of efficacy of the award and, even, delaying exceptions.

As developed in this article, such approach should be rejected by the Supreme Court in light with its pro-arbitration and pro-enforcement approach towards the recognition and enforcement of foreign awards and, particularly, the provisions set forth in Law No. 19,971.

(i) *Lack of Personal Jurisdiction*

As a matter of Chilean law, the Supreme Court has considered that it has exclusive subject matter jurisdiction to rule on recognition and enforcement requests (Article 247 of the Civil Procedure Code). However, under Article 5 of the Code on the Organization of Tribunals and 76 of the Chilean Constitution²², it has been argued that it still necessary that the Supreme Court can assert personal jurisdiction over the award debtor²³.

In the *EDF* case²⁴, the Supreme Court had to deal with such argument, but it finally dodged the question because it denied the exequatur based on Article V(1)(e) of the New York Convention. Nevertheless, the discussion presented by the opposing parties is interesting because both alleged the “lack of personal jurisdiction” to contest the enforcement, arguing that there was no connection between the award and Chile²⁵.

The fiscal judicial agreed with the opposing parties. In the opinion, it is stated that “being a foreign award, in which the plaintiff was a corporation domiciled in Paris, France, and, the respondents, ENDESA (a company domiciled in Madrid, Spain) and YPF (a company domiciled in Buenos Aires, Argentina), there is no court in Chile with jurisdiction to conduct the execution of the award. Accordingly, under Article 76 of the Political Constitution of the Republic of Chile, the Supreme Court lacked jurisdiction to rule on the exequatur.”²⁶

The opinion of the fiscal judicial deserves attention. In short, she recommended that personal jurisdiction is a ground to deny enforcement and that it cannot be asserted only from the existence of assets in the enforcing forum.

²² POLITICAL CONSTITUTION OF THE REPUBLIC OF CHILE (hereinafter, the “CHILEAN CONSTITUTION”).

²³ As expressed by ROMERO, the issue of personal jurisdiction has not been addressed directly in Chilean law, but such requirement can be asserted from Article 5 of the CODE ON THE ORGANIZATION OF TRIBUNALS, Article 76 of the CHILEAN CONSTITUTION and a series of international law principles in such regard. ROMERO (2009) pp. 9-12.

²⁴ EDF INTERNACIONAL S.A. v. ENDESA *et al.* (2010).

²⁵ The award debtors argued lack of personal jurisdiction because the award was rendered abroad, in connection with an agreement entered into a different country, and in an arbitral proceeding in which no Chilean party actually participated.

²⁶ EDF INTERNACIONAL S.A. v. ENDESA *et al.* (2010).

Such argument may be considered in line with the ideas that “Contracting States recognize foreign and nondomestic awards [...] in light of, and not inconsistently with, customary jurisdictional limitations on the judicial powers of Contracting States”²⁷ and that, under Chilean law, it is possible to argue that courts are not allowed to rule over parties that are not inhabitants in Chile.²⁸

However, such particular approach (and the argument raised by the opposing parties in *EDF*) is arguably under Chilean law and, moreover, it is inconsistent with the pro-enforcement bias resulting from the New York Convention²⁹ for the reasons developed below.

First, Article 5 of the Code on the Organization of Tribunals provides that the Supreme Court “must rule on every issue that is presented within the territory of the Republic, in connection with the subject matters that are within its jurisdiction [including the recognition and enforcement of foreign awards], and regardless the nature or qualities of the persons that intervene in such issues.” That is, an exequatur request affecting a national of another country is subject to the Supreme Court jurisdiction. Accordingly, rejection solely depends on the grounds established by the applicable laws, that is, Law No. 19,971 of 2004. Otherwise, the Supreme Court would disregard applicable law to the subject matter, that is, it would not apply the special rule that is applicable to this subject. Moreover, this approach obviates that “by recognizing the enforceability of a jurisdictional decision rendered by a foreign organism, [a court] only applies the internal laws that allow the application of foreign law and having as valid the jurisdictional decisions of another State.”³⁰ Indeed, if a case has an outstanding international element, its impact on the extension and limits of the national jurisdiction must be assessed. Firstly, by any applicable treaty and, then, the internal laws³¹, which force the court to apply the New York Convention and Law No. 19,971 of 2004. In turn, those rules do not establish the “lack of personal jurisdiction” or “lack of domicile in Chile” as a ground to reject enforcement of a foreign award.

Secondly, the argument given by the fiscal judicial is not directed to the exequatur proceeding, but to the collection proceeding that could follow (i.e., lack of a Chilean domicile to assert jurisdiction and enforce the award). This argument is erroneous because, under the rules governing the enforcement of foreign awards, an award debtor cannot file an opposition based on the execution proceeding that may follow after the exequatur is granted, as the Supreme Court has ruled in connection with the “delaying exceptions” (*infra* III.a.iii). Moreover, it does not consider that the exequatur proceeding may be used to obtain the recognition of the foreign award solely.

²⁷ BORN (2014) p. 2982.

²⁸ ROMERO (2009) p. 11, quoting *HOLZMANN v. GAINSBORG* (1950).

²⁹ This approach has been confirmed by FERNÁNDEZ and JIMÉNEZ, who have stated that “the objective of the Convention was to ease the enforcement of awards in countries other than in which the award was rendered establishing minimum standards.” FERNÁNDEZ AND JIMÉNEZ (2009) p. 1.

³⁰ CORTES DELGADO AND OTHERS V. MARUHA CORPORATION (2007); quoted by AGUIRREZABAL *ET. AL.* (2011) p. 438.

³¹ AGUIRREZABAL *et al.* (2011) pp. 439-440.

Also, such approach is inconsistent with the New York Convention because instead of promoting enforcement, it can be used to insulate the assets of award debtors thus turning Chile into a “non-enforcing paradise.” Indeed, foreign parties with no relation to Chile could defeat enforcement of awards by, when possible, moving their assets (but only their assets) to Chile.

Even more, assets located in Chile are subject to Chilean law as a matter of public policy. Therefore, Chilean jurisprudence has rejected judgments or judicial orders that deal directly with assets located in Chile, including orders to attach or seize them³². Accordingly, the award creditor will not be able to commence enforcement proceedings in the country in which the losing party is domiciled and, then, enforce a foreign attachment order over assets located in Chile.

Consequently, if the reasoning of the fiscal judicial is correct, the award creditor would be prevented from executing the award. Indeed, he will not be able to: (i) request an exequatur in Chile for the foreign award, (ii) commence proceedings in Chile due to the arbitration agreement (if it does not consider Chile as the arbitration seat), and (iii) request enforcement of foreign orders over Chilean assets.

The approach of the fiscal judicial has also been contested by Chilean authors, stating that “[t]his line of reasoning does not make any sense in the context of international commercial arbitration, where it is common for parties of different nationalities to agree on a neutral seat of arbitration as New York, London or Paris, with which they do not have any association. In addition, it is equally common that those parties seek to enforce the arbitral award in a country other than the seat, regardless of their countries of origin. Considering this, neither the New York Convention, nor the International Arbitration Law establishes any domicile requirement.”³³

Born has also argued in favour of rejecting this argument, stating that jurisdiction can “be based solely on the presence of an award debtor’s property within the recognition forum [or] an award debtor’s consent to jurisdiction for recognition purposes.”³⁴ In connection with this last reason, it is possible to conclude that under the pro-enforcement rationale of the New York Convention “there is a serious argument that an agreement to arbitrate includes a commitment to comply with an arbitral award, the breach of which allows recognition proceedings in any Contracting State.”³⁵ Finally, based on *Holzmann*, it is possible to follow this particular approach in Chile because that judgment recognized that

³² CASTANO V. GUINAZU (2010).

³³ NAZAR, p. 4. In the same sense BORN affirms that “In general, international arbitration conventions do not limit the forums where enforcement or recognition of an award may be sought. That is true under the New York Convention, as well as under other leading international arbitration conventions [...] The same is true of the Inter-American Convention, the European Convention, the ICSID Convention and bilateral treaties. All of these instruments leave parties entirely free to seek recognition and enforcement of awards in whatever forums they deem appropriate. That permits parties holding an award to seek enforcement in any jurisdiction where the award-debtor may have assets.” BORN (2014) p. 2981.

³⁴ BORN (2014) p. 2983.

³⁵ BORN (2014) p. 2983.

international treaties could modify the interpretation and scope of Chilean courts' jurisdiction³⁶.

In summary, the interpretation given by the fiscal judicial can be considered as against Chilean law and, most importantly, the international approach towards arbitration that the New York Convention and the Law No. 19,971 of 2004 intend to promote. It would frustrate the neutrality of the seat that is behind most arbitration proceedings³⁷ and, in doing so, it would unduly position Chile as a haven for award debtors.

(ii) *Lack of Efficacy of the Award*

According to Article 246 of the Civil Procedure Code, to enforce a foreign arbitral award, the prevailing party must accompany the exequatur request with a "prove [of] the authenticity and efficacy of an arbitral award by means of a sign of approval granted by a superior court of the country in which the award was rendered." This requirement can be qualified as a "double exequatur"³⁸ because the winning party is obliged to obtain, in addition to the enforcement decision, an authorization from the courts of the seat of the arbitration.

As this requirement hinders the enforcement of arbitral awards, the New York Convention, the Panama Convention and the UNCITRAL Model Law eliminated it. Therefore, the award creditor must only submit "(a) The duly authenticated original award or a duly certified copy thereof; and (b) The original agreement referred to in article II or a duly certified copy thereof."³⁹

However, the interpretation of the Supreme Court has contradicted such approach. Indeed, Chilean decisions on exequatur show that the lack of authorization from the courts of the seat of the arbitration has been considered as a ground to reject the enforcement of arbitral awards⁴⁰.

In doing so, the Supreme Court has stated that Article 246 of the Civil Procedure Code sets an "additional and unavoidable requirement, related with the prove of the authenticity and efficacy of every award [...] despite the existence of treaties in force in such regard with the State in which the award was rendered due to the fact that arbitrators, in general, come from the will of the parties, thus not being real agents of the country's sovereignty."⁴¹ Accordingly, in *Transpacific* the Supreme Court ruled that "[m]oreover, neither has been proved that the award which enforcement is sought has been approved by the

³⁶ ROMERO (2012) p. 12.

³⁷ NAZAR, p. 4, quoting "International Arbitration Survey: Choices in International Arbitration, Queen Mary University of London", available in: www.arbitrationonline.org/research/2010/index.html.

³⁸ "The Convention's predecessor, the Geneva Convention of 1927, required that the award had become "final" in the country of origin. The word "final" was interpreted by many courts at the time as requiring a leave for enforcement (exequatur and the like) from the court in the country of origin. Since the country where enforcement was sought also required a leave for enforcement, the interpretation amounted in practice to the system of the so-called "double-exequatur"." JAN VAN DEN BERG (2008) p. 17.

³⁹ Article IV of the NEW YORK CONVENTION

⁴⁰ "It is curious that this last requirement was precisely one of the characteristics that the Convention intended to modify in order to eliminate the so called "double exequatur"." FERNÁNDEZ and JIMÉNEZ (2009), p. 5.

⁴¹ EDF INTERNACIONAL S.A. v. ENDESA *et al.* (2010); quoting CASARINO (2009) p. 146.

superior court of the country in which the award was rendered, as mandatorily requires Article 246 of the Civil Procedure Code.”⁴²

This requirement, however, has not been outcome determinative⁴³. Enforcing parties have borne it in mind and submit documents that, in the view of the Supreme Court, are sufficient to comply with it.

The reasoning, however, is arguably under Chilean law and in open contradiction with it. Consequently, it should be abandoned to comply with the pro-enforcement mandate of the New York Convention (which has been accepted by the Supreme Court) and directly apply Law No. 19,971 (which is the special rule in this regard).

First, the Supreme Court has consistently ruled that the decisions on exequatur of foreign arbitral awards must be based on the New York Convention or the Law No. 19,971 of 2004, thus showing a pro-enforcement bias in this regard. Those rules are special in connection with Article 246 of the Civil Procedure Code and, under Article 13 of the Civil Code, they should be applied instead of the general rules governing the Chilean exequatur proceeding (including Article 246 of the Civil Procedure Code). Thus, it is unlawful to add a requirement that has been expressly dismissed by a more recent and special regulation on the subject. Fortunately, the recent decision of the Supreme Court on *Qisheng* has sent a clearer sign in this regard⁴⁴.

Secondly, this approach contradicts the pro-enforcement bias resulting from the New York Convention, which has been adopted by the Supreme Court. Particularly, it is against Article III of such Convention to impose additional or more onerous requirements to the enforcement of foreign arbitral awards than those imposed to domestic awards. In such regard, Chilean law does not need an authorization from local courts to enforce domestic arbitral awards⁴⁵. Therefore, it is unlawful to require such permission from foreign courts in connection with foreign awards.

Thirdly, the rationale behind the approach of the Supreme Court (reflected in the quote to Mario Casarino) is debatable. The mere fact that arbitration is a creature of consent cannot be used to impose additional requirements to the enforcement of foreign awards, without affecting and denying such special nature. Indeed, it is precisely such nature what the New York Convention recognizes and supports by establishing minimum

⁴² *TRANSPACIFIC STEAMSHIP LTDA. v. EUROAMÉRICA COMPAÑÍA DE SEGUROS GENERALES S.A.* (1999).

⁴³ The only case in which the enforcing party did not comply with this requirement and the exequatur was rejected is *Transpacific*. However, in such case the reference to Article 246 of the CIVIL PROCEDURE CODE is dictum because the exequatur was rejected on the basis of public policy considerations. See *TRANSPACIFIC STEAMSHIP LTDA. v. EUROAMÉRICA COMPAÑÍA DE SEGUROS GENERALES S.A.* (1999).

⁴⁴ *QISHENG RESOURCES LIMITED v. SOCIEDAD CONTRACTUAL MINERA “MINERA SANTA FE”* (2016). In this judgment, although referring Article 246 CCP, the Court concluded that the enforceability of a foreign award depends on LAW No. 19,971 of 2004 and there is no need to provide a certificate from an arbitral institution as to the finality of the award. Moreover, the Court stated that “the award is binding on the parties since they waived, in advance, to the possibility of contesting it.”

⁴⁵ Exceptionally, Chilean law requires this authorization in the specific cases set forth in Article 1342 of the CIVIL CODE, in connection with an award rendered during an allocation arbitral proceeding, which must be submitted to arbitration.

rules in favour of the recognition and enforcement of arbitration agreement and foreign awards.

Finally, the interpretation of the Supreme Court contradicts the scope of Article V of the New York Convention. In the first place, because the Supreme Court obviates that Article V “contains the sole exceptions that can be opposed to the request of enforcement of an award.”⁴⁶ Then, because the Supreme Court forgets that “the New York Convention shifted the burden of proof of the award’s finality to the award-debtor, who is required by Article V of the Convention to prove the existence of grounds for non-recognition of the award, including that the award is not final or binding.”⁴⁷

In conclusion, by imposing to the requesting party the need to provide an authentication of the foreign award, the Supreme Court departs from the New York Convention and Law No. 19,971. Most importantly, in doing so, the Supreme Court departs from its uniform and pro-enforcement approach towards the recognition and enforcement of foreign awards. Accordingly, such interpretation should be disregarded to avoid any attempt to circumvent the limited grounds of refusal established in the Law No. 19,971 of 2004 and the New York Convention.

(iii) *Delaying Exceptions*

Under Chilean law, ordinarily and at the outset of a proceeding, defendants can raise “delaying exceptions” to correct some formal defects of the proceeding⁴⁸. If the court sustains those exceptions, the plaintiff must make the necessary arrangements to rectify the proceeding. Failing to do so would mean that the proceeding cannot continue and, subject to the statute of limitations and rules of abandonment, it could mean that the plaintiff loses his right to bring the relevant cause of action.

The New York Convention nor Law No. 19,971 of 2004 establish this formal defence; however, the Supreme Court has faced this kind of defence in some exequatur proceedings.

In such cases, the approach of the Supreme Court has been aligned with its uniform approach towards the enforcement of foreign awards and the rules established by the New York Convention and Law No. 19,971 of 2004, rejecting the possibility of raising this kind of defences during the exequatur proceeding. Accordingly, it has ruled that “the exequatur proceeding is solely aimed to entitle the commencement of a summary collection proceeding in which [the defendant will be able] to discuss what has been alleged [in the exequatur proceeding] [...] therefore the exception cannot be opposed and resolved at this stage.”⁴⁹

The *fiscal judicial* shares this principle, opining that “[those exceptions are] contained in Article 464 of the Civil Procedure Code and, therefore, cannot be opposed and

⁴⁶ In fact, the Supreme Court has recognized that “in this proceeding [exequatur] the only arguments that can be reviewed are those supported in the requirements and exceptions set forth in Article IV [of the NEW YORK CONVENTION].” *COMVERSE V. ATI CHILE* (2008).

⁴⁷ BORN (2014) p. 3608.

⁴⁸ In favor of the admissibility of these exceptions: *MONSALVEZ* (2008) p. 99.

⁴⁹ *COMVERSE V. ATI CHILE* (2008).

resolved within a proceeding aimed solely to the future commencement of a summary collection proceeding.”⁵⁰

The Supreme Court summarized its approach towards delaying exceptions in *Gold Nutrition*. The court ruled that “this proceeding is not an instance; therefore it is not possible to promote nor resolve within it [...] arguments that can be exceptions that must be opposed in the respective execution and before the court in charge of said execution.”⁵¹ The more recent decision of the Supreme Court in *Qisheng* confirmed this approach: exceptions established in connection with the collection proceeding are not colourable during the exequatur proceeding⁵².

B. “WRITTEN” GROUNDS FOR REFUSING THE RECOGNITION OR ENFORCEMENT OF A FOREIGN AWARD

The available decisions on enforcement of foreign arbitral awards show that, when faced with a ground for refusal established in the Article V of the New York Convention and Article 36 of Law No. 19,971 of 2004, the Supreme Court has uniformly interpreted them following a pro-enforcement bias.

(i) *Non-Valid Arbitration Agreement*

Article 36(1)(a)(i) of Law No. 19,971 of 2004 provides that enforcement can be denied if “the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.” The Supreme Court entertained this defence, which is focused on the validity of the arbitration agreement (instead of its extension), in *Laboratorios Kin*⁵³.

In that case, *Laboratorios Pasteur* (the defendant) argued that the arbitration agreement was unenforceable because it was ambiguous, incomplete and imprecise in connection with the entity in charge of appointing the arbitrator. Although those reasons do not tantamount to the lack of validity of an arbitration agreement (which is the subject of Article 36(1)(a)(i)), the Supreme Court did not address this issue.

In turn, the Supreme Court rejected the defence stating that it aimed to “argue against a matter that is part of the decision rendered by the foreign judges and that the Court cannot review within the exequatur proceeding.”⁵⁴

The reasons given by the Supreme Court, in this case, are interesting. The Supreme Court confirmed that the exequatur proceeding cannot be used to re-examine the merits of a dispute, but only to check compliance with the minimum standards outlined in Article V of the New York Convention.

⁵⁰ *DEUTSCHE BANK AG v. INVERSIONES ERRÁZURIZ LIMITADA* (2009)

⁵¹ *GOLD NUTRITION INDUSTRIA E COMERCIO v. LABORATORIOS GARDEN HOUSE S.A.* (2008).

⁵² *QISHENG RESOURCES LIMITED v. SOCIEDAD CONTRACTUAL MINERA “MINERA SANTA FE”* (2016).

⁵³ *LABORATORIOS KIN v. LABORATORIOS PASTEUR* (2014).

⁵⁴ *LABORATORIOS KIN v. LABORATORIOS PASTEUR* (2014). The Supreme Court added that “as previously noted, this matter was expressly resolved both in the award and in the judgment that rejected the annulment request, which cannot be reviewed in the exequatur proceeding.”

In addition, they show that the Supreme Court gives great deference to the decision rendered by the arbitrators as to their jurisdiction. This approach confirms the broad acceptance of the principle of *kompetenz-kompetenz* by Chilean courts⁵⁵ and a pro-enforcement approach, in line with the New York Convention.

However, it is interesting to note that the Supreme Court granted deference to the arbitral decision in connection with a ground for refusal that directly relates with the validity of an arbitral agreement⁵⁶, which is a subject under discussion. Indeed, whereas the international and comparative case law favors a deferent approach towards arbitral decisions in connection with the scope an arbitral agreement (as also shown by the Supreme Court, *infra* III.b.iii); such favor is subject to more shades in relation with the validity of an arbitral award⁵⁷. Nevertheless, although absolutely interesting, it is not possible to address such issue in this article due to its limited extension.

(ii) *Due Process Defence*

Article 36(1)(a)(ii) of Law No. 19,971 of 2004 provides that enforcement can be denied if “the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case.” The Supreme Court has entertained this due process defence in a series of cases as it seems to be the “preferred” argument of award debtors.

In particular, Chilean parties have attempted to include within this ground of refusal: economic difficulties to carry out an arbitration proceeding; impossibility of defending themselves; language barriers; lack of compliance with Chilean constitutional standards of due process; and, lack of proper service of process. All of these arguments have been rejected by the Supreme Court, on a case by case basis.

In *Comverse*⁵⁸, the opposing party argued that it could not exercise his right to defence properly due to economic reasons that prevented it from “materializing its allegations and evidence and contradict the allegations and evidence of the counterparty.”⁵⁹

The Supreme Court made a thorough review of the record and the reasons that were given by ATI Chile (the defendant) to reject its arguments. The court ruled that “it clearly appears that the resistant party was not impeded from exercising his right to defence but, as itself recognizes, it appeared before the arbitral tribunal to make allegations and defences,

⁵⁵ “In accordance with this, the judgment rendered in *Marlex Ltda. v. European Industrial Engineering*”, No. 2026-2007, Supreme Court, July 28, 2008. It is possible to note in said judgment a clear acknowledgment of this principle.” VÁSQUEZ (2011) p. 357.

⁵⁶ Although the Supreme Court acted with deference in this case, this decision must be taken carefully, Indeed, the Supreme Court decision deals, at the end, with reasons (ambiguity, lack of completion and lack of precision) that do not actually relate with the validity of the arbitral agreement. Therefore, it is not possible to conclude that the Supreme Court would issue, necessarily, a similar decision when asked in the future.

⁵⁷ See the so-called “infamous” English decision on *DALLAH ESTATE AND TOURISM HOLDING COMPANY v THE MINISTRY OF RELIGIOUS AFFAIRS, GOVERNMENT OF PAKISTAN* (2009, which denied the enforcement of a foreign award on the basis of lack of validity of the arbitral agreement, despite the fact that the arbitral tribunal had asserted jurisdiction over the Government of Pakistan).

⁵⁸ *COMVERSE v. ATI CHILE* (2008).

⁵⁹ *COMVERSE v. ATI CHILE* (2008).

[...] filed documentary evidence and witnesses.”⁶⁰ Accordingly, the Supreme Court rejected the opposition because, under such circumstances, what the opposing party was doing was “attacking the merits of the decision rendered by the foreign judges, as well as the assessment of the evidence.”⁶¹

In *Gold Nutrition*⁶², the award debtor argued that it was prevented from exercising his right to defence. However, the Supreme Court ruled that “from the duly translated and legalized copies [of the record] appears that the defendant was personally notified of the action, it filed a reply to the lawsuit, filed a counterclaim and opposed exceptions, a law firm represented it, and it was served with the award, towards which it did not file a recourse, circumstances that deny the statement that it had no opportunity to defend itself.”⁶³

Garden House (the defendant) took this defence one step further and claimed that its right of defence was affected because the proceeding was carried out in Portuguese, that documents were not officially translated, and that it could not submit relevant evidence because it was requested to translate them into Portuguese. Following the opinion of the fiscal judicial, the Supreme Court dismissed this argument. The court ruled that “the circumstance that the proceeding was carried out in the language of the country that was the seat of the arbitration to which the parties voluntarily agreed upon to solve their difficulties is not a rational reason to consider that any of the parties could not file their defences.”⁶⁴

The *Gold Nutrition* case also gave the Supreme Court the possibility to reject the idea of applying the standards of due process established in the Chilean Constitution, particularly Article 19 No. 3. The Supreme Court held that such guaranty “only applies within our territory and because to consider that a foreign proceeding does not conform to the requirements of justice and rationality or principles of due process, would mean an undue interference with the sovereignty of such country.”⁶⁵

In *Kreditanstalt*⁶⁶ the Supreme Court again visited the defence of due process; now in connection with the lack of proper service of process. However, the respondent actually appeared in the arbitral proceeding to deny the jurisdiction of the arbitral tribunal. Accordingly, the Supreme Court ruled that “it could have raised, in the proper stages, all its arguments and defenses [...], [therefore] [the lack of participation in the arbitral proceeding] is solely the result of a judicial strategy followed during the arbitration [...] as if such inactivity would mean the paralyzation or nonbinding effect of a possible unfavorable award, something impossible to bear in light of the general principles of law, since in

⁶⁰ *COMVERSE V. ATI CHILE* (2008).

⁶¹ *COMVERSE V. ATI CHILE* (2008). A similar analysis and conclusion informed the decision in *QISHENG RESOURCES LIMITED V. SOCIEDAD CONTRACTUAL MINERA “MINERA SANTA FE”* (2016).

⁶² *GOLD NUTRITION V. GARDEN HOUSE* (2008).

⁶³ *GOLD NUTRITION V. GARDEN HOUSE* (2008).

⁶⁴ *GOLD NUTRITION V. GARDEN HOUSE* (2008).

⁶⁵ *GOLD NUTRITION V. GARDEN HOUSE* (2008).

⁶⁶ *KREDITANSTALT FÜR WIEDERAUFBAU V. INVERSIONES ERRÁZURIZ* (2009).

practice it would mean the absolute uselessness of arbitration clauses in commercial agreements.”⁶⁷

In *Stemcor*⁶⁸, the resistant party did not file an opposition to the enforcement proceeding. However, the *exequatur* was analyzed from the due process point of view by the fiscal judicial due to the inactivity of the respondent during the arbitration proceeding. In such regard, the Supreme Court agreed with the fiscal judicial and ruled that the respondent had voluntarily subjected itself to an arbitral tribunal and foreign law, had appeared before the arbitral tribunal and had approved the appointment of the arbitrator, which showed an acknowledgement of being properly notified in the arbitral proceeding. Consequently, it granted *exequatur*.

The decisions on *Kreditanstalt* and *Stemcor* are also relevant because, following the opinion of the fiscal judicial, it is possible to set a general standard in connection with this ground of refusal, which is in line with the pro-arbitration and pro-enforcement bias shown by the Supreme Court. In particular, the fiscal judicial stated that “the disposition guards what is the service of process of the litigant before the arbitral tribunal and, therefore, the reasons that may have prevented a litigant from exercising its rights cannot arise from its simple will of staying on default, but on circumstances that seriously hinder his right of defense.”⁶⁹

Consequently, parties must prove “circumstances that severely hinder their right to defence,” which requires that they could not present their case before the arbitral tribunal, and not minor difficulties of language, economic resources or opportunities to do it.

Also, from these decisions also appears that the Supreme Court has applied principles of estoppel in connection with this ground for refusal, preventing parties that voluntarily performed an act or refrained from doing so during the arbitral proceeding, from opposing this defence.

In summary, the above decisions show that the Supreme Court has rejected the idea that parties may introduce into this ground for refusal alleged violations that are not substantial in connection with the whole proceeding and, most importantly, that are contradictory with the previous behavior of the defendant. Such approach confirms the idea proposed in this article: the Supreme Court, save but limited exception, uniformly promotes an interpretation of the New York Convention and Law No. 19,971 that favors the enforcement of foreign awards.

(iii) Decisions Beyond the Scope of the Arbitration

Article 36(1)(a)(iii) of Law No. 19,971 of 2004 provides that enforcement can be denied if “the award deals with a dispute not contemplated by or not falling within the

⁶⁷ KREDITANSTALT FÜR WIEDERAUFBAU V. INVERSIONES ERRÁZURIZ (2009). A similar challenge was rejected in *Deutsche Bank*. In this case the Supreme Court expressly recognized that service of process could be made to an agent of the Chilean party appointed by means of an agency agreement entered into Germany and subject to German law and formalities. *DEUTSCHE BANK V. INVERSIONES ERRÁZURIZ* (2009).

⁶⁸ *STEMCOR V. COMPAÑÍA COMERCIAL METALÚRGICA LIMITADA* (2010).

⁶⁹ *STEMCOR V. COMPAÑÍA COMERCIAL METALÚRGICA* (2010).

terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.”

Under Chilean law, this defence is a form of *ultra petita*⁷⁰ and it differs from the one established in Article 36(1)(a)(i) which deals with the validity of the arbitral agreement. As per Chilean decisions over this defence, in *Gold Nutrition* it was presented as an *ultra petita* issue.

In the exequatur proceeding, Garden House (the defendant) posited that the court should deny enforcement because it was condemned to pay the costs of the proceeding although the claimant did not ask for it in his claim. However, the Supreme Court rejected the argument by considering the scope of the arbitration rules, holding that “the arbitration rules set by the Judge of the 19th Civil Court of the Central Forum of the District of Sao Paulo authorized the arbitrators to resolve this matter.”⁷¹

Therefore, the Supreme Court considered that the “terms of the submission to arbitration” are not limited to the claim filed by the plaintiff, but that they have to consider the arbitration rules governing the proceeding.

Additionally, the Supreme Court has also shown great deference to arbitrators in connection with the interpretation of the scope of arbitration agreements. In *Laboratorios Kin* the resistant party claimed that the award covered a subject not included in the arbitration agreement.⁷² However, the Supreme Court ruled that “although the arbitration clause does not expressly refer to the performance, compliance or lack of compliance of the agreement, what is under the arbitration agreement is not [only] its interpretation, as stated by the opposing party, but all the controversies or differences that in the future could arise from the interpretation and, in this case, the award actually resolved the differences or disputes between the parties.”⁷³ The court added that “the opposing party actually attacks the argument that the arbitrator gave to the arbitration agreement to rule on its jurisdiction.”⁷⁴

From these decisions above, it is possible to conclude that, for the Supreme Court, the scope of an arbitration agreement is a matter for the arbitrators to decide upon, giving great deference to their decisions. Also, judgments show that as long as the opposition is related to the issues of law or facts adjudicated by the arbitrators, the Supreme Court will likely reject them because it rejects every attempt to review the merits of the award.

(iv) *Defect in the Composition of the Arbitral Tribunal or the Arbitral Procedure*

Article 36(1)(a)(iv) of the Law No. 19,971 of 2004 provides that enforcement can be denied if the “composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.”

⁷⁰ That is, a ruling rendered beyond what was asked (or agreed) by the parties.

⁷¹ *GOLD NUTRITION V. GARDEN HOUSE* (2008).

⁷² It argued that the arbitral jurisdiction was limited to the interpretation of the main agreement.

⁷³ *LABORATORIOS KIN V. LABORATORIOS PASTEUR* (2014).

⁷⁴ *LABORATORIOS KIN V. LABORATORIOS PASTEUR* (2014).

In *Gold Nutrition* the opposing party argued that the appointment of the arbitrators was made by a private entity⁷⁵ and not by the parties. However, the Supreme Court considered that “the appointment of the persons that should act as arbitrators was subject to Brazilian law [...] and the arbitral tribunal was organized accordingly.”⁷⁶

Following the opinion of the fiscal judicial, the Supreme Court added that “the argument that a private entity appointed the arbitrators lacks any ground because it came from the parties and a court decision.”⁷⁷ To conclude, as *Garden House* (the defendant) actually intervened in the proceeding, the Supreme Court also applied estoppel principles to reject *Garden House*’s opposition.

The Supreme Court also rejected a similar argument in *Laboratorios Kin*. In this case, the respondent argued that the arbitration agreement was impossible of being performed because the appointing entity did not exist.⁷⁸ However, the Supreme Court showed its pro-enforcement bias, even in light of an arguably pathological arbitration clause. In such regard, the court ruled that “it is not true that the composition of the tribunal contravened the agreement because [...] the reference [to the Chamber of Commerce of Barcelona] should be understood as made to the Official Chamber of Commerce, Industry and Navigation of Barcelona, as it is the only institution in Barcelona that usually perform these functions.”⁷⁹

Finally, a particular approach to this ground of refusal appears in *Kreditanstalt*. In this case, the award debtor argued that the arbitral tribunal was faulty organized and, consequently, that it was judged by one arbitrator instead of three. It grounded such argument in the fact that the dispute was subject to Chilean law and only one arbitrator was a Chilean lawyer, accordingly, as alleged, he acted as a sole arbitrator.

This particular view of the ground for refusal was rejected by the Supreme Court, ruling that “being an international tribunal, the application of the law of a country other than the rules governing the tribunal, must be proven, for that reason the arbitration proceeding considers procedural instances to submit evidence in such regard and if respondent *Inverraz* did not file evidence for that, it could not impose the responsibility to the Chilean arbitrator, as the respondent seems to forget that the claimant *KfW* acted in the respective procedural stages, including proving the foreign law.”⁸⁰

These decisions of the Supreme Court confirm its deferential approach towards the decisions of arbitrators and, most importantly, a pro-enforcement and international view in connection with foreign awards and arbitration agreements. Indeed, besides showing a

⁷⁵ The arbitration agreement did not provide an appointment mechanism. However, it provided that the arbitration would be conducted in accordance with “the Brazilian organisms of Sao Paulo”. *GOLD NUTRITION V. GARDEN HOUSE* (2008).

⁷⁶ *GOLD NUTRITION V. GARDEN HOUSE* (2008).

⁷⁷ *GOLD NUTRITION V. GARDEN HOUSE* (2008).

⁷⁸ The parties had agreed that the arbitrators would be appointed by the Chamber of Commerce of Barcelona, which did not exist. Consequently, the appointment was made by the Official Chamber of Commerce, Industry and Navigation of Barcelona.

⁷⁹ *LABORATORIOS KIN V. LABORATORIOS PASTEUR* (2014).

⁸⁰ *KREDITANSTALT FÜR WIEDERAUFBAU V. INVERSIONES ERRÁZURIZ* (2009).

preference for enforcement of awards, the Supreme Court has also demonstrated a preference for enforcement of arbitration agreements.

(v) *Non-Binding Award*

Article 36(1)(a)(v) of Law No. 19,971 of 2004 provides that enforcement can be denied if “the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.”

The Supreme Court has addressed this argument in one case: *EDF*⁸¹. However, this ground was confused with the “double exequatur” requirement set forth in Article 246 of the Civil Procedure Code expressing that “arbitral awards are typically contested before the courts [of the seat], and they are mandatory when the latter has approved them, as stated in Article 146 [sic] of the Civil Procedure Code.”⁸²

As said confusion is improper and against Chilean law⁸³, the analysis of this ground for refusal will be focused in the discussion raised in *EDF*.

On 2001, *EDF* acquired from *Endesa* and *YPF* shares that they had in some electric companies incorporated under the laws of Argentina. In addition, the parties agreed into side letters establishing a price adjustment under certain circumstances, which included arbitration clauses. A dispute arose in connection with the interpretation of the price adjustment mechanism. The arbitral tribunal ordered the payment of approx. USD MM 130 in favour of *EDF*⁸⁴.

When *EDF* requested the enforcement of the award, both *Endesa* and *YPF* (the defendants) opposed it stating that the award was set aside by Argentinean courts, thus being unenforceable in Chile. In this case, the Supreme Court ruled that “the arbitral award, which enforcement is requested in this proceeding, is affected by annulment, which was declared by the competent court, by final judgment, according to the rules of the country in which both rulings were rendered.”⁸⁵

Unfortunately, the Court arrived at such conclusion based on an arguable reasoning. It held that “once established the nullity of the arbitral award under discussion, it must also be determined [...] a particular reason to deny enforcement of a foreign award in our country, by not complying with the requirement of efficacy established in Article 246 of the Civil Procedure Code.”⁸⁶ As expressed in connection with the “lack of efficacy” defence (*supra* III.a.ii) this rationale is against Chilean law.

A different aspect of this ground for refusal arose in *Kreditanstalt*. In this case, the Supreme Court addressed and denied an objection based on the existence of a pending

⁸¹ *EDF INTERNACIONAL V. ENDESA* (2010).

⁸² *COMVERSE V. ATI CHILE* (2008).

⁸³ As expressed in connection the “lack of efficacy of the award” (*supra* III.a.ii)

⁸⁴ Such amount is the consequence of a set off between the money judgment awarded in favor of *EDF*, minus the money judgment awarded in favor of the respondents in connection with their counter claims.

⁸⁵ *EDF INTERNACIONAL V. ENDESA* (2010).

⁸⁶ *EDF INTERNACIONAL V. ENDESA* (2010).

recourse against the award which, allegedly, would suspend its enforceability⁸⁷. Denial was based on two main reasons.

First, the Supreme Court highlighted that the mere circumstance that the award debtor filed for an annulment after the exequatur request, without proving that a competent authority had ordered the suspension of the award, is not enough to satisfy the requirement established by Chilean law.⁸⁸

Second, the Supreme Court considered the agreement of the parties to support its interpretation of the scope of Article 36 of Law No. 19,971 of 2004. As the arbitration proceeding was subject to the Arbitration Rules of the ICC, the Supreme Court noted that Article 26 of such rules provided that the parties waive all recourses that may be available to contest the award. Therefore, the court added, the “award rendered by the arbitral tribunal cannot be modified within the system provided by such rules, therefore the recourse filed before the French justice, does not suspend the effects of the award, which remains in force and can be enforced as long as there is no decision to the contrary.”⁸⁹

In *Gold Nutrition* the Supreme Court faced a related argument: a pending appeal in connection with the ruling that declared enforceable the arbitration agreement that led to the award subject to the exequatur proceeding. Here the decision of the Supreme Court was based directly on Law No. 19,971 of 2004 which, at least for this author, is the proper approach towards the enforcement of foreign awards, and ruled that “unless a Brazilian court annuls the arbitral award, it is enforceable unless; it has not occurred and the mere possibility of that does not allow to accept the opposition.”

The referred cases present both doubts and a satisfaction. First, the approach of the Supreme Court is satisfactory because it applied directly and restrictively the grounds established in Law No. 19,971 of 2004 to conclude that mere possibilities of annulment are not enough to deny enforcement.⁹⁰ Indeed, foreign decisions in connection with the issue presented in *Kreditanstalt* and *Gold Nutrition* deal with awards that have been actually (not potentially) annulled. However, the decision in *EDF* confirms the doubts in connection with the approach of the Supreme Court towards Article 246 of the Civil Procedure Code. Indeed, it seems that the Supreme Court has found in Article V(1)(a)(v) a mechanism to introduce into the rationale of the New York Convention and Law No. 19,971 of 2004 the “double exequatur” requirement initially required under Chilean law.

This approach is erroneous under Chilean law.⁹¹ Article 246 of the Civil Procedure Code is rooted in a rationale that distrusted arbitration and required the approval of na-

⁸⁷ According to the ruling, there was an annulment recourse before the French courts as the seat of the arbitration. German law applied to the merits of the dispute.

⁸⁸ *KREDITANSTALT FÜR WIEDERAUFBAU V. INVERSIONES ERRÁZURIZ* (2009). Based on this argument the Supreme Court also that “the circumstance that the sole filing of the annulment recourse in Paris has suspensive effects under French law, or that, for the German law, it is necessary to have an exequatur from German courts, are not colorable because what is being asked in this proceeding is the enforcement of the award in Chile, in accordance with Chilean law.”

⁸⁹ *KREDITANSTALT FÜR WIEDERAUFBAU V. INVERSIONES ERRÁZURIZ* (2009).

⁹⁰ Decisions on *KREDITANSTALT FÜR WIEDERAUFBAU V. INVERSIONES ERRÁZURIZ* (2009) and *GOLD NUTRITION V. GARDEN HOUSE* (2008).

⁹¹ See *supra* 3.a.ii

tional courts before accepting awards as valid and enforceable⁹². On the contrary, current regulations abandoned such rationale, and the same should occur with this interpretation.

Moreover, to apply Article 246 of the Civil Procedure Code to the recognition and enforcement of foreign awards contradicts the scope and intention of Law No. 19,971 and the New York Convention, which impose their direct application in these proceedings (in particular, Law No. 19,971), without previous reference or application of the relevant provisions of the Civil Procedure Code.

Regardless such argument, is the decision of the Supreme Court sound? Is it possible to enforce annulled awards in Chile? Although the New York Convention and Law No. 19,971 of 2004 gives discretion to the Supreme Court, there are reasons to reject enforcement in such cases.

First, the judgments of the Supreme Court show great deference to the decisions rendered by both the arbitrators and foreign courts in connection with the awards. Accordingly, it would be in line with this approach to grant the same degree of deference to decisions that annulled an award.

Such deference is also in line with Law No. 19,971 of 2004. In fact, Article 5 of Law No. 19,971 of 2004 governs the role of the courts of the seat in assisting the parties during the arbitration and, notably, its exclusive jurisdiction to rule on annulment requests (Article 34). Therefore, as a matter of reciprocity, it is possible to conclude that when the seat of the arbitration is outside Chile, the courts of such country are the only competent to assess if a particular award is valid.

(vi) *Public Policy*

Article 36(1)(b)(i) of Law No. 19,971 of 2004 provides that enforcement can be denied if “the recognition or enforcement of the award would be contrary to the public policy of this State.” The Supreme Court has entertained this defence in a case by case basis, failing to set a standard.

Such standard, however, has been established by the Court of Appeals of Santiago⁹³, which has narrowed this ground “to the infringement of core and fundamental rules of the Chilean state; this is to avoid the limit of enforceability of international awards in Chile through the mere invocation of local public order.”⁹⁴

This restrictive interpretation was confirmed later, ruling that “[t]he establishment [...] of a cause of nullity based on Chilean public order refers to what in classical private international law is called international public order. The application of the notion of international public order instead of public order covered by the internal law means that only severe violations of fundamental principles and rules of law in Chile affords annulment

⁹² CASARINO (2009) p. 146.

⁹³ Under Article 34 of LAW No. 19,971 of 2004 the Court of Appeals have subject matter jurisdiction to rule on annulment requests, including the public policy argument set forth in Article 34(2)(b)(ii). In particular, the Court of Appeals of Santiago has been the most active court in this regard as most of arbitrations are conducted in Santiago.

⁹⁴ PUBLICIS GROUPE HOLDINGS BV AND PUBLICIS GROUPE INVESTMENTS v. ARBITRATOR MANUEL JOSÉ VIAL VIAL (2007).

of arbitration awards. These serious infringements can be of procedural or substantive order.”⁹⁵

The Supreme Court has not modified the standard set by the Court of Appeals. The highest court has applied the notion of public policy in a case by case basis.

In such regard, in *Gold Nutrition*, the Supreme Court considered that the prohibition of capitalizing interests is not a matter of public policy⁹⁶. In *Laboratorios Kin*, it also held that the fact that the arbitral award resulted from an arbitration agreement which named an inexistent entity to appoint arbitrators was not against public policy.⁹⁷ Finally, in *Quote Foods*⁹⁸, the Supreme Court also held that Chilean procedural rules were not a matter of public policy⁹⁹.

On the other hand, in *Transpacific Steamship*, the Supreme Court rejected an *exequatur* based on public policy, particularly in connection with an alleged *res judicata* effect.

There, the Supreme Court ruled that “the matter adjudicated in the award which enforcement is sought, is already being known by Chilean courts, who precisely declared their jurisdiction to do so, by means of a proceeding commenced before the one carried out in the United Kingdom [State in which the award was rendered], reason why the later request to order the enforcement of an award that declares –on the contrary– the jurisdiction of a London tribunal appears as disregarding the *res judicata* effect that results from the decision of national courts.”¹⁰⁰

From the previous decisions stem noticeable rationales regarding public policy. In line with modern theories on the subject, the Supreme Court has followed an international and strict approach towards this argument, thus rejecting parochial notions of public policy.

Moreover, following the decisions of the Court of Appeals of Santiago, it is possible to conclude that Chilean courts have set a standard that is consistent with foreign decisions on the subject. Indeed, the language used by such court is similar to the ruling of the Supreme Court of the United States in *Parsons Whittemore Overseas*¹⁰¹, which confirms an international approach from Chilean courts on this subject.

This approach towards public policy is also in accordance with the principle of neutrality in connection with the enforcement of awards. In such regard, it has been said that “the State should be careful of leaving room to its notions of domestic public policy in fa-

⁹⁵ VERGARA VARAS, PEDRO V. COSTA RAMÍREZ, VASCO (2013).

⁹⁶ GOLD NUTRITION V. GARDEN HOUSE (2008).

⁹⁷ LABORATORIOS KIN V. LABORATORIOS PASTEUR (2014).

⁹⁸ SOCIEDAD QUOTE FOOD PRODUCTS B.V. V. SOCIEDAD AGROINDUSTRIAL SACRAMENTO LTDA. (1999).

⁹⁹ In that case, the defendant argued that it was not properly notified of the arbitral proceeding because the notification was not made in accordance with Article 40 of the CIVIL PROCEDURE CODE, which requires personal notification.

¹⁰⁰ TRANSPACIFIC STEAMSHIP V. EUROAMÉRICA COMPAÑÍA DE SEGUROS GENERALES (1999).

¹⁰¹ “The enforcement of foreign arbitral awards should be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.” PARSONS WHITTEMORE OVERSEAS CO. INC. V. SOCIÉTÉ GÉNÉRALE DE L’INDUSTRIE DU PAPIER (1974).

vour of an international public policy notion that bears in mind the social and legal diversity and the standards that the international community accepts.”¹⁰²

However, this purported international approach towards public policy must be read with caution. Indeed, there are areas in which there is no clear international approach and, therefore, no international public policy to be followed. Consequently, in those cases, the decisions will necessarily depend on the public policy of the enforcing forum.

Such can be the case of the decision of the Supreme Court on *res judicata*. Indeed, this is a highly controverted¹⁰³ issue, and there have been attempts to provide a transnational approach on the subject¹⁰⁴; however, the decision of the Supreme Court goes in a different direction.

4. CONCLUSIONS

Chilean case law in connection with international arbitration shows that the Supreme Court have acted uniformly in granting the authorization to enforce foreign awards and, in doing so, have followed a pro-arbitration and pro-enforcement approach that is consistent with the Chilean historical approach towards arbitration.

Accordingly, the Supreme Court would likely authorize the enforcement of foreign awards, on the basis of the Civil Procedure Code, the New York Convention and Law No. 19,971. To do so, said Court have restrictively interpreted the grounds of refusal established in the New York Convention and Law No. 19,971 of 2004, thus usually granting the enforcement authorization. Such approach is in line with the pro-arbitration and pro-enforcement biases that stem from the New York Convention and show how the Supreme Court aims to prevent that the parties circumvent the limited grounds for refusal established in Law No. 19,971. In such regard, the Supreme Court have rejected arguments that aim to review the merits of the award, contradict the previous behaviour of the parties, and, apply parochial views regarding the available grounds for refusal.

Accordingly, decisions on disciplinary recourses have shown that the pro-arbitration approach followed by Chilean courts has also been extended to the understanding of the notion of “public policy”. Indeed, Chilean courts have rejected a parochial approach over the subject, which favors the enforcement of foreign awards.

However, Chilean case law still shows some vestiges of the law applicable before the enactment of the New York Convention and Law No. 19,971 of 2004. In particular, the Supreme Court continues to apply the Civil Procedure Code and, save for some exceptions, does not apply directly and exclusively Law No. 19,971. In such regard, it is worrisome that the Supreme Court applies and requires compliance with Article 246 of the Civil Procedure Code and that the fiscal judicial had supported the defence of lack of personal jurisdiction to contest the enforcement of foreign awards. Should the Supreme Court apply

¹⁰² VÁSQUEZ (2011) p. 358.

¹⁰³ In connection with the different approaches towards *res judicata*, see FILIP DE LY ET AL. (2004) p. 2.

¹⁰⁴ FILIP DE LY ET AL. (2004) p. 2.

directly Law No. 19,971 (as needed in accordance with Article 13 of the Civil Code), such interpretations and analysis should be disregarded.

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