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Editor
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The Guide to Arbitration in Latin America

Second Edition

Editor

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Publisher's Note

Latin Lawyer and Global Arbitration Review are delighted to publish the second edition of *The Guide to Arbitration in Latin America*.

Edited by José Astigarraga of Reed Smith LLP and containing the knowledge and experience of a leading practitioners from throughout the region, it provides guidance that will benefit all arbitration specialists in Latin America.

Latin America is one of the most important regions in the world for international arbitration. The maturation of the marketplace is evident in the creation of new arbitral institutions and the participation of Latin American lawyers and arbitrators on some of the world's largest arbitration disputes. Recently, the region has become a hotspot for global trends, such as dispute funding. This is after decades of states' reluctance to international forums resolving their disputes with foreign investors, which shaped arbitration in the region. Understanding this evolution is critical, as Latin America's shifting economic and political landscape continues to influence the direction of travel. Fast-moving politics give rise to new policy, while corruption waves and cutting-edge legal issues in the mining industry have had important implications for resolving disputes. This Guide draws on the expertise of highly sophisticated practitioners to draw out these trends and give practitioners the tools they need to navigate the arbitration marketplace in the region today.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide to Arbitration in Latin America*. If you find this volume useful, you may also like the other titles in the Latin Lawyer series, including *The Guide to Mergers and Acquisitions* and *The Guide to Restructuring*, and other guides in the Global Arbitration Review series, such as *The Guide to Energy Arbitrations* and *The Guide to Investment Treaty Protection and Enforcement*.

My thanks to the editor for his vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

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CHAPTER 2

The New York Convention in Latin America

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Introduction

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (the New York Convention)[2] has created a model that allows a party who has obtained a favourable award to request its recognition and enforcement in any of the Convention's signatory countries.[3]

Notwithstanding the above, Article V of the New York Convention sets out several grounds for domestic courts to refuse the recognition and enforcement of foreign arbitral awards, at the request of the party opposing the recognition if the scenarios described in them take place.

Latin American courts have successfully applied the New York Convention and taken a pro-enforcement approach to foreign arbitral awards, although they have also paid attention to the grounds for refusal detailed in Article V, denying recognition or enforcement when necessary.

This chapter examines the application of the grounds to refuse recognition and enforcement of foreign arbitral awards by domestic courts in Latin America and, in particular, in the following jurisdictions: Mexico, Brazil, Chile, Colombia, Peru and Ecuador.

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2 Available at https://www.newyorkconvention.org/english.

3 To date, 172 countries from all over the world have signed the New York Convention. The current signatories and status of the New York Convention can be consulted at: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

Implementation of the New York Convention in Mexico, Brazil, Chile, Colombia, Peru and Ecuador

The New York Convention has been implemented satisfactorily in Latin America.

Mexico acceded to the New York Convention on 14 April 1971 with no reservations. The Convention entered into force on 13 July 1971. Furthermore, Mexico passed a statutory amendment of its Commercial Code to approve the Arbitration Law, which is included in Book 4 of the Mexican Commercial Code.

With regard to Brazil, the New York Convention entered into force on 5 September 2002 with no reservations.[4] A few years later, in 2015, the Brazilian Arbitration Act[5] was amended to mirror the main provisions of the New York Convention and to establish specific procedural rules, per the practice developed over those years. The Brazilian Superior Court of Justice (Superior Tribunal de Justiça) – which has exclusive jurisdiction over recognition of foreign awards – has applied the New York Convention on a few occasions, taking a pro-recognition stance.[6]

Colombia has been a party to the New York Convention since 24 December 1979 and did not apply any of the reservations authorised under the Convention. It approved its Arbitration Act in 2012, establishing a dual system for domestic arbitration and international arbitration.[7]

Peru ratified the Convention on 7 July 1988 without reservations and became a party to it on 5 October 1988. Peru later passed its Arbitration Act in 2008. The Peruvian courts have experience applying the Arbitration Act to domestic awards. However, there have been very few requests to recognise or enforce foreign arbitral awards. There is, therefore, not a great deal of Peruvian case law on the matter.[8]

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4 Federal Decree 4.311 of 24 July 2002.

5 Federal Law 9.307 of 23 September 1996.

6 Lauro Jama Jr. and Bruno Teixeira, 'Interpretation and Application of the New York Convention in Brazil', in George A Bermann (Editor), *Recognition and Enforcement of Foreign Arbitral Awards*. The Interpretation and Application of the New York Convention by National Courts, pp. 149–61.

7 Law 1563/12.

8 Fernando Cantuarias Salaverry, 'Interpretation and Application of the New York Convention in Peru', in George A Bermann (Editor), *Recognition and Enforcement of Foreign Arbitral Awards*. The Interpretation and Application of the New York Convention by National Courts, pp. 751–64.

Ecuador ratified the Convention on 3 January 1962 (and became a party to it on 3 April 1962) with reservations regarding reciprocity and commercial relationships.[9] Arbitration in Ecuador is regulated by the Arbitration and Mediation Law of 1997, although the Procedural Code of Ecuador, dated 22 May 2015, set out the requirements for the recognition and enforcement of foreign awards. Even though a requirement existed to recognise a foreign arbitral award prior to its enforcement, this approval process was eliminated in 2018, specifically for foreign awards.[10] It has since been possible to enforce foreign awards in Ecuador in the same way as domestic awards, without the need for a prior recognition phase.[11]

Chile ratified the Convention on 4 September 1975 with no reservations and became a party to it on 3 December 1975. In September 2004, Chile enacted a specific law dedicated to international arbitration, the International Commercial Arbitration Act No 19.971.[12] Regardless of the country in which a foreign award is rendered, it is recognised as binding in Chile if it complies with the requirements set forth in that legislation, which constitute a repetition of the relevant provisions of the New York Convention.[13]

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9 Ecuador, on a basis of reciprocity, will apply the Convention to the recognition and enforcement of arbitral awards made in the territory of another contracting state only if such awards have been made with respect to disputes arising out of legal relationships that are regarded as commercial under Ecuadorian law.

10 The approval process was removed pursuant to the Ecuadorian Basic Law on fostering production, attracting investment, generating employment and stability, and fiscal equilibrium, issued on 21 August 2018, which reinstated the last paragraph of Article 42 of the Arbitration and Mediation Act. This tendency to eliminate the need to obtain recognition of a foreign arbitral award prior to its enforcement has been further reinforced by the passing of Presidential Decree N.º 165, of 18 August 2021, which approves a Regulation which complements the Arbitration and Mediation Law of 1997.

11 Rodrigo Jijón-Letort, Juan Manuel Marchán and Javier Jaramillo-Troya, *The Arbitration Review of the Americas 2022*, 'Ecuador', 12 August 2021. Available at https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2022/article/ecuador

12 Available at Ley-19971 29-SEP-2004 MINISTERIO DE JUSTICIA - Ley Chile - Biblioteca del Congreso Nacional (bcn.cl)

13 Supreme Court, *Almendra y Miel S.A. v. Agrícola Comercial e Inversiones El Camino S.A.*, 30 November 2017 a summary of the judgment can be found in *Yearbook Commercial Arbitration 2019*, Volume XLIV. Supreme Court, *Qisheng Resources Limited v. Minera Santa Fe*, 21 April 2016. Supreme Court, *Klion v. Pesquera Villa Alegre, S.A.*, 26 July 2018.

Grounds to refuse recognition and enforcement of foreign arbitral awards in Latin America

Formal requisites when requesting recognition and enforcement of a foreign arbitral award

When filing a claim requesting the recognition and enforcement of a foreign arbitral award, the local legislation of the jurisdictions analysed in the present chapter impose certain formal requirements. More specifically, the party requesting the enforcement of a foreign arbitral award must provide the following documents:

- The original arbitral award or a certified copy. Some countries, like Brazil, Peru and Chile impose that the original award must be authenticated.[14]
- The original arbitration agreement or a certified copy.
- If the arbitral award or the arbitration agreement are drafted in a language other than the official language of the state (in these countries, Spanish or Portuguese), the party requesting recognition must provide a translated copy of the award or the arbitration agreement. In this case, Mexican, Brazilian, Peruvian and Chilean law requires that the translation be done by an official translator.[15]

Once these formal requirements are met, the courts will admit the application for recognition and enforcement of the foreign arbitral award and allow the opposing party a period of time to file its opposition based on the grounds contained in the New York Convention. In the following sections, we will proceed to analyse how the courts have applied these grounds of opposition one by one.

Incapacity of a party or invalidity of the arbitration agreement

According to Article V(1)(a) of the Convention, a court in a Contracting State may refuse to recognise and enforce a foreign arbitral award (1) if the parties to the arbitration agreement were affected by some type of incapacity, according to the law applicable to them; or (2) if the arbitration agreement is not valid under

14 More specifically, Brazil requires that the award must be authenticated by a Brazilian consular agent (Federal Law 9.307 of 23 September 1996, Article 37). Peru also requires that the award must be legalised in accordance with the laws of the country in which the award was rendered and authenticated by a Peruvian diplomatic or consular agent (Peruvian Arbitration Law, Articles 9 and 76). Lastly, Chile simply indicates that the original of the arbitral award must be 'authenticated' (Chilean Arbitration Act, Article 35)

15 Mexican Commercial Code, Article 1461; Brazilian Federal Law 9.307 of 23 September 1996, Article 37; Peruvian Arbitration Law, Articles 9 and 76 and Chilean Arbitration Act, Article 35.

the law applicable to it. Failing an express agreement of the parties as to the law applicable to the arbitration agreement, the court may refuse recognition if the agreement to arbitrate is invalid under the law of the seat of the arbitration.

Both of these defences are based on the lack of valid consent of the parties to arbitration. However, the incapacity defence has in practice been used very little in Latin America.

As for defences relying on the invalidity of the arbitration agreement, in Brazil there are two cases in which the Superior Court of Justice has found that the party resisting recognition failed to prove the ground in Article V(1)(a) of the Convention. In the first case, the party opposing recognition and enforcement of a foreign arbitral award argued that it was not bound by the arbitration clause because it was not a party to the contract which contained the arbitration clause. It also argued that counsel had not represented it properly in the proceedings and therefore it had been unable to present its defence. However, the Superior Court of Justice dismissed all of these claims, as it considered that none of them were proven by Respondent.[16] In the second case, the party opposing recognition argued that the arbitral agreement was null and void. However, the Superior Court of Justice dismissed this objection, indicating that the validity of the arbitration agreement is a matter that should have been discussed in the arbitral proceedings, something which does not appear in this case, as the party never opposed the jurisdiction of the arbitral tribunal constituted under the Grain and Feed Trade Association Arbitration Rules.[17]

On another hand, the Superior Court of Justice rejected enforcement of a series of foreign arbitral awards rendered in England under the International Cotton Association Arbitration Rules and the Grain and Feed Trade Association Arbitration Rules.[18] In these cases, the Brazilian party had not signed the sale contract or the arbitration agreement contained therein. Consequently, the Superior Court of Justice refused to recognise and enforce these foreign arbitral awards on the ground that they violated public policy. However, some authors

16 Brazil, 14 June 2012. Superior Tribunal de Justiça (Superior Court of Justice), *Comverse Inc. v. American Telecommunications do Brasil Ltda.*, SEC 3.709.

17 Brazil, 4 May 2016. Superior Tribunal de Justiça (Superior Court of Justice), *Searice Limited v. R Brazil Importaçao, Exportaçáo e Comércio de Cereais Ltda.*, Challenge Foreign Award 9.619.

18 Sentença Estrangeira Contestada No. 967; Sentença Estrangeira Contestada No. 866 and Sentença Estrangeira Contestada No. 978.

suggest that the ground for non-recognition contained in Article V(1)(a) of the Convention would have provided a better legal basis to refuse recognition and enforcement in this case.[19]

In Colombia, there is one precedent in the *Petrotesting* case. In this case, the party opposing recognition and enforcement of a US arbitral award argued that the arbitration agreement was not valid under Article V(1)(a) of the Convention because Colombian law does not allow the conclusion of arbitration agreements in public contracts. However, the Supreme Court considered that the arbitration agreement did not form part of the public contract for oil exploitation but in a consortium agreement signed between the parties. Consequently, the arbitration agreement had been validly entered into by the parties.[20]

There are no reported cases in Mexico, Chile, Ecuador or Peru pertaining to the ground established in Article V(1)(a) of the Convention. However, the Peruvian Arbitration Law[21] contains a ground that is identical to the one established in Article V(1)(a). In this regard, the Peruvian Arbitration Law establishes[22] that this ground cannot be invoked to oppose enforcement if the invoking party appeared in the arbitration proceedings and did not challenge the arbitral tribunal's jurisdiction based on a lack of validity of the arbitration agreement during the arbitration proceedings or if the arbitration agreement is valid under Peruvian law, in which case the award will be enforceable in Peru even if the arbitration agreement is not valid under the law applicable to it.

Insufficient notice or opportunity to present one's case

Article V(1)(b) of the Convention states that recognition and enforcement may be refused if 'the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case'. This ground is commonly invoked by

19 Lauro Jama Jr. and Bruno Teixeira, 'Interpretation and Application of the New York Convention in Brazil', in George A Bermann (Editor), *Recognition and Enforcement of Foreign Arbitral Awards*. The Interpretation and Application of the New York Convention by National Courts, pp. 149-61.

20 Colombia, 27 July 2011. Corte Suprema de Justicia (Supreme Court of Justice), *Petrotesting Colombia SA & Southeast Investment Corporation v Ross Energy S.A.*, 11001-0203-000-2007-01956-00.

21 Article 75(2)(a) of the Peruvian Arbitration Law.

22 Article 75(4) of the Peruvian Arbitration Law.

parties seeking to oppose the recognition of a foreign award. Parties who invoke this ground claim that they were not duly informed – or did not receive proper notice – of the appointment of arbitrators or of the arbitral proceedings.

Latin American courts have studied the scope of this ground in various different situations, comparing it with their own domestic legislation on arbitration.

In Brazil, the Superior Court of Justice has held on several occasions[23] that the burden of proving that insufficient notice was given lies with the party invoking the ground. In reaching this position, the court has relied on Article 38(III) of the Brazilian Arbitration Act,[24] the content of which is identical to Article V(1)(b) of the New York Convention.[25] Therefore, it is for the party opposing enforcement to prove that the notice was insufficient, or that they were otherwise unable to present their case.

On a separate note, the Brazilian Superior Court of Justice has also held that notification of arbitration proceedings to a party domiciled in Brazil does not have to be made through a letter rogatory.[26] Thus, a foreign arbitration award is enforceable in Brazil if the notice of the initiation of arbitration proceedings is given through methods recognised under international law standards, such as fax, letter or courier, as long as there is no violation of public policy.[27]

This ground is also covered in Mexico, by Article 1462.I(b)[28] of the Mexican Commercial Code.[29] The Mexican Commercial Code also includes specific rules regarding notification in the context of arbitration proceedings in Article 1418. However, it draws no distinction between notice from a court and notice in the

23 Sentença Estrangeira Contestada No. 9.412 – Us (2013/0278872-5), 30 May 2017 and Sentença Estrangeira Contestada No. 9.5029.502/EX, Corte Especial, Rel. Min. Maria Thereza de Assis Moura, DJe, 5 August 2014.

24 Available at http://www.planalto.gov.br/ccivil_03/leis/l9307.htm.

25 Article 38(III) of the Brazilian Arbitration Act states that the recognition or enforcement of a foreign arbitral award may only be denied when the defendant demonstrates that they have not been notified of the appointment of the arbitrator or of the arbitration proceedings, or the adversarial principle has been violated in such a manner that they were prevented from fully defending themselves.

26 Sentença Estrangeira Contestada n.º 3660 and Sentença Estrangeira Contestada n.º 6335, cited in Lauro Gama Jr. and Bruno Teixeira, op. cit., p. 156.

27 Sentença Estrangeira Contestada n.º 887 and Sentença Estrangeira Contestada n.º 6365, cited in Lauro Gama Jr. and Bruno Teixeira, op. cit., p. 156.

28 Article 1462.I.b) of the Mexican Commercial Code is identical in content to Article V(1)(B) of the New York Convention.

29 Available at https://www.diputados.gob.mx/LeyesBiblio/pdf/CCom.pdf.

context of arbitration proceedings in terms of the effectiveness of the notification, and therefore the same standards apply in arbitration and in domestic judicial proceedings.[30]

In Colombia, the Supreme Court has analysed Article V(1)(b) and concluded that it applies only in cases where the violation of due process affects the exercise of fundamental rights protected under the Colombian Constitution.[31] In any case, the Colombian Supreme Court has stated that the proper-notice requirement aims to ensure that defendants are aware of the existence of proceedings against them so they can choose the procedural strategy that best fits their interests. The Colombian Supreme Court has also stated that there are no generally accepted formal requirements or standards and therefore notice can be given in any manner agreed by the parties.[32]

In Peru, the courts have held that this ground can only apply if there is a clear infringement of defence rights that prevents a party from properly exercising its right to a defence, but no other kind of violation will be sufficient. Each case must therefore be analysed on an individual basis.[33]

In Chile, the ground is worded in Article 36.1(a)(ii) of the Chilean Arbitration Act in the same manner as in Article V(1)(B) of the New York Convention. The Chilean Supreme Court has held that notifications in the context of arbitration proceedings must be understood as an international concept and therefore a party cannot demand that they follow the Chilean domestic requirements for notifications.[34] Thus, a foreign arbitration award is enforceable in Chile if initiation of arbitration proceedings is notified through methods recognised under international law standards, such as courier.[35]

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30 Claus von Wobeser, 'Interpretation and Application of the New York Convention in Mexico', in George A. Bermann (Editor) *Recognition and Enforcement of Foreign Arbitral Awards.* The Interpretation and Application of the New York Convention by National Courts, pp. 677, 387.

31 Supreme Court of Justice, *Petrotesting Colombia v Southeast Investment Corp & Ross Energy S.A.*, 27 July 2011.

32 Supreme Court of Justice, *Petrotesting Colombia v Southeast Investment Corp & Ross Energy S.A.*, 27 July 2011.

33 Supreme Court of Lima, *Mota & Compahia Sociedad Anónima, Transportes Lei Sociedad Anónima y Engil Sociedade de Construcao Civil Sociedad Anónima v. T & T Ingeniería y Construcción Sociedad Anónima and other*, File No 265-2003, 2 August 2004.

34 Supreme Court, Revista de Derecho y Jurisprudencia, 96, n.º 2, Section 1, p. 82 et seq., 5 July 1999.

35 *Supreme Court, Klion v. Pesquera Villa Alegre, S.A.*, 26 July 2018.

Additionally, the Chilean Supreme Court has also indicated that if the defendant was properly notified of the arbitration proceedings, it is not possible to refuse to enforce an award simply because the defendant refused to appear in the proceedings.[36]

With regard to the right to a defence, the Chilean Supreme Court has held that the right to due process is not linked to the fairness or unfairness of the award, which cannot be analysed in the context of enforcement proceedings as that would inevitably lead to the national court revisiting the arbitral award.[37]

The award deals with a dispute not contemplated by the terms of the submission to arbitration, or contains a decision on matters beyond the scope of the submission to arbitration

Under Article V(1)(c) of the Convention, a court may refuse to grant recognition and enforcement of a foreign arbitral award when '[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration'. This Article also states that 'if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced'. Consequently, the Convention allows for the partial recognition of a foreign arbitral award.

This ground for refusal has rarely been used by Latin American courts. However, when applying similar rules in their domestic arbitration laws, Latin American courts have consistently held that in these cases the award should only be partially annulled. They have also been very careful not to use this ground as a way to reassess the merits of the dispute.

In the case of Brazil, on at least one occasion the Superior Court of Justice addressed the application of Article 38(IV) of the Brazilian Arbitration Act, which is almost identical to Article V(1)(c) of the Convention.[38] In this case,[39] the

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36 Supreme Court, *Almendra y Miel S.A. v. Agrícola Comercial e Inversiones El Camino S.A.*, 30 November 2017 a summary of the judgment can be found in Yearbook Commercial Arbitration 2019, Volume XLIV.

37 Supreme Court, *Comverse Inc. v. American Telecommunication, Inc Chile S.A.* Rol 322-2008, 8 September 2009, p. 22.

38 Article 38(iv) of the Brazilian Arbitration Act states that recognition may be denied if the arbitral award was delivered outside the limits of the arbitration agreement, and it was not possible to separate the excess part from that submitted to arbitration.

39 Sentença Estrangeira Contestada No. 3035, cited in Lauro Gama Jr and Bruno Teixeira, op. cit., p. 156.

parties had chosen Swiss law as the governing law. However, the arbitral tribunal issued an award applying the 1980 Vienna Convention on the International Sale of Goods (CISG). According to the party opposing recognition and enforcement, the award contravened not only the parties' agreement on the choice of law, but also domestic public policy, since Brazil was not yet a party to the CISG.

In this case, the Brazilian Supreme Court held that it could not review the merits of a foreign arbitral award for the purposes of recognition and enforcement. It stated that the CISG was an international instrument of uniform law duly incorporated into Swiss law and, consequently, the tribunal had not exceeded its mandate when it applied the CISG, as it was still applying Swiss law.

In the case of Mexico, there is no case law applying Article V(1)(c) of the Convention. However, the federal courts have consistently interpreted Article 1457(I)(c) of the Mexican Commercial Code (which mirrors Article V(1)(c) of the Convention)[40] as indicating that awards that exceed the scope of the submission to arbitration may be granted partial recognition and enforcement.[41]

In Colombia, there are two reported cases concerning the application of Article V(1)(c) of the Convention.[42] In both cases, the Supreme Court held that Article V(1)(c) only applies to disputes regarding the arbitration agreement itself and not to the remedies provided for in the main contract. Consequently, when deciding whether to recognise and enforce the award, the court refused to analyse the arguments put forward by the party opposing recognition regarding the substantive issues dealt with by the arbitral tribunal (including those relating to *ultra petita*).[43]

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40 According to Article 1457(I)(c) of the Mexican Commercial Code, an award can only be annulled when the award deals with a dispute not provided for in the arbitration agreement or contains decisions which exceed the terms of the arbitration agreement. However, if the provisions of the award which relate to matters submitted to arbitration can be separated from those which are not, only the latter may be set aside.

41 Partial Nullity of the Arbitral Award. The Party Opposing the Appeal Has Standing to Challenge the Decision which Dismisses Other Arguments Raised by the Court, Tercer Tribunal Colegiado en Materia Civil del Primer Circuito [TCC], Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XXXIII, May 2011, Decision No. I.3o.C.956 C, 1233 (Mexico).

42 Eduardo Zuleta and Rafael Rincón, 'Interpretation and Application of the New York Convention in Colombia' in George A Bermann (Editor) *Recognition and Enforcement of Foreign Arbitral Awards*. The Interpretation and Application of the New York Convention by National Courts, pp. 219–238.

43 Supreme Court of Justice, *Petrotesting Colombia v. Southeast Investment Corp & Ross Energy S.A.*, 27 July 2011.

In the case of Peru, there is one reported case of the Supreme Court applying Article V(1)(c) of the Convention.[44] In that case, the party opposing recognition and enforcement of the award contended that the arbitral tribunal had exceeded its mandate when it granted one of the parties a remedy that it had not expressly requested. The Supreme Court dismissed the argument by conducting a simple comparison between the party's request for relief and the relief ultimately granted by the arbitral tribunal, concluding that the arbitral tribunal had granted exactly what was requested by the party.

Last, in the case of Chile, there are two reported cases concerning the application of Article V(1)(c) of the Convention. In the first case, one party objected to the recognition and enforcement of the award on the grounds that the tribunal had ruled on costs, when the parties had not requested such a decision. The Chilean Supreme Court dismissed this argument, taking the view that the tribunal had issued this decision pursuant to the power conferred to it by the Brazilian courts. In this case, the arbitral tribunal had been appointed by the Brazilian courts. Taking this into consideration, the Chilean Supreme Court dismissed the set-aside argument. It found that when the Brazilian courts appointed the arbitral tribunal, the latter had been granted the power to rule on costs.[45]

In the second case, the Chilean Supreme Court applied the doctrine of *actos propios* (similar to estoppel)[46] to a dispute that arose out of two different (though related) contracts. One contract contained an arbitration agreement while the other did not. When making its decision, the arbitral tribunal relied on the content of the second contract, even though it did not include an arbitration agreement. When one of the parties tried to obtain recognition and enforcement of the award in Chile, the other party objected on the grounds that the tribunal had exceeded its mandate when it relied on the second contract to render its award. However, the Supreme Court considered that the party opposing recognition had tacitly consented to submitting both contracts to arbitration, as it had

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44 Supreme Court of Justice, 2º Chamber of Commerce, *Great Harvest International Investment Limited v. Shougang Corporation*, 10 December 2014.

45 Supreme Court, *Gold Nutrition Industria e Comercio con Laboratorios Garden House S.A.*, 15 September 2008.

46 Supreme Court, *Kreditanstalt für Wiederaufbau v Inversiones Errázuriz Limitada*, 5.228-2008, 15 December 2009. Available at https://jusmundi.com/en/document/decision/es-kreditanstalt-fur-wiederaufbau-v-inversiones-errazuriz-limitada-decision-de-la-corte-suprema-de-chile-tuesday-15th-december-2009.

relied on both of the contracts to support its case in the arbitral proceedings. Consequently, the Supreme Court held that the party opposing recognition was bound by its previous actions and that the tribunal had not exceeded its mandate.

Improper composition of the arbitral tribunal or non-compliance with arbitral procedure

Article V(1)(d) of the Convention states that the recognition and enforcement of an arbitral award may be refused if 'the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place'. This ground is not frequently invoked, because domestic courts do not generally uphold such oppositions unless it is clearly proven by the party that the procedure was not in accordance with the parties' agreement and that this circumstance deprived the party of an opportunity to be heard.

Latin American courts have analysed the scope of this ground on several occasions, reaching different conclusions.

In Brazil, the Superior Court of Justice has ruled in a case mentioned above[47] on the application of Article 38(v) of the Brazilian Arbitration Act,[48] which is identical to Article V(1)(d) of the New York Convention. As previously explained, the court held that although the parties had agreed that Swiss law would govern the merits of the dispute, the application of the CISG by the arbitral tribunal did not violate the parties' agreement or arbitral procedure. The arbitrators had simply applied an international instrument duly incorporated into Swiss law.

Although there is no relevant Colombian case law applying this ground, it is identical in content to Article 112 of the Arbitration Act, which requires for domestic awards that the irregularity in the constitution of the tribunal must be materially grave and affect the substance of the tribunal's decision. Any other irregularity will not result in a denial of recognition.[49] This approach could therefore also be taken into account by Colombian courts when analysing the ground described in Article V(1)(d) to recognise foreign awards.

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47 Sentença Estrangeira Contestada 3035.

48 Article 38(v) of the Brazilian Arbitration Act states that recognition may be denied if the arbitration does not comply with the parties' agreement or with the arbitration clause.

49 Eduardo Zuleta and Rafael Rincón, 'Interpretation and Application of the New York Convention in Colombia' in George A Bermann (Editor) *Recognition and Enforcement of Foreign Arbitral Awards*. The Interpretation and Application of the New York Convention by National Courts, pp. 219–238.

There is no relevant Peruvian case law applying this ground either. However, Article 34(1) of the Arbitration Act states that for domestic awards, parties are free to agree on the rules that will govern the arbitration. If the parties have not agreed on those rules, the arbitrators are entitled to establish them, as long as the parties are treated equally and their right to a defence is respected.[50] Peruvian courts could therefore also apply these criteria when deciding on the recognition and enforcement of foreign awards.

Furthermore, the Peruvian courts have held that in a domestic context, when the parties have agreed on an arbitration in law and yet the tribunal decides on the basis of equity, the rules of procedure agreed by the parties will be considered to have been violated. Therefore, if something similar were to happen in a foreign award, a Peruvian court would likely be reluctant to recognise the award.[51]

In Chile, the Arbitration Act also contains a provision[52] reproducing Article V of the New York Convention and, in particular, a ground specifying that an award will not be recognised if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place. In this regard, the Chilean Supreme Court has decided a case[53] related to an International Chamber of Commerce (ICC) arbitration in which one of the parties alleged that the award was issued by a single arbitrator while the parties had agreed on a tribunal of three arbitrators. This was because, according to this party, only one of the three arbitrators was Chilean and knew the Chilean law applicable to the case, and the other two arbitrators simply trusted the first arbitrator's interpretation of the Chilean law. However, the court dismissed this argument since it was proven that all the ICC Rules of Arbitration were complied with throughout the arbitration proceedings and that there was no doubt that the award was rendered by the three arbitrators in accordance with those rules.

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50 Article 34(1) of the Peruvian Arbitration Law.

51 Fernando Cantuarias Salaverry, op. cit. p. 760.

52 Article 36 of Law 19.971.

53 Supreme Court, *Kreditanstalt für Wiederaufbau v. Inversiones Errázuriz Limitada*, 5.228-2008, 15 December 2009. Available at https://jusmundi.com/en/document/decision/es-kreditanstalt-fur-wiederaufbau-v-inversiones-errazuriz-limitada-decision-de-la-corte-suprema-de-chile-tuesday-15th-december-2009.

The award has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made

Article V(1)(e) of the Convention states that the recognition and enforcement of an arbitral award may be refused if '[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made'. This ground for refusal is often used when the award has been annulled by the courts of the country where the arbitration is seated. It is also used as a way to suspend the recognition and enforcement of foreign arbitral awards when an annulment proceeding is still pending in the country where the arbitration is seated.

In the case of Brazil, the Superior Court of Justice has considered Article V(1)(e) of the Convention on at least one occasion.[54] The relevant case concerned the recognition and enforcement of an award issued in Argentina that had been set aside by the Argentinian courts. The Brazilian Superior Court of Justice refused to enforce the award on the grounds that it had been set aside at the seat of arbitration. In making its decision, the Supreme Court relied on both Article V(1)(e) of the Convention and the 1975 Panama Convention and the 1992 Las Leñas Protocol (Mercosur).

In another case, the Superior Court of Justice refused recognition and enforcement of a foreign arbitral award even when the arbitral award had been confirmed by the courts of the seat of the arbitration, which was the United States. In this case, the chair of the arbitral tribunal had allegedly failed to disclose that colleagues from his law firm were providing legal advice in a number of matters involving the party which won the arbitration. Even though the US Courts did not consider this sufficient to vacate the award, the Brazilian Superior Court of Justice concluded that it was not bound by the decisions of the US courts and was in no way prevented from examining the arbitral award. Consequently, the court held that there were sufficient elements to conclude that the chair was biased. Therefore, the Superior Court of Justice refused to enforce the award, as it considered that it violated Brazil's public policy.[55]

In another 2006 judgment, the Superior Court of Justice granted recognition and enforcement of a foreign arbitral award even when there was a pending annulment proceeding against the award in the US courts.[56] Consequently, in

54 See Sentença Estrangeira Contestada No. 5.782, cited in Lauro Gama Jr and Bruno Teixeira, op. cit. p. 157.

55 Sentença Estrangeira Contestada No. 9412.

56 Sentença Estrangeira Contestada No. 611.

Brazil, the court will need to assert whether annulment has been granted (not simply requested) in order to deny recognition and enforcement of the award. Additionally, even if the courts of the seat confirm the validity of the arbitral award, the Superior Court of Justice of Brazil will still perform its own analysis as to whether the foreign arbitral award violates Brazil's public policy.

The courts of Colombia have not specifically analysed Article V(1)(e) of the Convention. However Article 112 of the Colombian Arbitration Law allows judges to proceed with recognition and enforcement proceedings even if there is a pending application for the award in question to be set aside.[57]

There is also no reported case law concerning the application of Article V(1)(e) by the courts of Peru. However, as with Colombia, Article 75(8) of the Peruvian Arbitration Law[58] provides that Peruvian courts can decide to continue with proceedings to enforce a foreign arbitral award even if there is a pending application for the award to be set aside, unless the party requesting the set-aside or suspension provides some appropriate form of security to cover the expenses incurred by the set-aside or suspension. In any case, the Court will make the final decision as whether to continue with the recognition proceedings 'if deemed appropriate'.

In the case of Chile, parties have normally presented some sort of proof to the Supreme Court that the award is final and binding, such as an official certification that the award cannot be challenged before the courts of the country where the arbitration is seated.[59] The Chilean Supreme Court has taken into consideration on two occasions that the award had become final and binding as it had not been challenged by the party opposing recognition and enforcement.[60]

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57 According to Article 112 of Law 1563/12, if the annulment or suspension of the award has been requested before a judicial authority of the country where the arbitration took place, the Colombian judicial authority, if it considers it appropriate, may defer its decision on the recognition of the award, at the request of the party requesting it. The latter may also order the other party to provide appropriate security.

58 Article 75(8) Peruvian Arbitration Law.

59 Supreme Court, *Gold Nutrition Industria e Comercio con Laboratorios Garden House S.A.*, 15 September 2008.

60 Supreme Court, *Comverse Inc. con American Telecommunication, Inc. Chile S.A.*, 8 September 2009; and *Klion v. Pesquera Villa Alegre, S.A.*, 26 July 2018.

However, it is not necessary for the party requesting recognition to prove that the award is final and binding. In fact, in two cases, the Supreme Court of Chile has concluded that ICC arbitral awards are binding simply because the ICC Rules state that the awards rendered pursuant to the Rules are final and binding on the parties.[61]

Subject matter of the dispute not capable of settlement by arbitration

Article V(2)(a) sets out the grounds for refusing recognition or enforcement of a foreign arbitral award where the subject matter of the dispute that led to the award is not arbitrable (not capable of settlement by arbitration) under the law of the country where recognition or enforcement is being sought. This ground for refusal does not refer to whether or not the dispute fell within the scope of the arbitration agreement, but rather to whether it is reserved for resolution by the courts (i.e., the matter is not arbitrable). Preliminarily, the language of Section 2 of Article V, namely the expression 'if the competent authority . . . finds that' – in contrast with that of Section 1, which reads 'only if the party furnishes . . . proof that' – enables the local court before which recognition or enforcement is sought to raise this ground for refusal *ex officio*. This ground for non-recognition, as well as that provided for in the subsequent Paragraph (b), allows the competent local court to examine the local law and apply it to assess whether the dispute is capable of being settled by arbitration.

There are no reported cases in Brazil, Mexico, Ecuador or Chile of the courts analysing Article V(2)(a) of the Convention. However, their respective domestic arbitration laws establish that a dispute is arbitrable if it can be the subject of a transaction – in other words, if it involves disposable economic rights.[62]

On the other hand, disputes involving matters of public policy, civil status and family law, criminal offences or employment law cannot be arbitrated. Additionally, in Mexico certain specific disputes are legally excluded from arbitration and reserved to the Mexican courts (e.g. ,disputes or claims concerning land and water resources in the country). Matters relating to the public interest cannot be settled by arbitration either (e.g., competition law, tax and labour matters); however, arbitration clauses can be included in public contracts. In Chile, there

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61 Supreme Court, *Almendra y Miel S.A. v. Agrícola Comercial e Inversiones El Camino S.A.*, 30 November 2017 a summary of the judgment can be found in Yearbook Commercial Arbitration 2019, Volume XLIV. Supreme Court, *Qisheng Resources Limited v. Minera Santa Fe*, 21 April 2016.

62 Article 1 of the Brazilian Arbitration Act; Article 1 of the Ecuadorian Arbitration and Mediation Act.

was a moment in which, according to Decree Law 600, disputes relating to foreign investment agreements entered into under Chile's Foreign Investment Law were not arbitrable. However, this Decree Law was repealed in January 2016 by Law 20,848, which does not contain any provisions regarding arbitration.

In Peru, Article 2 of the Peruvian Arbitration Law provides that disputes on matters that are freely disposable by law, as well as those authorised by law and international treaties, may be submitted to arbitration. According to the Peruvian courts, a subject matter may be arbitrable if it pertains to disposable rights or if it is established as arbitrable by law.[63] Regarding the former, the Peruvian courts have emphasised the autonomy of the parties and noted that arbitrable matters include contractual and extracontractual rights, and may or may not concern property rights, provided that the rights at stake are disposable. Matters related to crimes, parenthood, civil status, guardianship, functions or competencies of state bodies, and so on, or related to issues of morality, cannot be freely disposed of by the parties and hence cannot be arbitrated.[64] A matter may also be arbitrable regardless of the rights underpinning the dispute if a specific legal provision permits or requires the matter to be settled by arbitration. Fields such as labour disputes, consumer protection, finance, insurance and public procurement[65] are arbitrable (though subject to certain specifications and exceptions).

In Colombia, the grounds of Article V(2) of the Convention are set out in Article 112 of the Arbitration Statute.[66] In short, not every matter can be referred to arbitration. The Colombian Constitutional Court has linked the notion of 'arbitrability' enshrined in the New York Convention to the parties' capacity to negotiate, settle, waive and dispose of the right from which the dispute originates.[67] As in most jurisdictions, in Colombia arbitration must therefore relate to assets or rights that can be freely disposed of by the parties, and it is Colombian

63 Peru, 5 March 2018. Second Civil Chamber specialised in Commercial Matters of the Supreme Court of Justice of Lima, *D.P. Trade S.A. v. Metalyck S.A.C.*, Expediente No. 00352-2017-0-1817-SP-CO-02.

64 See n 52.

65 Peru, 5 March 2018. Second Civil Chamber specialised in Commercial Matters of the Supreme Court of Justice of Lima, *D.P. Trade S.A. v. Metalyck S.A.C.*, Expediente No. 00352-2017-0-1817-SP-CO-02; Peru, 6 November 2017. Second Civil Chamber specialised in Commercial Matters of the Supreme Court of Justice of Lima, *Pluspetrol Norte S.A. v. Pluspetro S.A.*, Expediente No. 00336-2017-0-1817-SP-CO-02.

66 Estatuto de Arbitraje Nacional e Internacional.

67 Colombia, 15 November 2022. Supreme Court of Justice, *Zurgroup SA v. Importaciones y Exportaciones Fenix SAS*, Case No. 11001-02-03-000-2021-04294-00, Decision No. SC3650-2022.

law that determines where parties can freely dispose of a right.[68] Matters relating to civil status, the rights of the incapacitated and disputes concerning the rights of workers are not disposable under Colombian law and therefore not arbitrable. Contractual and commercial disputes that only involve private interests and disposable, negotiable and waivable rights are capable of being settled by arbitration in Colombia.[69]

Recognition or enforcement of the award would be contrary to public policy

The last defence listed in Article V of the Convention relates to public policy issues.

To date, the Ecuadorian courts have not rendered any judgments based on Article V(2)(b) of the Convention.

In the case of Chile, there are two reported cases in which the party opposing recognition and enforcement argued that the award was contrary to Chilean public policy. However, in both cases, the Supreme Court dismissed this argument, as it considered that the defendants were only asking the court to make its own assessment of the merits of the disputes subject to arbitration (which it cannot do).[70]

In Brazil, the notion of public policy prohibits only those legal acts and effects that are absolutely incompatible with the Brazilian legal system. The impartiality of arbitrators is an example of an element that is part of the concept of public policy. The Brazilian courts follow the internationally consolidated understanding that a violation of a mandatory rule of national law is not in and of itself contrary to public policy. Consequently, the Brazilian courts apply a restrictive approach to public policy when assessing whether to recognise and enforce an award.[71]

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68 Judgment C-226 1993 of the Constitutional Court, SU174-07 Constitutional Court.

69 Colombia, 15 November 2022. Supreme Court of Justice, *Tricon Dry Chemicals LLC v Agroindustrias El Molino de la Costa SAS*, Case No. 11001-02-03-000-2022-02145-00, Decision No. SC3462-2022; Colombia, 23 March 2018. Supreme Court of Justice, *Innovation Worldwide DMCC v. Carboexco C.I. Ltda*, 11001-02-03-000-2017-00080-00; Colombia, 24 May 2017. Supreme Court of Justice, *Petrotesting Colombia S.A., Southeast Investment Corporation v, Riss Energy S.A.S.*, available at www.newyorkconvention1958.org.

70 Supreme Court, *Almendra y Miel S.A. v. Agrícola Comercial e Inversiones El Camino S.A.*, 30 November 2017, a summary of the judgment can be found in Yearbook Commercial Arbitration 2019, Volume XLIV. Supreme Court, *Qisheng Resources Limited v. Minera Santa Fe*, 21 April 2016.

71 Brazil, 19 April 2017. Superior Court of Justice, A*SA Bioenergy Holding A.G. and others v. Adriano Giannetti Dedini Ometto and other*, Challenge Foreign Award 9.412, available at www.newyorkconvention1958.org.

In Mexico, the courts have established that public policy is an indeterminate concept, the content of which varies over time and is determined according to the circumstances of each specific case. However, the concept of public policy is built around a 'hard core' that is made up of legal principles that protect the foundations of legal institutions (one of those legal principles being due process). An award is therefore contrary to public policy when it goes against the foundations of the legal institutions of the state (such as a right to due process).[72] The Mexican Supreme Court has clarified that arbitral tribunals do not have to comply with the requirement to justify their decision in the manner that national judges must do and therefore failure to do so does not constitute grounds for non-recognition of the award under Article V(2)(b) of the Convention.[73]

Peruvian arbitration law establishes that for a foreign award to be denied enforcement under Article V(2)(b) of the Convention, it must be contrary to international public policy.[74] The Peruvian Supreme Court has defined international public policy restrictively as the set of legal rules that are part of domestic public policy and constitute a set of non-waivable principles because they relate to the fundamental values of society.

According to the Peruvian Supreme Court, the purpose of this concept is to avoid any negative effects that applying a foreign rule may have on the local legal system. Consequently, the Supreme Court has adopted three principles for interpreting international public policy, which had already been established by case law: the principle of exceptionality, which establishes that the res judicata effect of an international award must be respected unless there is a very exceptional circumstance requiring the contrary; the principle of restrictive interpretation of the concept of public policy itself; and the principle of obviousness, which establishes that the level of the national court's review of the award should be minimal, such that the illegality 'can be brought to the court's attention –namely if a detailed and exhaustive analysis is necessary, then it does not involve a matter of true public policy.[75]

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72 Mexico, 18 May 2016. First Chamber of the Supreme Court of Justice of Mexico, Amparo directo 71/2014, available at www.newyorkconvention1958.org.

73 Mexico, 18 May 2016. First Chamber of the Supreme Court of Justice of Mexico, Amparo directo 71/2014, available at www.newyorkconvention1958.org.

74 Article 75.3(b) of the Peruvian Arbitration Law.

75 Peru, 5 March 2018. Second Civil Chamber specialised in Commercial Matters of the Supreme Court of Justice of Lima, *D.P. Trade S.A. v. Metalyck S.A.C.*, Expediente No. 00352-2017-0-1817-SP-CO-02. See also 6 November 2017, Peru, Second Civil Chamber specialised in Commercial Matters of the Supreme Court of Justice of Lima, *Pluspetrol Norte S.A. v. Perupetro S.A.*, Expediente No. 00336-2017-0-1817-SP-CO-02; Peru, 3 July 2017.

Last, when faced with a defence based on Article V(2) of the Convention, the Colombian courts apply an international concept of 'public policy' as established in the Arbitration Statute. The Supreme Court of Colombia differentiates between international public policy, which it defines as 'the basic or fundamental values and principles underlying the legal institutions of the national legal order',[76] and the concept of public policy applicable to constitutional or internal civil law matters.[77] Accordingly, a mandatory rule of domestic law does not necessarily prevail in international affairs such as the recognition and enforcement of foreign awards.

The Colombian courts have also recalled that the concept of international public policy involves two limbs:[78] the merits, and questions of procedure. Aspects covered by the former include the prohibition of abuse of rights, good faith, the binding force of contracts, the prohibition of discrimination and expropriation without compensation, and the prohibition of immoral activities such as piracy, terrorism, genocide, slavery, drug trafficking and paedophilia. Aspects covered by the latter include the impartiality of arbitral tribunals and respect for due process.[79]

Second Civil Chamber specialised in Commercial Matters of the Supreme Court of Justice of Lima, *D.P. Trade S.A. v. Vemaser Perù S.A.C.*, Expediente No. 00310-2016-0-1817-SP-CO-02; Peru, 19 October 2016. Second Civil Chamber specialised in Commercial Matters of the Supreme Court of Justice of Lima, *Energía Eólica S.A. v. Montealto Peru and Vestas Perú*, Case No. 00045-2016-0-1817-SP-CO-02, available at www.newyorkconvention1958.org.

76 Colombia, 15 November 2022. Supreme Court of Justice, *Tricon Dry Chemicals LLC v Agroindustrias El Molino de la Costa SAS*, Case No. 11001-02-03-000-2022-02145-00, Decision No. SC3462-2022; Colombia, 15 November 2022. Supreme Court of Justice, *Zurgroup SA v Importaciones y Exportaciones Fenix SAS*, Case No. 11001-02-03-000-2021-04294-00, Decision No. SC3650-2022.

77 Colombia, 23 March 2018. Supreme Court of Justice, *Innovation Worldwide DMCC v. Carboexco C.I. Ltda.*, 11001-02-03-000-2017-00080-00; Colombia, 24 May 2017. Supreme Court of Justice, *Petrotesting Colombia S.A., Southeast Investment Corporation v. Ross Energy S.A.S.*,11001-02-03-000-2012-02952-00; Colombia, 7 September 2016. Supreme Court of Justice, *Empresa de Generación Eléctrica del Sur S.A., "Egesur S.A." v. Consorcio Pisco, conformado por Gas Consultores Ltda., sucursal de Perú, Ingeniería y Aguas S.A., sucursal de Perú, y Ario Contratistas Generales S.A.C.*, 11001-02-03-000-2014-02737-00; Colombia, 24 June 2016. Supreme Court of Justice, *HTM LLC v. Fomento de Catalizadores Foca S.A.S.*, 11001-02-03-000-2014-02243-00, available at www.newyorkconvention1958.org.

78 Colombia, 18 April 2017. Supreme Court of Justice, *Consorcio CICE v. Consorcio Geo Bauer*, 11001-0203-000-2016-01312-00.

79 Colombia, 18 April 2017. Supreme Court of Justice, *Consorcio CICE v. Consorcio Geo Bauer*, 11001-0203-000-2016-01312-00.

Conclusion

The New York Convention is increasingly being applied in Latin America, with a strong general stance in favour of recognition. However, there is still not a large amount of case law on its application in countries such as Brazil, Mexico, Peru, Chile, Colombia and Ecuador. The courts are deciding on a case-by-case basis. We will see in the coming years how the grounds of the Convention work in those countries.

Furthermore, as a general rule domestic arbitration laws in Latin America contain grounds for opposing the enforcement of awards inspired by the Convention. Therefore, the courts' interpretation of these grounds is useful in predicting how they are likely to react when applying the grounds of the Convention.