



**LL.M. INT. INTERNATIONAL LAW,**  
Investments, Trade and Arbitration

**Degree Thesis:**

**Recognition and Enforcement of Foreign Arbitral Awards, a  
practical analysis:  
The Chilean Experience in the Application of the New York  
Convention of 1958 and the Chilean International Commercial  
Arbitration Law in the Exequatur Proceedings, since 2005.**

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*I wish to thank my parents,  
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## CONTENTS

	Page
INTRODUCTION	p.1
I. CHAPTER I: NEW YORK CONVENTION OF 1958, CONVENTION OF RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS.	p.3
i. History and main objectives of the convention.	p.4
ii. Entry in force of the convention.	p.8
iii. Signature and ratification by Chile.	p.8
iv. Relevant dispositions.	p.8
a) Article I	p.8
b) Article III	p.9
c) Article IV	p.10
d) Article V	p.10
e) Article VI	p.12
f) Article VII	p.13
II. CHAPTER II: CHILEAN INTERNATIONAL COMMERCIAL ARBITRATION LAW OF 2004	p.14
i. History and main objectives of the law.	p.16
ii. Entry in force of the law.	p.18
iii. Relevant dispositions.	p.18
a) Article 1	p.18
b) Article 8	p.19
c) Article 9	p.19
d) Article 35	p.20

e) Article 36	p.20
III.    CHAPTER III: CHILEAN EXEQUATUR PROCEEDINGS	p.21
i.    Explanation of the former <i>exequatur</i> proceeding under the rules of Chilean Civil Procedural Code.	p.22
ii.   Relevant dispositions for <i>exequatur</i> under the present rules established by Chilean Civil Procedural Code, the New York Convention and the Chilean International Commercial Arbitration Law.	p.24
iii.  Explanation of the <i>exequatur</i> proceeding of foreign arbitral awards under the present applicable rules.	p.26
IV.    CHAPTER IV: CASE ANALYSIS	p.29
i.    Exequatur cases recognizing foreign arbitral awards.	p.30
1) Case “Max Mauro Stubrin y otros v. Inversiones Morice S.A.”.	p.30
2) Case “Gold Nutrition Industria e Comercio Ltda.”.	p.32
3) Case “Comverse Inc.”.	p.35
4) Case “Kreditanstalt für Wiederaufbau”.	p.40
5) Case “Stemcor UK Limited”.	p.45
ii.   Exequatur cases denying foreign arbitral awards.	p.48
Case “EDF Internacional Soc. Energética Francesa S.A.”.	p.48
iii.  Exequatur cases of interim measures.	p.52
Case “Western Technology Services International Inc.”	p.52
CONCLUSION	p.55
BIBLIOGRAPHY	p.60

## INTRODUCTION

Over the last 70 years the international trade has increased on the volume of transactions and parts involved in it. This is how year after year, with some exceptions, the number of international commercial transactions have grown.

In direct relation with this, the actors involved in international trade have multiplied, not only natural and legal persons and states participate in international trade, now also participate Non-Governmental Organizations or International Organizations among others.

In consideration of the above the number and complexity of the disputes between the different actors is higher and have become more complex and need to be solved quickly. In this scenario the International Commercial Arbitration emerges as an important way -if not the only and natural way- to settle the disputes between traders.

Traders choose arbitration because it is a quicker way than the national courts to solve the disputes, also because the arbitration is objective and gives more confidence to the parts involved on the justice of the decision to be reached, and because the arbitrators are experts in the matters to be addressed.

But the arbitration also needs to be reliable. What does this mean? Does it means that when an award in an arbitration proceeding is reached, it is necessary that the award can be recognized and enforced successfully in other countries than the seat country of the arbitration.

In this order of ideas is necessary to analyze if Chile is a reliable country to get the recognition and enforcement of foreign arbitral awards. Because it is very important that traders have confidence if they have a favorable award, that they can get recognition and enforcement of it in Chile by the application, of the -almost

universal- New York Convention of 1958 about Recognition and Enforcement of Foreign Arbitral Awards and the Chilean International Commercial Arbitration Law.

So, it becomes very relevant analyze how the Chilean courts have ruled about the recognition and enforcement of foreign arbitral awards, in the *exequatur* proceedings before the Supreme Court of Chile.

This work in its I Chapter about the New York Convention of 1958 about Recognition and Enforcement of Foreign Arbitral Awards will be revised the history and main objectives, entry into force, signing and ratification by Chile and the relevant dispositions of the Convention.

Then, in the II Chapter about Chilean International Commercial Arbitration Law of 2004 will be revised the history and main objectives, entry into force and the relevant dispositions of the law.

Thereupon, in the III Chapter about the Chilean *Exequatur* Proceedings will be shown an explanation of the former *exequatur* proceeding under the rules of Chilean Civil Procedural Code; the relevant dispositions for *exequatur* under the present rules established by Chilean Civil Procedural Code, the New York Convention and the Chilean International Commercial Arbitration Law and, an explanation of the *exequatur* proceeding of foreign arbitral awards under the present applicable rules.

Afterwards, in the IV Chapter will be revised and analyzed the most relevant cases of *exequatur* before the Supreme Court of Chile since 2005 to 2011. That review is with the objective to extract the Jurisprudence of the court and make an analysis of it in the conclusions of this work.

Finally, in the conclusions will point out the main Jurisprudence set by the Supreme Court in the *exequatur* cases. Also, we will criticize the judgments of the court and propose future perspectives and a final conclusion on the topic.

I. CHAPTER I: NEW YORK CONVENTION OF 1958, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10 of 1958, known as New York Convention<sup>1</sup>, is the most widespread international commercial covenant in the world, with 149 member states<sup>2</sup> is one of the most - if not the most - important and successful international convention in the world, in words of Kofi Annan in the special meeting of the United Nations Commission on International Trade Law (hereinafter UNCITRAL) for the celebration of the 40 years of the New York Convention is "... one of the most successful treaties in the area of commercial law"<sup>3</sup>.

At the present time the convention is in force in 149 states, covering the main commercial and trade areas of the world. In the, almost, 55 years of the entry into force of the convention its principles served as the base for important law documents, like the UNICTRAL Model Law on International Commercial Arbitration of 1985, and many internal regulations of countries. Pieter Sanders, which was the writer of the famous "Dutch Proposal", who was basis of the New York Convention, stated "The 1958 New York Convention is the most successful multilateral instrument in the field of international trade law. It is the centrepiece in the mosaic of treaties and arbitration laws that ensure acceptance of arbitral awards and arbitration agreements. [...] Vivat Floreat et Crescat New York Convention 1958"<sup>4</sup>.

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<sup>1</sup> See full text of the convention, available: [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf) Hereinafter New York Convention. [Visited: 2014, January 5].

<sup>2</sup> See the status of the convention, available: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) [Visited: 2014, January 5].

<sup>3</sup> ANNAN, Kofi. (1999). "Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration", in *Enforcing Arbitration Awards under the New York Convention, Experiences and Prospects*, Paper presented at "New York Convention Day" in the Trusteeship Council Chamber of the United Nations Headquarters, New York on 10 June 1998 to celebrate the 40<sup>th</sup> anniversary of the Convention on Recognition and Enforcement of Foreign Arbitral Awards concluded on 10 June 1958, New York: United Nations, p. 2.

<sup>4</sup> SANDERS, Pieter. (2011). "Foreword", in *ICCA's guide to the interpretation of the 1958 New York Convention: a handbook for judges*. The Hague, Netherlands: International Council for Commercial Arbitration, p. vii.

i. History and main objectives of the convention.

The Convention was borne by the proposition of the International Chamber of Commerce (ICC) of a draft of the Convention on the Recognition and Enforcement of International Arbitral Awards in 1953<sup>5</sup>, the objectives pursued by the ICC were “...the interest of developing international trade it is important to further means to obtain the enforcement in one country of arbitral awards rendered in another country in settlement of commercial disputes”.<sup>6</sup> The draft made by the ICC was presented to the United Nations Economic and Social Council (ECOSOC), the ECOSOC in its resolution 520 adopted on 6 April 1954 in his 17<sup>th</sup> session established a committee to study the matter. The committee established by the ECOSOC concluded “that it would be desirable to establish a new convention which while going further than the Geneva Convention in facilitating the enforcement of foreign arbitral awards”<sup>7 8</sup>, within the committee made a draft named “Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards”, this change was made by the committee because the convention deals with the recognition and enforcement of arbitral awards made in one state to be enforced and recognized in other states and not about arbitration between states.<sup>9</sup>

The draft prepared by the committee was presented in the International Conference at the United Nations in 1958, this conference (known as the “United Nations Conference on Commercial Arbitration), was attended by forty-five nations and produced a compromise between the ICC and the ECOSOC

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<sup>5</sup> Complete text available: [http://www.newyorkconvention.org/userfiles/documenten/texts-history/87\\_preliminarydraft1953.pdf](http://www.newyorkconvention.org/userfiles/documenten/texts-history/87_preliminarydraft1953.pdf) [Visited: 2014, January 6].

<sup>6</sup> United Nations Economic and Social Council. (1955). *Report of the committee on the Enforcement of International arbitral awards*, Available: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N55/080/97/PDF/N5508097.pdf?OpenElement> p. 4. [Visited: 2014, January 6].

<sup>7</sup> *Idem*, p. 5.

<sup>8</sup> The New York Convention also regulates the arbitration clauses, but due the scope of this work we are going only to focus on the recognition and enforcement of foreign arbitral awards.

<sup>9</sup> For further information on the history of the convention see, available: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_travaux.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_travaux.html) [Visited: 2014, January 6].



versions.”<sup>10</sup>. The convention adopted in the conference was on the basis of the “Dutch proposal” rendered by Dutch representatives in the conference, in the words of Pieter Sanders: “[...] The main elements of the “Dutch proposal” were, first of all, the elimination of the double *exequatur*, one in the country where the award was made and another one in the country of enforcement of the award. [...] Another element of the proposal was to restrict the grounds for refusal of recognition and enforcement as much as possible and to switch the burden of proof of the existence of one or more of these grounds to the party against whom the enforcement was sought.”<sup>11</sup>.

There are two main objectives of the New York Convention, first, the recognition and enforcement of foreign arbitral awards and, second, “the recognition -and more than that the effectiveness- of the arbitral agreement”<sup>12</sup>.

Summarizing, we can remark the following improvements, about the recognition and enforcement of arbitral awards, made by the New York Convention (hereinafter NYC) over the previous system established before it:<sup>13</sup>

a) Elimination of the double *exequatur*.

We think that is one most important improvements made by the NYC. Before the convention, the party who wants that the arbitral award were recognized and enforced in other country than the country seat of the arbitration, has to obtain the approval of the courts of the seat country of the arbitration, and then request the recognition and enforcement in the

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<sup>10</sup> BIRD, Robert C. (2012). Enforcement of annulled arbitration awards, a company perspective and an evaluation of a “new” New York Convention. *North Carolina Journal of International Law and Commercial Regulation*, 37 (4), p.1026.

<sup>11</sup> SANDERS, Pieter. (1999). “The making of the Convention” in *Enforcing Arbitration Awards under the New York Convention, Experiences and Prospects*, Paper presented at “New York Convention Day” in the Trusteeship Council Chamber of the United Nations Headquarters, New York on 10 June 1998 to celebrate the 40<sup>th</sup> anniversary of the Convention on Recognition and Enforcement of Foreign Arbitral Awards concluded on 10 June 1958, New York: United Nations, p. 4.

<sup>12</sup> TAWIL, Guido and ZULETA, Eduardo. (2008). “Historia de la Convención de Nueva York” in TAWIL, Guido, (editor). *El Arbitraje Comercial Internacional*, Buenos Aires: Abeledo-Perrot, p. XXIX. Free translation of the author.

<sup>13</sup> i.e.: The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

courts of the country where the award wants to be enforced and recognized.

Within the application of the NYC the party who wants that and arbitral be recognized in other country of the seat country of the arbitration, has to sought only before the courts of the other country, either by an *exequatur* proceedings or any other proceeding that the country where the enforcement and recognition of the award is sought has. In this way we can say that “In other words, is passed from require to prove the binding force [of the award] for the recognition, to require to prove the lack of binding power [of the award] to deny the recognition.”<sup>14</sup>.

- b) Change of the burden of proof of grounds to refuse a recognition and enforcement to the party against the enforcement is sought.

Closely related with the point showed before, the NYC changes the burden of proof from the party who seeks the enforcement and recognition of the award on his favor to the party that resist the recognition and enforcement of the award. Before the NYC the party who sought the recognition and enforcement of the award has to prove to both courts, the courts of the seat of the arbitration and the courts where the recognition and enforcement is sought, that the award is binding and that does not exist any cause to set aside the award, either under the law of the seat country, neither the law of the country where the recognition and enforcement of the award is sought.

The NYC provides that the party who wants to set aside an award has to prove the grounds for annulment of the award. In other words “[...] who has to prove the existence of a cause to deny the recognition of the award is the party against the award is invoked.”<sup>15</sup>.

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<sup>14</sup> JIMENEZ, Dyalá. (2008). “Las Convenciones Anteriores a la Convención de Nueva York: Discusiones y Problemas” in TAWIL, Guido, (editor). *El Arbitraje Comercial Internacional*, Buenos Aires: Abeledo-Perrot, p. 8. Free translation of the author.

<sup>15</sup> Idem, p. 4. Free translation of the author.

c) Grounds for refusal of recognition and enforcement.

The NYC provides an exhaustive list of grounds upon an award can be set aside; these grounds are listed in the Article V of the NYC. These are the only grounds that a court can base to set aside an award and they have to be interpreted in a narrow way, always in favor of recognize and enforce the award. In this way we can say that “The list is exclusive and the court may not base its refusal in any other ground. In addition, the grounds for refusal are to be interpreted restrictively in accordance with the purpose of the NYC.”<sup>16</sup>.

d) Favorability to arbitration.

The NYC provides in his Article III that the contracting states are bound to recognize and enforce the arbitral awards. Also, the Article III provides that the contracting states cannot impose any requirement more onerous for the recognition and enforcements of arbitral awards in their countries. The proceedings of enforcement are according of the law of the country where the recognition and enforcement of the award is sought.

e) Most favorable rights provision.

According to part 1 of the Article VII of the NYC the contracting states shall interpret and apply the NYC in a way that favors the recognition and enforcement of awards. Also, this article provides that is possible to base the recognition and enforcement in any other international agreement or internal law more favorable for the arbitration (recognition and enforcement of the award) of the country, where the recognition and enforcement of the award is sought.

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<sup>16</sup> United Nations Conference on Trade and Development. (2003). “Recognition and Enforcement of Arbitral Awards: The New York Convention” in *Course on Dispute Settlement in International Commercial Arbitration*, Vienna: United Nations, p.29.

ii. Entry in force of the convention.

As the Article XII of the NYC provides, the convention entered into force on 7<sup>th</sup> June 1959.

iii. Signature and ratification by Chile.

The approval of the NYC was made by Law Decree N°1095<sup>17</sup> on 14<sup>th</sup> July of 1975, this approval Decree Law was published and entered into force on 31<sup>th</sup> July 1975. The accession of Chile to the NYC was deposit in the Secretary-General of the United Nations on 4<sup>th</sup> September 1975. The NYC was published as a law in Chile by the Decree N°664<sup>18</sup> in the Official Gazette of Chile (N°29.293) on 30<sup>th</sup> October 1975. Finally, the NYC entered into force in Chile on 3<sup>th</sup> December of 1975, according to article XII of the same instrument. Chile did not make any reservation to the NYC.

iv. Relevant dispositions.

For our work the relevant dispositions of the NYC are: Articles I, III, IV, V, VI and VII.

a) Article I

Related to our work the Article I, parts 1 and 2 defines the scope of the NYC. The convention provides: “1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, [...] 2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have

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<sup>17</sup> See full text, available: <http://www.leychile.cl/Navegar?idNorma=222617&buscar=reconocimiento+y+ejecucion> [Visited: 2014, January 7].

<sup>18</sup> See full text. available: <http://www.leychile.cl/Navegar?idNorma=400639&buscar=reconocimiento+y+ejecucion> [Visited: 2014, January 7].

submitted”<sup>19</sup>. In the matters treated by us it is relevant to say that the NYC scope covers the recognition and enforcement of any foreign arbitral awards<sup>20</sup>, that is why some authors stated that the NYC is an universal instrument<sup>21</sup>, because, except in case of states that made a reciprocity o commercial reservation to the NYC<sup>22</sup>, the convention apply to any foreign arbitral awards, not being relevant if the country seat of the arbitration is a contracting State of the NYC or not.

b) Article III

This article provides one of the main objectives of the NYC which is that the contracting States are binding to recognize and enforce the arbitral awards, in other words “the obligation of every contracting States to recognize the binding force of the arbitral award and to grant their recognition”<sup>23</sup>. Also, this article establishes the mandate to the contracting States to not impose, either in the recognition neither in the enforcement of arbitral awards harder conditions, or higher fees or costs than to domestic arbitral awards.

The doctrine stated that the article III of the NYC established the so called “Favorability Principle”, which set, first, the mandate that the states are obligated to recognize and enforce foreign arbitral awards -with the only grounds for refusal provided un the Article V of the NYC- and, second, that the states cannot impose harder terms (conditions or fees or

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<sup>19</sup> United Nations Conference on International Commercial Arbitration. (1958). *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York: United Nations*, p. 1. Available: [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf) [Visited: 2014, January 7].

<sup>20</sup> The NYC also applies to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought (Article I, part 1, second part), but for the practical application of the NYC in Chile we are going to analyze only the cases of foreign arbitral awards.

<sup>21</sup> TAWIL, Guido and ZULETA, Eduardo. Op. Cit. p. XXXII.

<sup>22</sup> See NYC article I, part 3.

<sup>23</sup> RIVERA, Julio C. (2008). “Las Normas de Procedimiento Locales y la Convención. Remisión al Procedimiento Vigente y sus Posibles Contradicciones con la Convención” in TAWIL, Guido, (editor). *El Arbitraje Comercial Internacional*, Buenos Aires: Abeledo-Perrot, p. 323. Free translation of the author.

costs) in the recognition and enforcement of foreign arbitral awards than to national arbitral awards<sup>24</sup>.

c) Article IV

The NYC in its Article IV provides which documents have to present the claimant of the recognition and enforcement of the award in his request before the court where the recognition and enforcement of the arbitral award is sought<sup>25</sup>. In brief, the claimant has to present to the court a duly authenticated original award or a duly certified copy of the award and the original or the duly certified copy of the arbitration agreement. In case that the award or the arbitration agreement are in other language than the official language of the court where the recognition and enforcement is sought, the claimant has to present a translation of the award or the arbitration agreement made by official or sworn translator or by a diplomatic or consular agent.

d) Article V

The part 1 of this article provides which are the grounds that the defendant of the request of recognition and enforcement of the award can base and prove his petition for the refusal of the recognition and enforcement of the award, before the court where the recognition and enforcement is sought<sup>26</sup>. Those grounds only can be invoked by the party against the recognition and enforcement of the award is sought and

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<sup>24</sup> See: AGUILAR, Fernando. (2008). "Convención de Nueva York: Cincuenta Años" in TAWIL, Guido, (editor). *El Arbitraje Comercial Internacional*, Buenos Aires: Abeledo-Perrot, pp. 345-357.

<sup>25</sup> For further discussion of this topic see: AGUILAR, Fernando. (2008). "Convención de Nueva York: Cincuenta Años" in TAWIL, Guido, (editor). *El Arbitraje Comercial Internacional*, Buenos Aires: Abeledo-Perrot, pp. 345-357.

<sup>26</sup> For further discussions about Article V, part 1 of the NYC, see: MOURRE, Alexis. (2008). "May or Must? Las Causales de No Reconocimiento de Laudos Previstas en el Artículo V de la Convención de Nueva York, ¿Son ellas facultativas?"; and BARRADAS, Marcelo and GIUSTI, Marcelo. (2008). "La Taxatividad de los Supuestos que Obstan el Reconocimiento y la Ejecución de las Sentencias Arbitrales Extranjeras y la Carga de la Prueba Invertida: Factores que Convierten al Artículo V en un triunfo de la Convención de Nueva York", both in TAWIL, Guido, (editor). *El Arbitraje Comercial Internacional*, Buenos Aires: Abeledo-Perrot, pp. 361-379 and pp. 380-388, respectively.

cannot be invoked by the court where the recognition and enforcement of the award is demand. Summarizing, the grounds are:

- The parties to the arbitral agreement were under some incapacity at the moment when arbitration agreement was made (Article V (1) (a)).
- The arbitration agreement is invalid under the law that the parties subjected or in case that the parties have not chosen any law under the law of the seat country of the arbitration (Article V (1) (a)).
- The party against the recognition and enforcement of the award is sought has not been notified of the appointment of the arbitrator or the arbitration proceedings or if the party was unable to present his case to the arbitrators (Article V (1) (b)).
- The award was beyond the difference submitted under the arbitration agreement (Article V (1) (c)).
- The composition of the arbitral court or the arbitral proceedings were not under the law that the parties have chosen or in case that the parties have not chosen any law under the law of the seat country of the arbitration (Article V (1) (d)).
- Finally, the award is not yet binding to the parties, or was set aside or suspended by competent authority of the country where the award was made or under the law which the award was rendered (Article V (1) (e))<sup>27</sup>.

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<sup>27</sup> For further discussions about Article V, part 1 (e) see:

- BIRD, Robert C. (2012). "Enforcement of annulled arbitration awards, a company perspective and an evaluation of a "new" New York Convention". *North Carolina Journal of International Law and Commercial Regulation*, 37 (4), pp.1013-1058.

Part 2 of Article V provides which are the grounds that the court where the recognition and enforcement of the awards is sought can base to refuse the recognition and enforcement of the award. Those grounds only can be invoked by the court where the recognition and enforcement of the award is demand and cannot be invoked by the party against the recognition and enforcement of the award is sought<sup>28</sup>. Briefly, the grounds for refusal of the recognition and enforcement of the award provided by the part 2 of Article V are:

- The difference or subject under the arbitration agreement is not possible to be settled by arbitration (Article V (2) (a)).
- The recognition or the enforcement of the award would be contrary to the public policy of that country (Article V (2) (b)).

#### e) Article VI

This article provides that in case of the application of the ground for refusal of Article V (1) (e), the court, where the recognition and enforcement of the award is sought, may adjourn the decision on recognize and enforce the award. Also, the court where the recognition and enforcement is demand may require, at the request of the claimant of

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- SILBERMAN, Linda. (2010). "The New York Convention After Fifty Years: Some Reflections on the Role of National Law" *Georgia Journal of International and Comparative Law*, 38 (25), pp. 25-46.
  - SMIT, Hans. (2004). "Annulment and Enforcement of International Arbitral Awards: a Practical Perspective" in HILL, Richard and NEWMAN, Lawrence. (editors) *The Leading Arbitrators' guide to International Arbitration*, New York: Juris Publishing, Inc. & Staempfli Publishers Ltd., pp. 461-477.
  - JIMENEZ, Dyalá. (2006). "La Madurez del Arbitraje Comercial Internacional: de Laudos Extranjeros y Laudos Internacionales.", *Revista Internacional de Arbitraje*, 4, pp. 179-200.
  - MALINVAUD, Carole. (2008). "Reconocimiento y Ejecución de Laudos Arbitrales Anulados. La Experiencia Francesa"; and FRIEDLAND, Paul and LEVINE, Judith. (2008). "Reconocimiento y Ejecución de Laudos Arbitrales Nulos. La Experiencia de los Estados Unidos de Norteamérica", both in TAWIL, Guido, (editor). *El Arbitraje Comercial Internacional*, Buenos Aires: Abeledo-Perrot, pp. 554-567 and pp. 568-592, respectively.

<sup>28</sup> For further discussions about Article V, part 2, see: MARQUEZ, Stephanie. (2009). *El orden público y su función como límite a la eficacia, reconocimiento y ejecución de los laudos arbitrales internacionales en Chile*. (Master's degree thesis in law). Law School. Universidad de Chile. Santiago.



the recognition and enforcement, to the party against the recognition and enforcement of the award is sought a proper security.

f) Article VII

For our work is relevant the part 1 of Article VII which provides that the claimant of the recognition and enforcement of an award can base its request in any other most favorable international agreement or more favorable internal law of the country where the recognition and enforcement is sought than the NYC<sup>29</sup>.

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<sup>29</sup> For further discussions about Article VII, part 1, see: DONOVAN, Donald and PRAGER, Dietmar. (2008). "El Impacto del Artículo VII"; and RINCON, Rafael. (2008). "El Artículo VII de la Convención de Nueva York: Aproximación por parte de las Cortes Europeas y Norteamericanas", both in TAWIL, Guido, (editor). *El Arbitraje Comercial Internacional*, Buenos Aires: Abeledo-Perrot, pp. 631-644 and pp. 645-663, respectively.

## II. CHAPTER II: CHILEAN INTERNATIONAL COMMERCIAL ARBITRATION LAW OF 2004

The Chilean International Commercial Arbitration Law (hereinafter CICAL) entered into force in 2004 (10 years in 2014); this law was based on the template of the Model Law on International Commercial Arbitration of the UNCITRAL. As the United Nations stated the UNCITRAL Model Law “contributes to the establishment of a united legal framework for the fair and efficient settlement of disputed arising in international commercial relations. [...] *Recommends* that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.”<sup>30</sup>.

The CICAL came to fill the gap in the Chilean legislation regarding the international commercial arbitration, as the CICAL followed the template of the UNICTRAL Model Law it adopted the main objectives pursued by the Model Law which are the “ [...] harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world. Since its adoption by UNCITRAL, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on the Model Law.”<sup>31</sup>.

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<sup>30</sup> General Assembly of the United Nations. (1985). *Resolution 40/70 of 11 December 1985*, p. 308. Available:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/40/72&Lang=E&Area=RESOLUTION](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/40/72&Lang=E&Area=RESOLUTION) [Visited: 2014, January 16].

<sup>31</sup> United Nations Commission on International Trade Law. (2008). “Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration” in *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as adopted in 2006*, Vienna: United Nations, p. 23. Available:

In this way, about the UNCITRAL Model Law the doctrine said that:

“[...] [the Model Law] transmuted to the concept of a standard text evolved and published by the United Nations, designed both to promote uniform arbitration procedures throughout the world, and to encourage the modernization of obsolete domestic arbitration laws which had become a hindrance to international trade. [...] the Model Law presented a balanced regime, embodied in readily comprehensible language and reflecting a reasonable compromise between the extremes of opinion as regards the relationship between the state (and particularly the state acting through its national courts) and the voluntary dispute-resolution process.”<sup>32</sup>.

Regarding the CICAL, the former President of Chile Mr. Ricardo Lagos Escobar in the message to the congress of Chile to submit the CICAL for approval stated:

“[...] In our legal system, the international commercial arbitration is not specifically regulated. Thus, it has to be ruled by the same rules applicable to domestic arbitration, when the arbitral proceedings are made in national soil. [...] Considering that current internal regulations were made for domestic arbitration proceedings, they are inadequate for international cases; thereby, is possible to conclude that there is a legal gap in Chilean legislation that is necessary to fill in matters of international commercial arbitration. [...] It should be noted that

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[http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) [Visited: 2014, January 16].

<sup>32</sup> MUSTILL, Lord. (2004). “The History of International Commercial Arbitration a Sketch” in HILL, Richard and NEWMAN, Lawrence. (editors) *The Leading Arbitrators’ guide to International Arbitration*, New York: Juris Publishing, Inc. & Staempfli Publishers Ltd., pp. 13-15.

the project proposes the text of the Model Law without major changes or modifications.”<sup>33</sup>.

Concluding, the CICAL “[...] [Chile] has taken a significant step in strengthening arbitration and make Chile an important center in international arbitration.”<sup>34 35</sup>.

i. History and main objectives of the law.

The CICAL was made based in the proposition of the “Colegio de Abogados de Chile A.G.”, the “Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago A.G.” and the “Centro de Arbitraje y Mediación de la Cámara Chileno-Norteamericana de Comercio A.G.”, to the Chilean government. This proposition was based upon the template of the UNCITRAL Model Law with the intention of fill the gap of the Chilean legislation in matters of international commercial arbitration. Also, the proposed law has the intention to set Chile as attractive place to be a seat of arbitration proceedings between Latin-American countries.

The laws draft was presented to the Chilean congress where was discussed for their further approval. The main new elements and objectives of the law were established in the message with the draft law presented by the government to the congress for the approval of the law, the main objectives that the new law aimed are the following:

“[...] Rise of transactions with arbitral clause; Incentive to trial in Chile and Chile as arbitration center [...]”<sup>36</sup>, those three main

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<sup>33</sup> LAGOS, Ricardo. (2003). Message from H.E. President of the Republic that starts with a draft law on international commercial arbitration. (Bulletin N°3252-10). pp. 4-7 Available : <http://www.camara.cl/pley/pdfpley.aspx?prmID=3344&prmTIPO=INICIATIVA> [Visited: 2014, January 16].

<sup>34</sup> SATELER, Ricardo. (2007). “Historia de la Ley N° 19.971 sobre Arbitraje Comercial Internacional” in PICAND, Eduardo. (coord.) *Estudios de Arbitraje*, Santiago: Editorial Jurídica de Chile, p.389.

<sup>35</sup> In the same way: FIGUEROA, Juan E. (2005) “La Nueva Ley Chilena sobre Arbitraje Comercial Internacional (Ley N° 19.971)” *Gaceta Jurídica*, 303. pp. 7-20.

<sup>36</sup> LAGOS, Ricardo. Message from H.E. President of the Republic that starts with a draft law on international commercial arbitration. (Bulletin N°3252-10). p. 2. Available: <http://www.camara.cl/pley/pdfpley.aspx?prmID=3344&prmTIPO=INICIATIVA> [Visited: 2014, January 17].

objectives of the law were based on the grounds that “[...] Chile's integration into the world economy means that business transactions involving individuals and corporations with Chilean foreign counterparts have increased significantly. As we know an important part of these transactions take the form of international contracts with arbitration clauses; [...] stimulate that trade disputes be settled in Chile; and [...] It is desirable, from the point of view of public and private, that our country distinguishes as a prominently center for arbitration in international trade, especially throughout Latin America.”<sup>37</sup>, respectively.

The doctrine stands as principles of the CICAL, the following stated by Vásquez:<sup>38</sup>

a) Minimal judicial intervention principle.

This principle aims that the intervention of the courts of the seat country of the arbitration proceedings interfere only in the cases that the law authorizes their intervention.

b) Arbitral autonomy principle.

This principle provides that the arbitrators are competent to decide all the aspects of an arbitral proceeding, as well as to conduct the proceedings and rule about the different matters presented in the case. Obviously, this principle reflects the obligation assumed by the parties in the arbitral clause, in the performance of their contractual autonomy.

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<sup>37</sup> Ibid. p. 3.

<sup>38</sup> Cf. VASQUEZ, María F. (2011) “Reception of the International Commercial Arbitration in Chile from a Jurisprudential Optics. An Unavoidable Review”, *Revista Chilena de Derecho*, 38 (2), pp. 349-370.

c) Kompetenz-Kompetenz Principle.

In brief, this principle provides that is the arbitral court is the called to solve the conflicts arising of the invalidity of the arbitral clause, in other words is the arbitrator who decides on his own jurisdiction.

d) Neutrality and recognition and enforcement of foreign arbitral awards.

The neutrality aims that the arbitral proceedings cannot be interfered by the ideas and notions of the seat country. The recognition and enforcement of foreign arbitral awards implies that the awards rendered in other countries shall be recognized and enforced in the country where the recognition and enforcement is sought without prejudices or bias approaches.

Finally, the draft was approved by the congress without any change, adopting the original text of the proposal made to the government.

ii. Entry in force of the law.

The CICAL was adopted as the Law N°19.971 about International Commercial Arbitration, being published in the official gazette of Chile on September 29, 2004 and entered into force on the same date<sup>39</sup>.

iii. Relevant dispositions.

The relevant disposition of the CICAL about the recognition and enforcement of foreign arbitral awards are the articles 1(1) and (2), 8, 9, 35 and 36. With regard to recognition and enforcement of foreign arbitral awards the main dispositions are articles 35, and 36 of the CICAL.

a) Article 1

Article 1, part 1 provides the scope of the CICAL providing that the CICAL applies to the international commercial arbitrations, without prejudice of

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<sup>39</sup> Full text available in: <http://www.leychile.cl/Navegar?idNorma=230697&buscar=19.971> [Visited: 2014, January 20].

any other multilateral or bilateral treaty in force in Chile. This article allows basing the recognition and enforcement of arbitral awards upon any other international treaty in force in Chile, for example the NYC. We can say that this article is similar to Article VII of the NYC.

Article 1, part 2 provides that the CICAL applies only when the seat of the arbitration is in Chile, with exception of articles 8, 9, 35 and 36 of the law. With regard to foreign arbitral proceedings are applicable articles 8, 9, 35 and 36 of the CICAL.

b) Article 8

This article provides in his part 1 that the courts shall refer the parties to arbitration, at the request of any of them, if the conflict is under an arbitration agreement made by the parties, unless the court finds that the arbitration agreement is null and void, ineffective or incapable of being performed. This provision is similar to the Article II (3) of the NYC.

Article 8, part 2 provides that even though the action of the part 1 of the article has been performed, is possible to initiate or continue the arbitral proceeding, even with the rendering of the arbitral award, while the actions before the court are pending.

c) Article 9

This article provides about interim measures, establishing that those measures are not incompatible with the arbitral agreement, so a party can request them to a court before or during the arbitral proceedings. In other words, parties are allowed to request to courts interim measures because these are compatible with the arbitral agreement or arbitral proceedings. This provision is an innovation because the NYC does not regulate the interim measures; thus it is an improvement in the protection of the rights of the parties involved in an arbitration proceeding.

d) Article 35

This article is one of the cornerstones on the recognition and enforcement of foreign arbitral awards together with article 36. Article 35, part 1 provides, in similar way that article III of the NYC does, that the foreign arbitral awards shall be recognized as binding, whatever country where were rendered. Also, provides that an arbitral award shall be executed after a written request made by a party to the competent court under the dispositions of articles 35 and 36.

Article 35, part 2 provides, again in a similar way to article IV of the NYC, that a party who wants that an arbitral award be recognized and enforced shall present to the court where the recognition of the award is sought, the original of the award duly authenticated or a certified copy of it and the original of the arbitration agreement or a certified copy of it. Also, provides that in case that the award is in other language than the official language of Chile, is necessary to present a certified translation of the award in the official language. Is remarkable to note that is not provided under which law has to be made the certification or the authentication of the documents, so it could be made under the laws of the seat country of the arbitration proceedings or under the Chilean laws.

e) Article 36

Article 35, part 1 (a) and (b) sets the grounds to refuse the recognition and enforcement of arbitral awards in the same way as the NYC does in its Article V, with the same grounds and terms for refusal<sup>40</sup>.

Article 35, part 2 provides about the adjournment of the recognition and enforcement of the arbitral award in the same terms as the Article VI of the NYC does<sup>41</sup>.

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<sup>40</sup> See supra Chapter I (iv).



### III. CHAPTER III: CHILEAN EXEQUATUR PROCEEDINGS

The Chilean *exequatur proceeding* is ruled now by several laws, as the Chilean Civil Procedural Code, the NYC, the CICAL and the Inter-American Convention on International Commercial Arbitration<sup>42</sup>. It is important to highlight, that the Inter-American Convention on International Commercial Arbitration (hereinafter Panamá Convention) is an international covenant approved by Chile, which entered into force in Chile on August, 11th, 1976 according to Article 10 of the treaty. This treaty in its main dispositions about recognition and enforcement of arbitral awards (Articles 4, 5 and 6) it is similar to the provisions of the NYC about the topic.

Notwithstanding, concurrent application of the Panamá Convention and the NYC<sup>43</sup> the Chilean *exequatur* jurisprudence about recognition and enforcement of arbitral awards it has not based the recognition and enforcement of arbitral awards on the Inter-American Convention on International Commercial Arbitration.

Having clarified the above, the *exequatur* proceeding now is based on the rules provided by the Chilean Civil Procedural Law (hereinafter CCPC), the CICAL and the NYC. Before that the CICAL entered into force in 2004 the Chilean *exequatur* proceeding was ruled under the provisions of the CCPC and the NYC<sup>44</sup>.

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<sup>41</sup> See supra Chapter I (iv).

<sup>42</sup> Full text available in: <http://www.oas.org/juridico/english/treaties/b-35.html> [Visited: 2014, January 23].

<sup>43</sup> For a further development of this topic, see: ALJURE, Antonio. (2004). "Ámbito de Aplicación de las Convenciones de Nueva York y de Panamá sobre Arbitraje Internacional" *Revista Internacional de Arbitraje*, 1, pp. 105-121. The Colombian case of concurrent application of both Panamá and New York Conventions is similar to the Chilean case.

<sup>44</sup> See: FERNANDEZ, Gonzalo and JIMENEZ, Dyalá. (2009). *La Evolución de las Normas de Exequátur de Laudos Extranjeros en Chile*. Available: <http://www.djarbitraje.com/pdf/605CPC%20chileno%20y%20CNY%20 con%20GF.pdf> [Visited: 2014, January 23].

Finally, the *exequatur* proceeding is a proceeding which its objective is to control the objective law of the foreign awards and not to review the arbitral awards on its merits<sup>45</sup>.

- i. Explanation of the former *exequatur* proceeding under the rules of Chilean Civil Procedural Code.

The proceeding of *exequatur* only under the rules provided by CCPC (Articles 242 to 251) can be ordered in the following stages:

- 1) The claimant had to present his request for recognition of the award before the Supreme Court of Chile in accordance with the provisions of Articles 246 and 247 of the CCPC. The award had to be authenticated and approved its binding force by a superior court of the seat country of the arbitral proceeding.
- 2) Presented the request, the Supreme Court had to notify to the party against the recognition of the award is sought (defendant) and it will have the right to present to the Supreme Court whatever he wants to propose. The defendant could not appear before the Supreme Court. In both cases if the defendant appeared or in absence of it, the Supreme Court shall decide upon the request of recognition of the award. In all cases was necessary hear the opinion of the "Fiscal Judicial".<sup>46</sup>
- 3) The Supreme Court may, at his will, open a trial period.
- 4) The Supreme Court had to consider the following rules: first, it has to look at the Article 242 of the CCPC; this article provides that the foreign judgment (and awards according to Article 246 of the same law) will have binding force in Chile according to the international treaties about

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<sup>45</sup> For a further development of this topic, see: CAIVANO, Roque. (2011). *Control Judicial en el Arbitraje*, Buenos Aires: Abeledo-Perrot. Chapter VI, pp. 295-398.

<sup>46</sup> The "Fiscal Judicial" is judicial officer who advocates for the public interest.

the recognition of foreign judgments. Also, provides that for the enforcement of the judgments it will be applicable the proceedings established by the Chilean law, in case that the international treaties does not modify the enforcement proceeding.

Second, if was not applicable any international treaty about the recognition of foreign judgments it will be necessary to apply Article 243 of the CCPC which establishes a reciprocity rule. Article 243 provides that the foreign judgment will have the same binding force as the force of Chilean judgments in the country from where the judgment comes. Article 244 provides that if the foreign judgment comes from a country where the Chilean judgments have no binding force, the foreign judgment shall not have binding force in Chile.

Finally, if the previous articles are not applicable the foreign judgments will have force in Chile, as they were pronounced by Chilean courts, fulfilling some conditions by the claimant (Article 245 of the CCPC). Those conditions are:

- That the foreign judgment has no disposition against the Chilean legislation, not taking into account the rules of procedure that the judgment should have been followed according to Chilean law.
- That the foreign judgment is not contrary to national jurisdiction.
- That the party against that the foreign judgment is sought was properly notified of the action. Nevertheless, if the defendant was prevented from presenting their evidence, he can prove the defenseless situation to the court.
- That the foreign judgment is enforceable under the laws of the country where was made.

5) The Supreme Court upon the request made by the claimant, the requirements proved by it and on defendant arguments (if are presented), decided on the recognition of the award.

- 6) Finally, if the award was recognized the claimant had to ask the enforcement to the ordinary court where the action should have been filed if sued in Chile.

In conclusion, the former recognition and enforcement proceeding had all the features that the NYC aimed to eliminate, as the “double *exequatur*” because the claimant has to present an authenticated and approved its binding force by a superior court of the country where the award was rendered; the burden of proof was on the side of the claimant because it had to prove that the award fulfill all the requirements of asked by the CCPC, in case if there were no applicable international treaty; and the grounds for refusal were several and based on internal law. So, was very hard to get the recognition and enforcement of an arbitral award.

- ii. Relevant dispositions for *exequatur* under the present rules established by Chilean Civil Procedural Code, the New York Convention and the Chilean International Commercial Arbitration Law.

The CCPC provides in its articles 242 and 246 the main applicable dispositions to the recognition and enforcement of arbitral awards, on the other hand the relevant applicable dispositions for the recognition and enforcement of arbitral awards contained in the NYC and CICAL are articles VI, V, VI and VII and articles 35 and 36, respectively.

As was explained above, Article 246 provides that the claimant had to present his request for recognition of the award before the Supreme Court of Chile in accordance with the provisions of Articles 246 and 247 of the CCPC. Also, it is applicable Article 242 which provides that hat the foreign judgment (and awards according to Article 246 quoted before) will have binding force in Chile according to the international treaties about the recognition of foreign

judgments. Moreover, Article 242 provides that for the enforcement of the judgments it will be applicable the proceedings established by the Chilean law, in case that the international treaties does not modify the enforcement proceeding.

Thus, with the New York Convention in force it is applicable for the recognition and enforcement of foreign arbitral awards. The applicable articles of the NYC, as was explained above, are articles III, IV, V, VI and VII.

Further, are also applicable the provisions of the CICAL which in its articles 35 and 36 provides about the recognition and enforcement of arbitral awards in a similar way as the NYC does.

Regarding the applicable dispositions for the enforcement and recognition of foreign arbitral awards we believe that in application of the “Principle of Specialty” the Chilean Civil Procedural Code is no longer applicable because the Chilean International Arbitration Law is a specialized law for the recognition and enforcement of foreign arbitral awards which concurs with the application of the New York Convention. The NYC concurs with the CICAL for the recognition and enforcement of arbitral based on the article 27 of the Vienna Convention on the Law of the Treaties<sup>47 48</sup> (hereinafter VCLT) which is in force in Chile<sup>49</sup>. Article 27 of the VCLT provides that “A party may not invoke the

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<sup>47</sup> Full text available in: [https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch\\_XXIII\\_01.pdf](https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf) [Visited: 2014, January 24].

<sup>48</sup> The Vienna Convention on the Law of the Treaties entered into force on January 27<sup>th</sup>, 1980. Check the status of the convention in: [https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=UNTSO&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en#EndDec](https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=UNTSO&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en#EndDec) [Visited: 2014, January 24].

<sup>49</sup> The approval of the Vienna Convention on the Law of the Treaties was made by Law Decree N°3633 on 26<sup>th</sup> February, 1981. The ratification of Chile to the Convention was deposit in the Secretary-General of the United Nations on 9<sup>th</sup> April, 1981. The NYC was promulgated as a law in Chile by the Decree N°381 of 5<sup>th</sup> May, 1981 and was published in the Official Gazette of Chile on 22<sup>th</sup> June, 1981. Finally, the Convention entered into force in Chile on 9<sup>th</sup> May, 1981. Check the full text of the Law Decree and Decree, respectively, available in: <http://www.leychile.cl/Navegar?idNorma=128177&buscar=convencion+de+viena+sobre+el+derecho+de+los+tratados> [Visited: 2014, January 24]. <http://www.leychile.cl/Navegar?idNorma=12889&buscar=convencion+de+viena+sobre+el+derecho+de+los+tratados> [Visited: 2014, January 24].

provisions of its internal law as a justification for its failure to perform a treaty [...]”<sup>50</sup>.

Thereby, if the CCPC is no longer applicable for the recognition and enforcement of foreign arbitral awards and are applicable the NYC and the CICAL, we believe that the competent authority to present the request for recognition of a foreign arbitral award is no longer the Supreme Court, it will be now the ordinary court where the action should have been filed if sued in Chile. But, we have some apprehensions that an ordinary court decides on the recognition and enforcement of foreign arbitral awards because that could open the door for a long process of recognition inasmuch as exist several ways to challenge the decision of an ordinary court. In addition, the Supreme Court has the experience and knowledge over the recognition and enforcement proceedings that an ordinary judge not have.

- iii. Explanation of the *exequatur* proceeding of foreign arbitral awards under the present applicable rules.

The proceeding of *exequatur* under the rules provided by CCPC (Articles 242 and 246), the NYC and the CICAL can be ordered in the following stages:

- 1) The claimant had to present his request for recognition of the award before the Supreme Court of Chile in accordance with the provisions of Articles 246 and 247 of the CCPC. The claimant shall present, according to articles IV of the NYC and 35 of the CICAL, the original of the award duly authenticated or a certified copy of it and the original of the arbitration agreement or a certified copy of it. Also, in case that the award is in other language than the official language of Chile is necessary to present a certified translation of the award in the official language which is Spanish.

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<sup>50</sup> Op. cit. 47.

- 2) Presented the request, the Supreme Court had to notify to the party against the recognition of the award is sought (defendant) and it will have the right to present to the Supreme Court whatever he wants to propose. According to articles V, part 1 of the NYC and 36, part 1 (a) of the CICAL, the defendant only can base upon the grounds provided in those articles for the refusal of the recognition of the award. Anyway, the defendant could not appear before the Supreme Court. In both cases if the defendant appeared or in absence of it, the Supreme Court shall decide upon the request of recognition of the award. In all cases it is necessary to hear the opinion of the “Fiscal Judicial”<sup>51</sup>.
- 3) The Supreme Court may, at his will, open a trial period.
- 4) The Supreme Court had to consider the following rules: first, it has to look at the Article 242 of the CCPC, this article provides that the foreign awards (according to Article 246 of the same law) will have binding force in Chile according to the international treaties about the recognition of foreign judgments.

Second, as are applicable articles IV of the NYC and 35 of the CICAL, the Supreme Court has to check if the claimant fulfilled the requirements for the request established in those articles (explained above in 1)

Thirdly, if the defendant argued that the recognition of the award has to be denied under the grounds for refusal established in articles V, part 1 or 36, part 1 (a) of the CICAL; the Supreme Court has to decide if any of the grounds for refusal alleged by the defendant are applicable or not.

Finally, the Supreme Court has to decide if are applicable any of the grounds for refusal of the recognition of the award established in articles

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<sup>51</sup> The “Fiscal Judicial” is judicial officer who advocates for the public interest.

V, part 2 of the NYC or 36, part 1 (b) of the CICAL. In case that the defendant have alleged the ground for refusal of the recognition and enforcement of the award provided in articles V, part 1 (e) of the NYC or 36, part 1 (a) (v) of the CICAL, the Supreme Court has to decide if adjourns its decision on recognition of the award (according to articles VI of the NYC or 36, part 2 of the CICAL). In this latter case, the claimant can ask to the Supreme Court who orders to the defendant a proper security in case that the recognition and enforcement be approved.

- 5) The Supreme Court upon the request made by the claimant, the requirements proved by it and on proved defendant arguments (if are presented) shall decide on the recognition of the award.
- 6) Finally, if the award is recognized the claimant has to ask the enforcement to the ordinary court where the action should have been filed if sued in Chile; under the proceedings established by the Chilean law (according to articles III of the NYC and 242 of the CCPC).

We believe that following the spirit of the NYC and the CICAL the Supreme Court has to decide on the recognition and enforcement of foreign arbitral awards in a pro-arbitral and a pro-recognition and enforcement way. This entails that the Supreme Court shall not review in any way the merits of the awards; should not look at the grounds for refusal established to be alleged only by the defendant; and shall not have a local vision for the grounds for denial of the recognition and enforcement that can be profess by the Court.



#### IV. CHAPTER IV: CASE ANALYSIS<sup>52</sup>

Is necessary to analyze the *exequatur* cases decided by the Supreme Court of Chile because that allows us to know the jurisprudence and criteria established by the Supreme Court; and if that jurisprudence follows the principles and objectives aimed by the NYC -which are mandatory- and the CICAL (which is based on the UNCITRAL model law).

This analysis covers the relevant *exequatur* sentences in a period between 2005 and 2011 and will be split into three topics, those are: cases where the *exequatur* proceedings recognize foreign arbitral awards; cases where the *exequatur* proceedings denied the recognition of foreign arbitral awards; and cases where the *exequatur* proceedings were about the recognition of interim measures.

In each of the three topics to be analyzed, the analysis will be organized chronologically, from the oldest to the most recent case and will be presented a summary of the arbitral case, a summary of the statements of the party who requested the recognition and enforcement of the award (claimant), a summary of the statements of the party against the recognition and enforcement of the award is sought (defendant), a summary of the grounds of the decision of the Supreme Court and the decision taken by it.

Finally, in each case will be made an analysis of the jurisprudence established by the Supreme Court under the principles and objectives of the NYC and the CICAL.

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<sup>52</sup> In this chapter the author will do a free translation of the facts, statements of the parties and grounds of the decision of the Supreme Court, as well as paraphrase these.

i. Exequatur cases recognizing foreign arbitral awards.

1) Case “Max Mauro Stubrin y otros v. Inversiones Morice S.A.”<sup>53</sup>

a) Summary of the arbitral case.

In this case was sought the *exequatur* of an award which ordered to pay the unpaid amount of shares from the sale of an equity interest, plus attorney’s fees and interest. The award was rendered by the arbitration court of the Inter-American Commission on Commercial Arbitration on 16<sup>th</sup> May, 2003 in Argentina. The sale was between Argentinian citizens and a Chilean company.

b) Summary of the claimant’s statements.

Between Chile and Argentina are in force the NYC and the Panamá Convention, so in application of the article 242 of the CCPC and fulfilling all the requirements of Article IV of the NYC is suitable to recognize and enforce the award in Chile.

c) Summary of the defendant’s statements.

The defendant argued that the award shall not be recognized based on the ground established in Article V, part 2 (b) of the NYC in relation with Article 246 of the CCPC, because is necessary that the award be authenticated and approved by a superior court of the country where the award was rendered and in this case the award did not have a certificate of authenticity and binding force from a superior court of Argentina.

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<sup>53</sup> Max Mauro Stubrin y otros v. Inversiones Morice S.A., No. 6600-2005 (Supreme Court of Chile 11-01-2007). Available in: <http://suprema.poderjudicial.cl/SITSUPPORWEB/> [Visited: 2014, February 6].

d) Summary of the grounds of the decision of the Supreme Court.

Between Chile and Argentina are in force international treaties about international commercial arbitration and the recognition and enforcement of foreign arbitral awards. Article 242 of the CCPC provides that in case of exist international treaties about recognition and enforcement of foreign arbitral awards, those treaties are applicable in preference to decide on the recognition and enforcement. That the request for *exequatur* fulfills all the requirements established by the article IV of the NYC and the award was approved by a superior court of Argentina, so the authenticity and binding force are proved.

e) Decision.

The *exequatur* recognized the award.

f) Analysis of the jurisprudence.

Notwithstanding, that the Supreme Court recognized the award, made a mistake regarding the requirement of the approval of the award by a superior court of the country where the award was rendered. Because the Supreme Court demands that is necessary the approval of the award by a superior court of Argentina to recognize the award which in this case existed. On the other hand the Supreme Court correctly interpreted the requirements that the Article IV of the NYC provides to request the recognition of the award.

2) Case “Gold Nutrition Industria e Comercio Ltda.”<sup>54</sup>

a) Summary of the arbitral case.

The claimant and the defendant celebrated a contract for service of manufacturing and supply of foodstuffs that the defendant breached, because the foodstuffs supplied by it did not had the agreed quality. The contract had an arbitration agreement which provides that any difference between the parties will be solve by arbitration in equity and law by the Brazilian agencies of Sao Paulo. The claimant filed a request to an ordinary court of Sao Paulo to execute the arbitration clause because of the defendant’s refusal to constitute the arbitral court. The Sao Paulo’s court ruled that the arbitration proceeding will be developed in Sao Paulo by the Mediation and Arbitration Chamber of Sao Paulo (hereinafter the Chamber) under the law of Brazil, the proceeding rules of Brazil and the Chamber and the uses, customs and rules for international trade. Later, the defendant agreed on the terms of reference of the arbitration and actively defended. Meanwhile, the defendant appealed the judgment of the Brazilian court which ordered the constitution of the arbitral court. Finally, the award ordered the defendant to pay damages for breach of contract; the award was not challenged and the Chamber certified the binding force of it.

b) Summary of the claimant’s statements.

According to the Article 242 of the CCPC are applicable the international treaties for the recognition and enforcement of the foreign arbitral awards. In Chile are in force the NYC, the Panamá Convention and the CICAL. Articles I and IV of the NYC provide specific rules about the recognition and enforcement of foreign

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<sup>54</sup> Gold Nutrition Industria e Comercio Ltda., No. 6615-2007 (Supreme Court of Chile 15-09-2008). Available in: <http://suprema.poderjudicial.cl/SITSUPPORWEB/> [Visited: 2014, February 8].

arbitral awards. Moreover, Article 1 of the CICAL provides that this law will be applicable to the international commercial arbitration, notwithstanding any other bilateral or multilateral treaty in force in Chile. In addition, exposed that according to Articles 229 and 230 of the Court Statute Codes<sup>55</sup> allow referring the subject to arbitration. Finally, that none of the grounds to refuse the recognition of the award provided in the Article 36 of the CICAL apply.

c) Summary of the defendant's statements.

The defendant requested the denial of the recognition of the award based in: First, he was not the seller of the products; the real seller was another associated company. Second, the arbitration clause is void that is why he challenged the judgment of the Brazilian court. The arbitration clause is void because was written in a vague and contradictory language. Thirdly, that the arbitrators were incompetent and had no jurisdiction because they were appointed by the Chamber and not by the court. That is illegal and contrary to the Chilean Public Policy, in particular against the provided by Article 232 of the Court Statutes Code and Article 11, part 3 (a) of the CICAL. Fourth, is truth that he signed and agreed on the Terms of Reference of the arbitration but just to defending himself, but that fact did not gave competence to the arbitrators. Fifthly, the award violates the Chilean law about interest in money transactions because it orders to pay interest on capitalized interest or compound interest, which is banned. Sixth, according to Articles 245 of the CCPC and 36 of the CICAL is mandatory that the award shall be binding, but this award did not have binding force because is pending the appeal on the judgment of the Brazilian court. Seventh, there was no due

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<sup>55</sup> In Spanish: Código Orgánico de Tribunales, available in: <http://www.leychile.cl/Navegar?idNorma=25563&idParte=0> [Visited: 2014, February 8].

process because the proceedings were in Portuguese and he could not present evidence. Finally, the arbitrators went beyond the scope of the arbitral clause because they ordered him to pay the attorney's fees, but that was not agreed in the arbitral clause or was requested by the claimant.

d) Summary of the grounds of the decision of the Supreme Court.

First, the Supreme Court sets which are the doctrinal principles that govern the *exequatur* proceeding, they are that the Supreme Court after reviewing the arguments of the parties, it checks if the legal requirements are fulfilled and without reviewing the merits of the case, the Supreme Court grants the recognition of the award. Once the award was recognized, it becomes enforceable as if it had been made by a national court, then it can be performed before the competent court and applicable procedure. Second, the request for recognition has to be solved upon the Articles 242 of the CCPC and, specially, 35, part 1 of the CICAL, without prejudice of the NYC and the Panamá Convention. Thirdly, the *exequatur* procedure does not constitute a resort to review the merits of the award. The Supreme Court only shall verify compliance with the requirements of Articles 242 of the CCPC and 36 of the CICAL. Fourth, the main arguments of the defendant are about the merits of the award, so they will be rejected. Fifth, the Chamber certified the binding force of the award. Sixth, the defendant had a due process because it was represented by a law firm and actively participated in the proceeding. Finally, about that the arbitrators were beyond the scope of the arbitral clause when they ordered to pay the attorney's fee that is not true, because the Terms of Reference of the arbitration proceeding, which were accepted by the defendant, stipulated the payment of the attorney's fees by the losing party.

e) Decision.

The *exequatur* recognized the award.

f) Analysis of the jurisprudence.

In this case the court took the same path as before, but instead of relying on Article IV of the NYC was based on Articles 35 and 36 of the CICAL. Beyond that, the Supreme Court again requested a certificate of the binding force of the award. Despite the foregoing, the Supreme Court did something important when established what are the principles that govern the *exequatur* proceeding. Those principles will be developed in the following cases as we will observe.

3) Case “Comverse Inc.”<sup>56</sup>

a) Summary of the arbitral case.

The claimant and the defendant celebrated a contract value added reseller that the defendant breached. The contract had an arbitration agreement which provides that any difference between the parties will be solve by arbitration under the Law of the State of New York and the procedural rules of the “American Arbitration Association” (hereinafter AAA), before a panel of three arbitrators. The claimant submitted a request for arbitration and presented their demand. Later, the defendant submitted its reply and actively defended. Finally, the award ordered the defendant to pay damages for breach of contract and interests according to the law of the State of New York.

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<sup>56</sup> Comverse Inc., No. 3225-2008 (Supreme Court of Chile 08-09-2009). Available in: <http://suprema.poderjudicial.cl/SITSUPPORWEB/> [Visited: 2014, February 10].

b) Summary of the claimant's statements.

According to the Article 242 of the CCPC is applicable the NYC, which according to its provisions a foreign arbitral award shall be recognized and enforced, meeting the requirements set by it. Moreover, Articles 243, 244 and 245 of the CCPC are not applicable although the award fulfills all the requirements established by those articles. Additionally, the claimant argues that the Article III of the NYC provides that the member states of the convention are bound to recognize and enforce foreign arbitral awards, as long as the award comply with the requirements set in Articles IV and V of the NYC. In this case the request for recognition meets all the requirements set by Article IV of the NYC because the award and the contract are properly translated to Spanish and legalized.

c) Summary of the defendant's statements.

First, the defendant presented the defense of lack of legal capacity of the plaintiff because any of the documents presented are adequate to prove the existence of the claimant and the translation was not made by an official translator.

Second, there was no due process because in the proceeding it was not possible to him to provide the necessary evidence to prove its theory of the case, because of its lack of financial resources and bias of the arbitral panel. The above sets the grounds for refusal of recognition of the award set forth in Articles V, Part 1 (b) of the NYC and 36, part 1 (a) (ii) of the CICAL.

Thirdly, the award shall not be recognized based on the ground established in Article V, part 1 (e) of the NYC in relation with Article 244, part 4 of the CCPC, because the claimant does not prove the binding force of the award by a certificate of a superior court where the award was rendered.



Finally, the award did not fulfill the requirements set in Article 246 of the CCPC because the claimant did not prove the authenticity of the translation presented.

d) Summary of the grounds of the decision of the Supreme Court.

The grounds of the decision of the Supreme Court are the following:

First, about the lack of authenticity and proper translation of the documents presented by the claimant in its request of *exequatur*, it will reject that argument based on that the documents were duly authenticated by the competent authorities of the country where the award was rendered and by Chilean authorities; in this way the documents fulfill with the requirements set by Article 345 of the CCPC. Also, is obvious that the translations were properly made because it is impossible that the translated document have the signs of the people who signed them.

Second, about the claimant's lack of legal capacity to sue it is necessary to set the principles on which the *exequatur* procedure is based. In the case of Chile, the Supreme Court verifies the fulfilling of the legal requirements and, without review the merits of the award will recognize the award and allows to enforcing it, as if the award was a judgment made by a national court. In connection with the above, the former Constitution and legislation of Chile until 1902 (when the CCPC was promulgated), banned the recognition and enforcement of foreign judgments (an also awards) based on the sovereignty of each country; but the CCPC regulates the recognition and enforcement of foreign judgments (an awards) by the *exequatur* proceeding in Articles 242 to 251. This, because of the development of international relations in public and private issues between countries, becoming more flexible the territoriality principle, toward cooperation or mutual assistance between countries. That exist different systems to

recognize and enforce foreign judgments. Particularly, the Chilean system is mix of the main systems, in which the Supreme Court has to look at the foreign judgment (or award) and check if it fulfills the minimal requirements established by the Article 245 of the CCPC, but not to review merits or the justice of the decision to be recognized. Finally, that the *exequatur* proceeding aims to start an enforcement proceeding under the rule provided by the Article 464, part 2 of the CCPC. Besides, when the recognition of a foreign arbitral award is sought the only claims to be considered are provided by Articles IV and V of the NYC or 36 of the CICAL. In this case any of the arguments presented by the defendant are based on the grounds provided by the Articles aforementioned. Based on the above, the defense of lack of legal capacity to sue of the claimant will be rejected.

Thirdly, to decide this request of *exequatur* are applicable the Article 242 of the CCPC and the NYC. Notwithstanding, that according to Article 1, parts 1 and 2 of the CICAL, is also applicable.

Fourth, according to Article 1 of the CICAL we are in presence of an international contract, so are applicable Articles 35 and 36 of the aforementioned law, without prejudice of the provided by the NYC. Articles 35 and 36 of the CICAL reflect on equal terms the provisions of Articles IV and V of the NYC.

Fifth, the defendant's allegation on the existence of the grounds for refusal of recognition based on the provisions of Articles V, part 1 (b) of the NYC and 36, part 1 (a), (ii) of the CICAL not exist, because the defendant actively participated in the arbitral proceeding.

Sixth, the defendant's allegation on the existence of the grounds for refusal of recognition based on the provisions of Articles V, part 1 (e) of the NYC and 245, part 4 of the CCPC not exist, because the requirements provided in both Articles are not the

same. Articles V, part 1 (e) of the NYC and 36, part 1 (a), (v) of the CICAL provide that the arbitral awards need to have binding force upon the parties at the time when the recognition and enforcement is sought, as well as that the award cannot be voided or suspended in that moment; therefore according to Article 246 of the CCPC an award will have binding force when it has been approved by a court of the country where the award was rendered. On the other hand, Article 245, part 4 of the CCPC provides that a foreign judgment to have binding force and be enforced, as it was made by a national court, is necessary to prove that is enforceable and has binding force in the country where was made. Nevertheless, the difference between the rules analyzed above, in this case, the award was confirmed by a superior court of the State of New York, so it is binding to the parties.

Finally, regarding the defendant's argument of the lack of authenticity and proper translation of the award based on Article 246 of the CCPC will be rejected, because the claimant presented a duly authenticated copy of the award and the proper translation. Moreover, the aforementioned article does not require presenting the original of the award.

e) Decision.

The *exequatur* recognized the award.

f) Analysis of the jurisprudence.

In this case we find that the court made a thorough analysis of the principles and rules applicable to the procedure of *exequatur*, establishing the rules applicable to the procedure of *exequatur*. These rules are Articles 242 and 246 of the CCPC, IV and V of the NYC and 1, 35 and 36 of the CICAL.

Moreover, the Supreme Court sets that the only applicable articles to base the rejection of the *exequatur* are Articles V of the NYC and 36 of the CICAL. The foregoing is a significant step in determining the rules applicable to the *exequatur*, since the court declared that the rules to apply with preeminence are the rules provided by the NYC and the CICAL.

However, we find that the Supreme Court again did not defined its position regarding that if the claimant has to prove the “double *exequatur*” of the award, because the court stated that Articles 245 and 246 of the CCPC provide different requirements than Articles V, part 1 (e) of the NYC and 36, part 1, (a) (v) of the CICAL to establish the binding force of the award. Spite of the above, the court, once again, highlights that the award was approved by an ordinary court of the country where the award was made.

Finally, the Supreme Court innovates when stated that is not necessary to present by the claimant in the request for *exequatur* the original of the award, being sufficient to submit a duly authenticated and translated copy of the award. Regarding the translation, it is important to note that the court did not demand an official translation of the award.

#### 4) Case “Kreditanstalt für Wiederaufbau”<sup>57</sup>

##### a) Summary of the arbitral case.

The claimant and the defendant celebrated a contract basis for lending that the defendant breached. The contract had an arbitration agreement which provides that any difference between the parties will be solve by arbitration proceeding seated in Paris, France by arbitration under the Law of Germany and the

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<sup>57</sup> Kreditanstalt für Wiederaufbau, No. 5228-2008 (Supreme Court of Chile 15-12-2009). Available in: <http://suprema.poderjudicial.cl/SITSUPPORWEB/> [Visited: 2014, February 12].

procedural rules of the “International Chamber of Commerce” (hereinafter ICC), before a panel of three arbitrators. The claimant submitted a request for arbitration and presented their demand. Later, the defendant submitted a letter to the ICC presenting its arguments. Finally, the award ordered the defendant to pay damages for breach of contract; interests; and fees of arbitration and attorneys.

b) Summary of the claimant’s statements.

According to Article 242 of the CCPC is applicable the NYC, which provides in its Articles I, II and IV that: the convention's scope is to recognize and enforce foreign arbitral awards, over legal differences between legal or personal people; the member states of the convention shall recognize the written agreement of the parties to submit the differences between them to arbitration upon an issue capable to be settled by arbitration and, the requirements to fulfill by the claimant at the moment of present the request for recognition and enforcement are established by Article IV, respectively. Notwithstanding the foregoing, is also applicable the CICAL according to Article 1, part 1 of it. Furthermore, Articles 35 and 36 of the same legal text are applicable. Finally, in this case the defendant was notified of the arbitral proceeding and the award was made on an arbitrable dispute, within the competence of the arbitrators, as well as the award has binding force within the parties according to the rules of the ICC and, because, it has not been voided or suspended by a competent authority of the seat country of the arbitration proceeding.

c) Summary of the defendant’s statements.

The defendant argued that the award shall not be recognized and enforced because it does not fulfill any of the requirements set by Articles 242 to 251 of the CCPC, I to V of the NYC and 1, 35 and

36 of the CICAL. Also, argued that any dispute between the parties was solved by a settlement agreement between the parties. Particularly, the defendant presented the following statements for refusal of the recognition of the award:

First, that the claimant did not fulfill the requirements of Article IV, part 2 of the NYC because he did not presented a duly authenticated translation of the award and the arbitration agreement. Moreover, the claimant has confused the concepts of recognition and enforcement because it has requested the enforcement of the award when the Supreme Court has jurisdiction only to recognize the award and not to enforce it, according to Articles 248 and 249 of the CCPC.

Second, that he it could not defend himself in the arbitration proceeding and he only sent a letter to ICC in which declares that institution has not jurisdiction to settle the dispute.

Thirdly, that the arbitrators and the award went beyond the scope of the arbitral clause and it was applied a different applicable law to the dispute, so the award is not binding between the parties. Furthermore, the defendant stated that the award is against a judgment made by a Chilean court which decided that any difference between the parties shall be resolved by a Chilean court, because the enforceability of arbitration clauses ended when the parties agreed to the settlement agreement. So, the arbitral panel improperly interpreted the arbitration clauses and it settled a dispute that had been previously solved by a Chilean court, in an infringement of Article 76 of the Chilean Constitution.

Fourth, the defendant presented that the arbitral procedure did not follow the agreed between the parties, in an infringement of Article V, part 1 (d) of the NYC.

Fifth, that according to Articles V, part 1 (e) of the NYC and 36, part 1 (a) (v) of the CICAL the award did not have binding force

upon the parties because it was suspended by French court, which was deciding about the annulment of the award.

Finally, that the difference between the parties is not a difference able to be settled by arbitration because the dispute was settled before by a settlement agreement, agreed upon the parties, so there is an infringement of Article V, part 2 (a) of the NYC. Moreover, the difference is not able to be solved by arbitration according to Articles 230 and 357, part 5 of the Court Statute Codes, because in the difference was necessary to hear the opinion of the “fiscal Judicial”, but his opinion was not heard in the arbitral proceeding.

d) Summary of the grounds of the decision of the Supreme Court.

First, the Supreme Court as it did on the case “Comverse Inc.”<sup>58</sup>, set the principles on which the *exequatur* procedure is based in the same terms.

Second, the Supreme Court analyzed each of the arguments presented by the defendant to reject the recognition of the award. Regarding the first argument of the defendant, the Court stated that the claimant properly relied on the recognition and the enforcement of the award. Moreover, Article 248 of the CCPC provides that the defendant shall be notified of the request of enforcement of the award, so is evident that the *exequatur* proceeding is to recognize the award and not to enforce it.

Thirdly, it was proved in the arbitral proceeding that the defendant was notified of the proceeding, and even he defended itself.

Fourth, the defendant defended itself when it sent to the ICC a letter with its defense.

Fifth, the arbitral panel did not went beyond the scope of the arbitral clauses as it was the defendant who presented the settlement agreement as a defense, so the arbitral court had the

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<sup>58</sup> See above: Chapter IV, 3), d).

Jurisdiction and competence to analyze that agreement, and to solve if it was applicable to the difference.

Sixth, the arbitral panel and proceeding were properly established and developed. The 3 arbitrators correctly rendered the award; led the proceeding according to the ICC procedural rules; and they considered the presentations of the parties, examined them and adjudged the case on its merits.

Seventh, regarding that the arbitral award did not have binding force, that is not true because the defendant did not prove that a French court ordered the suspension of the award, so it is not possible to apply the provided by Articles V, part 1 (e) of the NYC or 36, part 1 (a) (V) of the CICAL. Furthermore, the arbitral rules of the ICC provide in its Article 28, part 6 that any award is binding upon the parties because when they submitted the difference to the ICC, they gave up to challenge in any way the award, so the award is binding immediately within the parties and they shall perform the award since it was rendered.

Finally, the difference is able to be settled by arbitration and do not attend any of the grounds set out in Article 36, part 1 (b) (i) or (ii) of the CICAL since the difference is on a subject expressly covered by the Article 113 of the Chilean Commerce Code, and, also, because the claimant is a foreign company, so the limitations established for Chilean legal persons of public law are not applicable. In brief, all the allegations made by the defendant to the denial of recognition of the award, will be rejected.

e) Decision.

The *exequatur* recognized the award.



f) Analysis of the jurisprudence.

In this case we see that the Supreme Court, again<sup>59</sup>, correctly interpreted the principles that inspired the NYC and the CICAL, as it did not require that the claimant prove the binding force of the award, i.e. it not requested the “double *exequatur*” of the award. Furthermore, the Supreme Court rejected all the arguments presented by the defendant because the grounds for refusal of the recognition were not properly proved or did not fulfill the requirements established by the NYC or the CICAL for the refusal of the recognition. In this way, we can see that the Supreme Court made a more pro-international and pro-arbitration interpretation of the NYC and the CICAL.

Finally, we can highlight that the Supreme Court gave an important value to the rules of arbitration of the ICC, when it stated that those rules set that the award is binding between the parties, because they gave up to challenge the award and, they shall perform the award since it was issued, immediately.

5) Case “Stemcor UK Limited”<sup>60</sup>

a) Summary of the arbitral case.

The claimant and the defendant celebrated sales contracts that the defendant breached, because the defendant did not opened the letters of credits to the claimant in a proper way and on time. Each contract had an arbitration agreement which provides that any difference between the parties will be solve by arbitration under English Law and the rules of the “London Court of International Arbitration” (hereinafter LCIA), before an arbitrator chosen by both parties. In the event that both parties do not agree

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<sup>59</sup> See above: Chapter IV, 3), d).

<sup>60</sup> Stemcor UK Limited, No. 1724-2010 (Supreme Court of Chile 21-06-2010). Available in: <http://suprema.poderjudicial.cl/SITSUPPORWEB/> [Visited, 2014, February 14].

on the choice of the arbitrator will be selected by the LCIA. The claimant submitted a request for arbitration. Later, the defendant agreed on the choice of the arbitrator made by the applicant, the terms of reference of the arbitration and actively defended. Finally, the award ordered the defendant to pay damages for breach of contract; interests; and fees of arbitration and attorneys.

b) Summary of the claimant's statements.

According to the Article 242 of the CCPC is applicable the NYC, which according to its provisions a foreign arbitral award shall be recognized and enforced, meeting the requirements set by it. Moreover, the Article 1 of the CICAL provides that this law will be applicable to the international commercial arbitration, notwithstanding any other bilateral or multilateral treaty in force in Chile.

c) Summary of the defendant's statements.

The defendant was in default.

d) Summary of the grounds of the decision of the Supreme Court.

Again the Supreme Court sets which are the doctrinal principles that govern the *exequatur* proceeding, as he did in cases "Gold Nutrition Industria e Comercio Ltda."; "Comverse Inc." and "Kreditanstalt für Wiederaufbau"<sup>61</sup>. Likewise, the Supreme Court repeated the following considerations, made in the cases "Comverse Inc." and "Kreditanstalt für Wiederaufbau"<sup>62</sup>, those are about: Principles which had regulated in Chile the recognition of foreign judgments; the different systems to recognize and enforce foreign judgments (to be applied to foreign arbitral awards); and

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<sup>61</sup> See above IV. 2), 3) and 4), respectively.

<sup>62</sup> See above IV, 3) and 4), respectively.

the rules currently applicable to recognition and enforcement of foreign arbitral awards in force in Chile. Further, the Supreme Court stated that the award fulfills all the requirements to be recognized, and the defendant did not present any arguments against the recognition of the award. Therefore, with the above is sufficient to recognize the award, but anyway it is necessary to mention that both sales contracts had their arbitration clauses, that there is an award legally rendered and that the defendant did not asserted their rights, even though it was lawfully notified of the arbitration proceeding.

e) Decision.

The *exequatur* recognized the award.

f) Analysis of the jurisprudence.

In this case we see that, again, the Supreme Court correctly interpreted the principles that inspired the NYC and the CICAL, as it did not require that the claimant prove the binding force of the award, i.e. it not requested the “double *exequatur*” of the award. Furthermore, the Supreme Court applied correctly the principle of “Lex Specialis” because it stated and, also, it applied the NYC and the CICAL preferentially than the CCPC.

Finally, we believe that the Supreme Court shall not analyze if are applicable the grounds for refusal of the recognition set in Articles V, part 1 of the NYC or 36, part 1 (a) of the CICAL, because these grounds were established to be invoked by the defendant and not by the courts that decide on the *exequatur*. Only the defendant can invoke those grounds, but if it does not, the defendant is giving up to its right to invoke them, and the court should remain silent.

ii. Exequatur cases denying foreign arbitral awards.

Case “EDF Internacional Soc. Energética Francesa S.A.”<sup>63</sup>

a) Summary of the arbitral case.

The claimant and the defendants celebrated a share purchase agreement. The contract had an arbitration agreement which provides that any difference between the parties will be solve by arbitration proceeding seated in Buenos Aires, Argentina in Spanish and French by arbitration under the Law of Argentina and the procedural rules of the “International Chamber of Commerce” (hereinafter ICC), before a panel of three arbitrators. The claimant submitted a request for arbitration and presented their demand. Later, the defendants agreed on the choice of the arbitrators, the terms of reference of the arbitration and they actively defended and both presented a counterclaim against the claimant. Thus, the arbitral proceeding was developed under the terms of the arbitral clause. Thereupon, the award ordered: to the defendants to pay damages to the claimant for breach of contract, and to the claimant to pay damages to each defendant for breach of contract. Later, the award was modified by two "addendas", the "addendas" comped the sums ordered to be paid to the parties. Later on, the parties presented to the "Commercial Appeal Chamber of Buenos Aires" requests for the annulment of the award, these requests were accepted. Finally, the claimant presented an extraordinary appeal to the "Commercial Appeal Chamber of Buenos Aires", which was rejected by the chamber; as a last resort, the claimant presented a disciplinary complaint, which was rejected by the Supreme Court of Argentina. The *exequatur* of the award was granted in France and the award was recognized in that country.

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<sup>63</sup> EDF Internacional Soc. Energética Francesa S.A., No. 4390-2010 (Supreme Court of Chile 08-09-2011). Available in: <http://suprema.poderjudicial.cl/SITSUPPORWEB/> [Visited: 2014, February 15].

b) Summary of the claimant's statements.

According to the Article 242 of the CCPC is applicable the NYC and the CICAL, which according to their provisions a foreign arbitral award shall be recognized and enforced, meeting the requirements set by those legal texts. Moreover, the claimant stated that the fact that the award was annulled by a court of the seat country of the arbitral proceeding is not an impediment to the binding force of it or the recognition of the award in other country, because the action for annulment not allows to review the merits of the arbitral proceeding as the Argentinian court did.

c) Summary of the defendant's statements.

Both defendants argued that according to Articles V, part 1 (e) of the NYC, 5, part 1 (e) of the Panama Convention of 1975 and 36, part 1, (a) (v) of the CICAL the recognition of the award must be rejected, because the award was annulled in the seat country of the award by the competent court. As the award was annulled, it is legally non-existent, so it is impossible to be enforced in any country.

Finally, both argued that the Supreme Court of Chile and any other court in Chile are not competent to recognize or enforce the award, respectively. The foregoing, as all the parties of the arbitral proceeding does not have their residences in Chile, they only have assets, but that is not enough to give jurisdiction to Chilean courts.

d) Summary of the grounds of the decision of the Supreme Court.

First, the Supreme Court stated that the Chilean system for recognition of foreign judgments requires an approval of a court of the country where the award will be enforced in order that the award fulfills all the requirements of the internal law to be recognized and enforced.

Second, the court established that the Chilean system for recognition of foreign judgments (and arbitral awards) is set in Articles 242 to 251 of the CCPC which established a subsidiary cascade system, in which, first, the international treaties on recognition and enforcement of foreign

judgments are applicable; second, a reciprocity principle and, third, if none of the foregoing rules were applicable, it is applicable the principle of “International Regularity” of the foreign judgments which provides that a foreign judgments have to fulfill some basic principles and rules established in the country where the recognition and enforcement is sought.

Third, according to Article 242 of the CCPC are applicable to the *exequatur* proceedings: the NYC; the Panama Convention of 1975; the Cooperation Agreement and Judicial Assistance in Civil, Commercial, Labor and Administrative matters between the States Parties of MERCOSUR and the Republics of Bolivia and Chile of 2002 and the CICAL.

Fourth, the analysis of the Supreme Court will be centered on the requirements set by Article 246 of the CCPC which are the authenticity and enforceability of the award.

Fifth, is allowed to the claimant to present to the Supreme Court in the *exequatur* proceedings an authenticated copy of the award made by the Secretariat of the International Arbitral Court of the ICC.

Sixth, the award was annulled by a final judgment rendered by a competent court of the seat country of the arbitration, so according with the provided by Articles V, part 1 (e) of the NYC, 5, part 1 (e) of the Panama Convention of 1975 and 36, part 1 (a) (v) of the CICAL the award does not have binding force, this is how the effectiveness requirement laid down in Article 246 of the CCPC is not met. The foregoing, as the award was deprived of all its effects and should be taken as if it never existed because of its annulment.

Finally, the court did not analyze any other argument presented by the parties because the grounds presented above are enough to deny the recognition of the award.

e) Decision.

The *exequatur* not recognized the award.

f) Analysis of the jurisprudence.

In this case, again the Supreme Court set the principles and rules that the exequatur proceedings has to follow, these principles and rules are very similar of those set in the previous exequatur cases.

We can highlight, that the Supreme Court confirms the value as authenticated copies of the award, to the certified copies given by the Secretariat of the International Arbitration Court of the ICC.

Finally, the most important topic discussed in this case was about the recognition of annulled awards, in this case the Supreme Court stated that is not possible to recognize an award in Chile if it was annulled in the seat country of the arbitration, according to the provided by Articles V, part 1 (e) of the NYC; 5, part 1 (e) of the Panama Convention of 1975; 36, part 1 (a) (v) of the CICAL and 246 of the CCPC. We believe that this argumentation made by the Supreme Court lacks of weight and of doctrinal base because there are at least two main positions about this topic in the doctrine and none of them were revised or discussed by the court. Thereby, for the Supreme Court was enough to reject the exequatur that the articles mentioned above established that an award could not be recognized if it was annulled, and to assess the award as without binding force. The Supreme Court did not even do the basic analysis regarding the word "may" which lies written in the chapeau of Articles V of the NYC, 5 of the Panama Convention and 36, part 1 (a) of the CICAL, aforementioned. That analysis, as the doctrine stated, it is manifest because unlike other cases in this case is used the word "may" which is conditional wording, instead of the word "shall" which is mandatory wording.

iii. Exequatur cases of interim measures.

Case “Western Technology Services International Inc.”<sup>64</sup>

a) Summary of the arbitral case.

The claimant and the defendant celebrated three contracts that according to the claimant the defendant breached. Those contracts had an arbitration clauses which provides that any difference between the parties will be solve by arbitration proceeding seated in Dallas, United States of America; in English; under the rules of the “American Arbitration Association” before a panel of three arbitrators. The applicant submitted a request for arbitration where requested termination of contracts and implementation of the remedies contained in the contracts, such as the non-competition clause. Later, the arbitral panel ordered the interim measure of non-competition to the defendant. The arbitral proceeding was developing while the recognition of the interim measure was sought.

b) Summary of the claimant’s statements.

The claimant noted that the resolution of the arbitral panel which it ordered the interim measure fulfill all the requirements to be recognized and enforced, according to Articles 242 and 246 of the CCPC and 35 of the CICAL. Also, stated that the interim measure is according to the provided the NYC.

c) Summary of the defendant’s statements.

The defendant requested the denial of the recognition of the award based in:

First, the interim measure is contrary to the Chilean Public Policy because it tries to impose the effects of foreign contracts. Also, that the

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<sup>64</sup> Western Technology Services International Inc., No. 5468-2009 (Supreme Court of Chile 11-05-2010). Available in: <http://suprema.poderjudicial.cl/SITSUPPORWEB/> [Visited: 2014, February 17].



non-competition clause affects its economic freedom and permits *de facto* a monopoly, with the consequential infringement of the Chilean Constitution.

Second, the interim measure did not fulfill the requirements set by Article 246 of the CCPC because it does not have binding force within the parties, as it has been clarified several times and there are several pending appeals against it. Moreover, the interim measure is not an arbitral award; it is only a resolution of the arbitral panel.

Finally, if the injunction is accepted implies rule in favor of the claimant in advance.

d) Summary of the grounds of the decision of the Supreme Court.

First, the Supreme Court sets that the applicable rules to decide the case are Articles 242 and 245 of the CCPC, 35 and 36 of the CICAL, which are similar to rules of the NYC.

Second, the interim measure is a resolution of the arbitral panel that does not decide in final way the difference to be determined by the arbitral proceeding.

Thirdly, the rules mentioned above only applies in cases of foreign arbitral awards but no in cases of an interim measure which is preliminary and tentative, designed to last for a while without establishing permanent rights on the parties.

Fourth, recognize the interim measure implies to decide the difference in favor of the claimant in advance.

Finally, the interim measure does not fulfill the requirements to be a final decision of the difference between the parties.

e) Decision.

The *exequatur* was denied.

f) Analysis of the jurisprudence.

We believe that the court erred in denying the recognition of the interim measure requested, because when the Supreme Court asked that the interim measure shall be a final decision of the difference between the parties, it imposed (on the recognition of an interim measure) a condition not addressed by the CICAL. The CICAL provides in its Article 1, part 2 that it is applicable to foreign arbitral proceedings the provided in Article 9 of the CICAL. Article 9 provides in our understanding, that is compatible and is allowed to request an interim measure before the arbitral proceeding, or while is being developing. Thereby, if the interim measure which is a resolution of the arbitrators, fulfills the requirements established by the Article 35 of the CICAL and do not applies any of the grounds for refusal of recognition established in Articles V of the NYC or 36, part 1 (b) of the CICAL, the interim measure shall be recognized and enforced.

## CONCLUSION

In this thesis we can note several relevant aspects regarding the recognition and enforcement of foreign arbitral awards by the Chilean Supreme Court:

First, that exist an international system for the recognition and enforcement of arbitral awards set by the New York Convention. This system established the universal principles applicable to the recognition and enforcement of arbitral awards, with differences in some topics, as the recognition of annulled awards, where we can observe very different positions over that topic, like we saw above<sup>65</sup>. Although the New York Convention did not established a universal proceedings for the recognition and enforcement of arbitral awards, it set the principles and base rules for that, as the provided in Articles I, III, IV and V of the Convention.

Second, the New York Convention set the grounds -even some articles as a template- for the UNCITRAL Model Law on International Commercial Arbitration. The Model Law was adopted as the template for national laws for the recognition and enforcement of foreign arbitral awards in almost 70 countries in the world, these countries are the most relevant in international trade in the world. Thus, we can say that it is developing an international system -with similar if not equal rules- for the recognition and enforcement of foreign arbitral awards. In this context, Chile used the Model Law as a template and approved the Chilean International Commercial Arbitration Law which is in force since 2004.

Third, in Chile since the entry into force of the Chilean International Commercial Arbitration Law in 2004 with the concurrent application of the New York Convention which is in force since 1975 we observed a development of the jurisprudence of the Chilean Supreme Court from a limited acceptance of recognition of foreign arbitral awards to a more open, pro-arbitration and

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<sup>65</sup> See: JIMENEZ, Dyalá. (2006). "La Madurez del Arbitraje Comercial Internacional: de Laudos Extranjeros y Laudos Internacionales.", *Revista Internacional de Arbitraje*, 4, pp. 179-200.

international interpretation of the CICAL and the NYC in the requests of *exequatur* since 2005.

Fourth, is remarkable the development made by the Supreme Court of Chile (hereinafter SCC) in its Jurisprudence since 2005 to these days by the following reasons:

- i. In the first case analyzed the SCC hesitated about which were the applicable laws for the *exequatur* proceedings of foreign arbitral awards, but then repeatedly set that the applicable rules are those provided by Articles 242 and 246 of the CCPC, the NYC and the CICAL. Moreover, the SCC established that applying the "*Lex Specialis*" the applicable rules are the provided by the CICAL concurrently with the NYC.
- ii. The SCC ruled that the fact that the defendant did not defend itself in the arbitral proceedings, or did not appear before the SCC in the *exequatur* proceedings are not an impediment to recognize the award.
- iii. The SCC established that is able to consider as a duly authenticated copy of the award the copy issued by the Secretariat of the permanent bodies of arbitration as the International Chamber of Commerce or the American Arbitration Association.
- iv. The SCC considered that the agreement made by the parties to submit their differences to arbitration is important because the parties resigned to the natural competent courts and voluntarily subjected to the chosen procedural rules of arbitration institutions. This is important because the SCC found that if the procedural rules of the arbitration institution provided that the parties shall perform the award immediately and they gave up to challenge the award will be not necessary to the claimant to prove the approval of the award by a superior court of the seat country of the arbitration. The foregoing is very important because the SCC initially set that the claimant has to prove that the award was

approved by a superior court of the seat country of the arbitration proceedings, according to the Article 246 of the CCPC.

- v. Other point to be highlighted is that the SCC set that the *exequatur* proceedings is not an instance for review the merits of the award, on the contrary it is an instance to check if the request for the recognition of the award and the award fulfill with the requirements provided by the NYC and the CICAL; and if are applicable any of the grounds for refusal of the recognition and enforcement of the award established in the same legal texts.
- vi. Concerning the grounds for refusal of the recognition and enforcement of the award the SCC stated that those grounds has to be interpreted in a restricted and narrow way, with the aim to recognize and enforce the award. Thereby, the SCC only accepted in one case a ground to reject the *exequatur* of the award based in Articles V, part 1 (e) of the NYC and 36, part 1 (a) (v) of the CICAL, which we will discuss later.

Fifth, the main criticisms that can be made to the jurisprudence of the Supreme Court are as follows:

- i. The position of the SCC about the recognition and enforcement of interim measures in the case “Western Technology Services International Inc.”, we found that the position taken by the SCC is wrong because the CICAL in its Article 1, part 2 provides that is applicable the Article 9 of that law. Article 9 provides that is possible to ask to the courts that orders interim measures before or during the arbitral proceedings. So, in this case where was requested the recognition of an interim measure, why the court did not accepted the recognition? If the CICAL allows to the SCC to do it and the order of the arbitral panel fulfills all the requirements set by Articles IV of the NYC and 35 of the CICAL and was not fulfilled any grounds for refusing recognition. We believe that the argument presented by the SCC to reject the interim measure is not enough (that the decision of the arbitral panel was not a final decision, so it is not

possible to recognize it because the recognition is only for final decision who solves the difference between the parties) because there are many other good reasons to recognize and enforce an interim measure that go beyond the scope of this work.

- ii. The denial of recognition in the case “EDF Internacional Soc. Energética Francesa S.A.”. In this case we believe that the only reason of the SCC to reject the recognition of the award was that the award was annulled in the seat country of the arbitration, so the SCC found that was enough to apply the ground for refusal established in Articles V, part 1 (e) of the NYC and 36, part 1 (a) (v) of the CICAL. The SCC did not analyze in depth which were the different solutions about this topic that exist in the doctrine or in other countries. As we said above, the Supreme Court did not even do the basic analysis regarding the word "may" which lies written in the chapeau of the articles aforementioned. That analysis, as the doctrine stated, it is manifest because unlike other cases in this case is used the word “may” which is conditional wording, instead of the word “shall” which is mandatory wording.

Sixth, at present in Chile the congress is discussing a new Civil Procedural Code, the draft<sup>66</sup> in its articles 243 to 250 provides about the judgments pronounced by foreign courts. In brief the draft follows the current system of recognition and enforcement of foreign judgments (and awards) established in the CCPC, but with two main changes: First, the draft does not includes the recognition of arbitral awards because the Article 243 set that the international conventions are applicable in first place, so the NYC and the Panama Convention will be applicable; and the CICAL too in application of the “*Lex Specialis*” principle. Second, the competent court changes from the Supreme Court to the ordinary courts with the possibility to challenge the ruled by the court, in this way we found that the draft could establish a more complicated and dilatory system because of the

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<sup>66</sup> MINISTRY OF JUSTICE. (2012). Message from H.E. President of the Republic that starts with a draft law on new Civil Procedural Code. (Bulletin N°8197-07). Available : <http://www.camara.cl/pley/pdfpley.aspx?prmID=8394&prmTIPO=INICIATIVA> [Visited: 2014, February 24].

inexperience of the judges of the ordinary courts and the possibility to challenge the judgments made by them.

Finally, we can say that Chile and the Jurisprudence of the Supreme Court are in a good path to show the “efficient working of the international arbitral system in Chile”<sup>67</sup>; to consolidate Chile as seat country for arbitral proceedings and to give to the trading parties the legal certainty that the foreign arbitral awards shall be recognized and enforced in Chile. In this same way, we can find that the Supreme Court’s judgments are a bit over the average time to get the recognition of awards, but in an acceptable time frame by the traders as the survey made by Mistelis and Baltag shown<sup>68 69</sup>.

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<sup>67</sup> FIGUEROA, Juan E. (2010). “Reconocimiento de Sentencia Arbitral Extranjera por Corte Suprema de Chile. “Gold Nutrition Industria e Comercio con Laboratorios Garden House S.A.”, *Revista de Arbitragem e Mediação*, 25 (7), p. 8. Available in: [http://www.camsantiago.com/articulos\\_online/JEF.pdf](http://www.camsantiago.com/articulos_online/JEF.pdf). [Visited: 2014, February 24].

<sup>68</sup> BALTAG, Crina and MISTELIS, Loukas. (2008). “Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices”, *The American Review of International Arbitration*, 19 (3/4), p. 351.

<sup>69</sup> For further information about traders expectative of traders, see: BREKOULAKIS, Stavros. (2008). “Enforcement of foreign arbitral awards, observations on the efficiency on the current system and the gradual development of alternative means on enforcement”, *The American Review of International Arbitration*, 19 (3/4), pp. 415-446.

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