

# Kluwer Arbitration Blog

## On the Right Track: Chile's Supreme Court Recent Ruling on Recognition and Enforcement of Foreign Awards

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A recent ruling by the Chilean Supreme Court has clarified the extent of control that Chilean tribunals can exert when reviewing the procedural rules applied in arbitration awards seeking recognition in Chile (*see* [Case N° 133.313-2022](#), dated 27 July 2023). Consistent with previous cases, the Court upheld a broad scope of freedom for parties to agree upon rules and procedural formalities that best suit their relationship, even if they deviate from the requirements of Chilean Law.

### Background

The award in the underlying proceeding ordered Procesadora Rengo SpA (“Defendant”) to pay US\$15,000 to Ashlock Company, Division of Vista Corporation (“Claimant”), for each year of use of eight leased machines, plus interest, readjustments, costs and freight in accordance with the lease contract concluded between the parties.

Claimant filed its enforcement petition on 21 October 2022. Defendant opposed the request, arguing that the complaint was not served in compliance with the strict formalities mandated by the [Chilean Code of Civil Procedure](#) (the “Code”). Importantly, Defendant’s argument was not the failure to serve the claim, but the invalidity of the service of process because it did not comply with the formalities set forth under Chilean law. The complaint was served to the company by one of Claimant’s employees in Chile. Thus, Defendant alleged violation of the Chilean mandatory rules requiring that service of process for a civil lawsuit be carried out exclusively by a duly authorized public official (as stipulated in Article 40 of the Code).

Notably, the defense was grounded on the general provisions governing enforcement of foreign judicial decisions (*see* article 245 of the Code) and not the International Commercial Arbitration Act (“[International Arbitration Act](#)”), which is based on the New York Convention on the Recognition and Enforcement of Foreign Awards (“[NY Convention](#)”).

### Not an Instance for Substantive Review: The Supreme Court’s Findings Regarding the Rules Governing the Enforcement of Arbitral Awards

First, the Court clarified that the enforcement of foreign arbitral awards falls within the broader category of recognition of jurisdictional decisions taken by foreign courts. In this context, the Court referred to its consistent line of decisions, pointing out that when it comes to arbitral awards or any other foreign judgments, the recognition process does not constitute an instance for reviewing the relevant facts and rules governing the dispute. On the contrary, its sole purpose is to verify compliance with certain minimum requirements, without analyzing the intrinsic justice or injustice of the judgment.

In particular, the Court stated that recognition and enforcement proceedings cannot revisit allegations that should be heard before the tribunal that issued the foreign judgment, in this case, the arbitral tribunal (in the same vein, *see* Supreme Court recent decision on [Case N° 124.338-2020](#), dated 5 July 2023).

Based on the above, the Court addressed the recognition of foreign arbitral awards, clarifying which of the possible regulations prevail when considering the minimum requirements that they must meet in order to be recognized in Chile. In agreement with relevant Chilean scholars, the Court declared that the International Arbitration Act takes precedence over general rules. For that purpose, the Court referred to the special nature of the International Arbitration Act, favoring its provisions as opposed to more general rules.

Accordingly, the analysis of the Court was based on the International Arbitration Act, giving relevance to Article 36 of the International Arbitration Act, which is based on Article V of the NY Convention, providing a list of grounds for denial. The grounds analyzed by the Court were the lack of proper notice, regulated in Article 36(1)(a)(ii) and Article V(1)(b) of the NY Convention, and the violation of Chilean public policy, regulated in Article 36(1)(b)(ii) and Article V(2)(b) of the NY Convention.

The Court's findings regarding the standard and the specific rules governing recognition of foreign arbitral awards are crucial, as they reaffirm Chile's strong deference to international tribunal decisions, especially arbitral tribunals. In recent years, Chile has been increasingly considered as a seat of choice for international arbitration and this is due, in large part, to this deference, which the Court's recent decision further reaffirms.

### **The Supreme Court's Findings on Substantive Standards of Fair Hearing and Public Policy**

After completing its analysis on applicable standards and governing rules regarding foreign awards, the Court rejected the lack of proper notice and the violation of public policy defenses. Essentially, the Court ruled that, even though service was not made in the manner established in the Chilean legislation, it was notified in a timely manner and did not prevent the Respondent from taking part in the proceeding or assert its rights. Furthermore, the Court stated that service was made according to contractual rules agreed upon by the parties, over which the Court was prevented to exercise any external control.

The Court also stated that although service is needed as an essential part of due process, its formalities need not comply with any other rule other than the one agreed upon by the parties, even if such rule broadly differs from Chilean domestic rules that would otherwise be applicable.

This is probably the most important feature of the decision. As George Bermann notes regarding

the recognition of foreign arbitral awards, the absence of a fair hearing is the particular way through which the control of public policy violations, which pertain to procedural aspects rather than substantive ones, is manifested. Due to significant variations between countries and legal traditions, the standard of review for such procedural issues relies on broadly formulated clauses, making it challenging to determine their exact scope. However, in this case the Court clearly stated that even violations of rules that would be mandatory under Chilean law do not necessarily amount to a violation of public policy or an impairment of the defendant's right to a fair trial. On the contrary, the Court's reasoning confirms the flexibility available to the parties to establish procedural rules that would not otherwise be available in domestic proceedings.

Again, this is a very important milestone. One of the key features of arbitration as a method of dispute resolution is the power given to the parties not only to establish the applicable substantive rules, but also to design the procedural provisions that best suit their specific business relationship.

### **National or International Public Policy?**

After rejecting the fair hearing defense, the Court made a final remark, stating that the concept of public policy in the International Arbitration Act must not be equated with the entire set of non-disposable rules mandatory under Chilean Law, but instead it refers to the much narrower set of rules and principles that are fundamental to Chilean law. In particular, the Court pointed out that:

*“the concept of public policy established by the International Commercial Arbitration Act is restrictive and refers to the fundamental principles and rules of Chilean law and not to any mandatory rules of domestic law.”*

This phrase requires further comment. The concept of public policy or public order is relevant for two different but related ways of control that domestic courts can exercise over international arbitral awards. The first is when considering annulment proceedings. The second, relevant in this case, is when confronted to recognition and enforcement petitions. In both scenarios the question is: what legal rules should be considered when analyzing the concept of public policy?

A very recent decision of the Court of Appeals of Santiago may be relevant to this point. The decision fell on an annulment proceeding, also regulated in the International Arbitration Act (Article 34, *see here*). In solving the case, the Court set a very strict standard, ruling that the public policy clause in the Act implies a distinction between national and international public policy. Furthermore, the Court stated that annulment control should be based on international public policy rather than domestic. The decision discussed here also used a strict standard to define what can constitute a public policy violation, but its content continues to be defined by reference to the fundamental principles of Chilean law and not to the ones of international law.

Whether the difference is explained by a distinction between annulment proceedings, on the one hand, and recognition and enforcement proceedings, on the other, remains to be seen.

### **Conclusion**

One of arbitration's key advantages is that it empowers the parties to create efficient procedural rules tailored to their business relationships. Therefore, the determination of the limits imposed on that power is of crucial importance. The recent ruling by the Chilean Supreme Court provides clarity in this regard: unless there is a breach of fundamental principles, parties are free to agree as they deem appropriate. However, the determination of which body of law holds the utmost relevance in defining what constitutes a violation of fundamental principles remains an open question.

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