CHILE, PARAGUAY, PARAGUAY-MERCOSUR, PERU, VENEZUELA

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MEMORANDUM

Date: October 20, 2014

To: International Bar Association (IBA) Arbitration Committee
Recognition and Enforcement of Awards Subcommittee

From: José Antonio Moreno Rodríguez
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Subject: Public Policy in The Hague Principles, Chile, Paraguay, MERCOSUR, Perú and Venezuela

Index

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I. THE HAGUE PRINCIPLES

This groundbreaking instrument is envisaged to be very influential in the arbitration setting for the years to come[1].

A brief introduction to the endeavor will follow, since the arbitral community in general may still be unaware of its potential benefits. Regarding public policy in particular, as will be seen, the document can result very effective in clarifying terminology and scope of application of its principles and rules.

The Hague Conference on Private International Law (hereafter "the Hague Conference), undoubtedly the most prestigious organization in the world codifying conflict or choice of laws, has advanced the initiative of drafting the now commonly named"the Hague Principles" or "the Principles".

The draft official introduction to the document states[2]:

> The Hague Principles on Choice of Law in International Contracts ("the Principles"), consisting of 12 articles on choice of law in international contracts, are a response to private international law questions arising out of contracts with a cross-border element in international commercial law. The Principles cut across the dividing line between common law and civil law, and are intended to be used in both judicial and arbitral proceedings. Developed over several years, these ground-breaking Principles are the first legal instrument on a global level to address choice of law in international contracts.[3]

Feasibility studies started in 2006, and in 2010 a Working Group was formed, comprised of fifteen members (two from Latin America: Lauro Gama and myself), and observers from UNIDROIT (Michael Bonell), the ICC (Fabio Bortolotti), the ICC Commission of Arbitration (at the time represented by Francesca Mazza), UNCITRAL and the International Bar Association, among others.[4] The Working Group was chaired by Daniel Girsberger, a Swiss Private International Law Professor with renowned expertise in Arbitration, and diligently coordinated by Marta Pertegás of The Hague Conference Secretariat. The representative of the IBA was Klaus Reichert, Co-Chair of the IBA Litigation Committee.

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[1] See, for instance, in L. RADICATI DI BROZOLO, "Non-national rules and conflicts of laws: Reflections in light of the UNIDROIT and Hague Principles", *Rivista di diritto internazionale privato e processuale*, Vol. XLVIII, No 4, 2012, pp. 841–864.
[2] As will be seen below, a final approval of the document is still pending. However, only minor editorial changes are expected.
[3] http://www.hcch.net/upload/wop/princ_com.pdf
[4] http://www.hcch.net/upload/wop/contracts_members.pdf

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Building on the task of the Working Group, the Special Commission (a diplomatic meeting with more than one hundred national delegations and observers), held in November 2012, made a proposal of rules for the Hague Principles[5].

The General Council Meeting of the Hague Conference, empowered to render the final approval to the Principles, at its session of April 2013, "welcomed the work" and "gave its preliminary endorsement" of the document[6]. In turn, the commentary to these rules received a provisional endorsement at the General Council meeting of April 2014[7].

This deserves a brief explanation: The Hague Principles follow the drafting technique of the UNIDROIT Principles. Hence, both instruments contain a preamble, rules or "principles", and comments and illustration, when necessary. The success of this drafting mechanism of the UNIDROIT Principles made the Hague Conference follow the technique, after considering the difficulties of attempting to draft a successful "hard law" international treaty.

As the UNIDROIT Principles, the Hague Principles are expected to guide legislators or contract drafters, and to serve for interpretation both in the judicial and arbitral setting. Particular care was dedicated to the document in all the drafting stages to take into account the developments in the arbitral world, since the Principles are expected to provide a useful guidance to arbitrators in several issues related to the complexities of party autonomy and its limits.

The Hague Principles do not deal with issues when choice of law is absent. It regulates party autonomy in international commercial settings, with provisions relating to formalities, severability, exclusion of renvoi, etc., including a ground-

[5] http://www.hcch.net/upload/wop/contracts_rpt2012e.pdf
[6] The Council "mandated the Working Group to prepare a draft Commentary, circulate it to all Members and Observers for comments, finalise the draft Commentary in light of these comments and present a complete draft of the Commentary, together with the Principles, to Council..." (http://www.hcch.net/upload/wop/gap2013concl_e.pdf)
[7] The official Council document states: "The Council welcomed the work completed by the Working Group. The Council welcomed the text of the Hague Principles and the draft Commentary. The Council requested the Working Group to undertake the editorial finalisation of the Principles in the two official languages of the Hague Conference. Members are invited to submit comments on the changes introduced in the draft Commentary after January 2014, bearing in mind the explanatory nature of the Commentary. Any comments should be submitted in writing to the Permanent Bureau by 31 August 2014. The Working Group will then review those comments and finalise the Principles and the draft Commentary in both languages, whereafter the final version of the texts will be submitted to Members for approval in a written procedure. The Principles and draft Commentary will be approved if no objection is raised within 60 days. (http://www.hcch.net/upload/wop/genaff2014concl_en.pdf) This process is currently underway.

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breaking rule in its article 3 (in regards to State Courts) which admits the selection of Non State law[8]. The document also deals with public policy as an exceptional limit to party autonomy.

Public policy is addressed as follows in the Hague Principles:

> *Article 11 – Overriding mandatory rules and public policy (*ordre public*)*
>
> 1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.
>
> 2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.
>
> 3. A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.
>
> 4. The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law.
>
> 5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.

Article 11 simplifies the chaotic terminology existing in comparative law regarding this subject. It also clarifies the exceptional circumstances in which public policy can override party autonomy.

Both accomplishments can prove very useful in the arbitral setting, where terminology regarding public policy and the scope of its application are disturbingly unsettled.

The Principles have the legitimacy of being advanced by an international organization, working many years with diverse stakeholders, including relevant actors of the arbitral community. To this must be added the simplicity and balanced regulation it includes regarding public policy, which contemplates the

[8] "Article 3 – Rules of law. The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise".

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interest of commerce in expanding party autonomy and at the same time the States' interest in exceptionally restricting choice of law when manifestly incompatible with the latter.

In this regard, the draft commentary states in the below selected passages the following[9].:

> "…Article 11 permits the application, on an exceptional basis, of two categories of restrictions on the application of the law chosen by the parties: overriding mandatory provisions and public policy (*ordre public*). These two categories are commonly dealt with in separate provisions in national and international instruments, including all of the Hague Conference's Conventions dealing with choice of law issues over the past 50 years (see, *e.g.*, Arts 16-17 1978 Hague Agency Convention; Arts 17-18 1986 Hague Sales Convention; Art. 11 2006 Hague Securities Convention).
>
> **…** There is no doubt that the categories of overriding mandatory provisions and public policy are "closely connected". They may be considered to share the same doctrinal basis and, in effect, to be two sides of the same coin. Nevertheless, their separate treatment in the Principles has the advantage, in particular, of not only consistency with the majority of existing international instruments but also of allowing a clear distinction to be drawn between (a) situations in which application of the chosen law is displaced because a specific, positive rule of the *lex fori* or another legal system takes priority and is applied instead (application of an overriding mandatory provision), and (b) situations in which application of the chosen law is blocked because its application in a particular case is repugnant to the fundamental policies of the forum or another legal system whose law would apply to the contract absent the parties' choice (application of *ordre public*)…"

In relation to "overriding mandatory provisions" the commentary, inter alia, expresses:

> "…The term, found in several regional and national instruments, is generally understood to refer to provisions of law (in Art. 11(1), the law of the forum) that must, according to their proper construction, be applied to the determination of a dispute between contracting parties irrespective of the law chosen to govern the contract. They are *mandatory* provisions in the sense that it is not open to the parties to derogate from them by the terms of their contract or otherwise. They are *overriding* provisions in the sense that a court must apply them even if the parties have chosen a law other than that of the forum to govern their contractual relationship. The presence of these two characteristics serves to emphasise the importance of the provision within the relevant legal system, and to narrow the category of provisions to which the Principles will apply. Overriding mandatory

[9] http://www.hcch.net/upload/wop/gap2014pd06rev_en.pdf

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> provisions are likely to be limited to those that are regarded as important for safeguarding the public interests of the forum (see Art. 9(1) Rome I Regulation).
>
> **...**It is not necessary that an overriding mandatory provision should take a particular form (*i.e.*, it need not be a provision of a constitutional instrument or statute), or that its overriding, mandatory character should be expressly stated. In every case, the law of the forum must be applied to determine (a) whether a particular provision is capable of having the effects described, and (b) whether, having regard to its terms (including its territorial application) and any relevant surrounding circumstances, it actually has those effects in the case in question. Nevertheless, the exceptional nature of the Article 11 qualifications to party autonomy should caution against the conclusion that a particular provision is an overriding mandatory provision in the absence of words or other indications to that effect..."

In turn, in reference to the notion of public policy, the draft commentary of The Hague Principles states, among other things, the following:

> "As to the first requirement, the use of the words "fundamental notions of public policy" and the internationally accepted expression "*ordre public*" emphasise that Article 11(3) is concerned with policies of the legal system of the forum (in whatever form) that are so important that they extend to contracts of an international character, notwithstanding that the parties are empowered to choose (and have, in the case in question, chosen) another law to govern those contracts. Accordingly, the category is much narrower than the concept of "public policy" as it may apply to domestic contracts. It is, of course, not sufficient that the chosen law adopts an approach different from that of the law of the forum. It is necessary that the application of the chosen law would violate a fundamental policy of the forum of the kind described.
>
> ...As to the second requirement, the words "manifestly incompatible" (used, *e.g.*, in Art. 17 1978 Hague Agency Convention and in Art. 21 Rome I Regulation) serve to emphasise that any doubt as to whether application of the chosen law would be incompatible with the forum's fundamental policies must be resolved in favour of the application of the former.
>
> ... Article 11(3) emphasises the third requirement, namely, that it is the result of *applying* the chosen law in a particular case rather than the chosen law in the abstract that must be assessed for compliance with public policy. The court is not, however, restricted to considering the outcome of the dispute between the parties, but may have regard to wider considerations of public interest. For example, a court may refuse on public policy grounds to enforce a contract, valid under the law chosen by the parties, based on a finding that the choice was designed to evade sanctions imposed by a United Nations Security Council resolution, even if non-enforcement would benefit financially a person targeted by those sanctions and even if the other party was not party to the evasion..."

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Finally, the Hague Principles address specifically the problem of public policy (*ordre public*) and overriding mandatory provisions in arbitration, expressing this:

> "...Article 11(5) reflects the different state of affairs facing arbitral tribunals as opposed to State courts in relation to mandatory rules and public policy. Arbitral tribunals, unlike courts, do not operate as part of the judicial infrastructure of a singlelegal system, and are subject to a range of legal influences. Moreover, the Principles, by their very nature as a non-binding instrument, do not (and cannot) grant an arbitral tribunal any authority beyond that which it already has pursuant to its mandate and cannot predict the exact circumstances in which an arbitral tribunal will be constituted and called upon to reach a decision.
>
> ...Consequently, Article 11(5) does not confer any additional powers on arbitral tribunals and does not purport to give those tribunals an unlimited and unfettered discretion to depart from the law chosen by the parties. Quite to the contrary, the Principles recognise that an arbitral tribunal might be required to take into account public policy or overriding mandatory provisions of another law, and must otherwise be satisfied that it is entitled to do so. The wording of the Article requires the tribunal to consider the legal framework within which its decision-making processes are conducted, having regard (in particular) to the agreement of the parties, the designated or deemed seat of the arbitration, any institutional rules applicable to the arbitration, and the potentially controlling influence of State courts applying local arbitration legislation.
>
> ...For example, arbitral tribunals may be subject to an express duty to endeavour to render an "enforceable award" (see, *e.g.*, Art. 41 ICC Rules and Art. 32.2 1998 LCIA Rules; see also Art. 34(2) UNCITRAL Arbitration Rules requiring that the award be "final and binding"). It is a controversial question whether a duty of this kind requires the tribunal to have regard to the overriding mandatory provisions and policies of the seat, however identified, or of the places where enforcement of any award would be likely to take place. Article 11(5) does not express any view on this controversy. It does, however, emphasise that (at least in the first instance) it is for the tribunal to form a view as to the existence and scope of the duties imposed on it (and the powers granted to it), and to apply or take into account the provisions or policies of a law other than that chosen by the parties to govern their contract only if it considers that it is under a legal obligation, or is otherwise entitled, to do so".

Evidently the Hague Principles can be considered a major contribution to the arbitration world, drawn upon its developments, and destined to bring particular guidance to stakeholders therein regarding complex issues such as the ones related to public policy.

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II. CHILE

The country ratified the New York Convention of 1958, and Chilean Law 19.971 of 2004 is importantly drawn upon the UNCITRAL Model Law of 1985[10].

Article 35, 2), ii, of the Chilean law only admits annulment proceedings against an award when it is contrary to the public policy of Chile[11]. The expression is replicated in Article 36, v, b, ii, which expresses that recognition and enforcement of awards can be denied when contrary to the public policy of Chile.

As will be seen below, this has been interpreted restrictively, in the sense that public policy in international arbitration does not coincide to national or internal public policy, but is limited to fundamental rules and principles of the country.

The following Chilean Court decisions have dealt with public policy[12]:

1) *Publicis Groupe Holdings B.V. v. Árbitro MJV.Rol N° 9134-2007. 04 August 2009. Appeals Court of Santiago (Fourth Chamber)*

The respondent in the arbitral proceedings (*Publicis Groupe Holding B.V. and the Publicis Groupe Investments B.V.*) based its application for setting aside the award, among other arguments, stating that the award rendered by a sole arbitrator contravened the procedural public policy of Chile.

The concrete allegation was that said party never received an expert's report provided by the claimant in the arbitral proceedings.

The Appeals Court of Santiago did not consider the public policy issue directly, since findings revealed that the expert´s report actually was received by the respondent. However, the District Attorney[13] stated (in a position mentioned on the Appeals Court ruling) that the procedural public policy must be interpreted restrictively, limiting the expression only to the fundamental basic rules of the State, in order to avoid enforcing international awards in Chile based only on national public policy[14].

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[10] However, some aspects of the law still remain to be clarified by case law (G. FERNÁNDEZ RUIZ, "Arbitraje Comercial Internacional en Chile", in: A. HIERRO HERNÁNDEZ-MORA / C. CONEJERO ROOS (coords.), *El Arbitraje Comercial Internacional en Iberoamérica – Marco legal y jurisprudencial,* España, LA LEY, grupo Wolters Kluwer, 2012, p. 316.

[11] The pertinent part of the provision states in Spanish: "… el laudo es contrario al orden público de Chile".

[12] The texts of these decisions were kindly provided for this report by Felipe Ossa.

[13] In Spanish "Fiscal Judicial".

[14] In Spanish, literally the District Attorney expressed the following: "…En lo que se refiere a la segunda causal, del artículo 34 N° 2 (b) ii –haber contravenido el orden público chileno permitiendo que el conflicto jurídico sea decidido con infracción a las

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2) *C.A.S. Emex con Eso. 10 April 2014. Appeals Court of Santiago (First Chamber)*

C.A.S. Emex requested the annulment of an award made by two arbitrators in proceedings seated in Chile according to Chilean law.

The Claimant stated that the award was contrary to Chile's public policy, since it established costs and fees of the arbitration proceedings higher than the limit provided by the law.

The Appeals Court referred to public policy as the set of legal norms seeking to protect the general or public interest of a country and that must be complied with mandatorily[15].

Said Court concluded that the regulation relating to the fees and costs of arbitration proceedings can be understood as a matter of public policy if the parties say nothing about it.

However, the parties can also agree on the fees and costs of the proceedings, and in this arbitration, that was the case. Since the parties had agreed on the costs and fees of the proceedings, the Appeals Court rejected the request.

3) *Exequatur.Gold Nutrition y Comercio. 15 September 2008. Supreme Court of Chile (First Chamber).*

Gold Nutrition, a Brazilian firm, requested the Exequatur of an award rendered in Brazil in regard to a purchase distribution and manufacturing of goods contract signed between Gold Nutrition, the buyer, and a Chilean firm, Garden House. The

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garantías del debido proceso, toda vez no se pudo objetar las pruebas-, indica que ésta debe aplicarse en forma restrictiva, limitándose sólo a infracción de normas básicas y fundamentales del Estado chileno; ello con el fin de evitar que se limite la ejecución de Laudos internacionales en Chile mediante la simple invocación del orden público local, razón por la cual dicha causal debe también ser rechazada. El objetivo de la ley 19.971 fue regular en nuestro ordenamiento jurídico de manera específica el arbitraje comercial internacional procurando que la intervención de los Tribunales fuera lo más limitada posible, interviniendo así sólo en aquellos casos establecidos por la ley. En el capítulo VII se regula la impugnación del laudo, contemplándose en el artículo 34 el único recurso permitido, a saber, el de nulidad, cuyo conocimiento se entrega a las Cortes de Apelaciones, y que considera entre otras causales que el laudo sea contrario al orden público nacional, lo que es un claro ejemplo de respeto al ordenamiento jurídico nacional. Tuvo como base la Ley Modelo de la Comisión De las Naciones Unidas para el Derecho Mercantil Internacional conocido con el nombre de Uncitral".

[15] In Spanish, the decisión literally states: "Si se considera el orden público como el conjunto de normas que buscan proteger el interés general o público de un país, siendo su cumplimiento necesario e imperativo, se debe determinar si en cada una de las situaciones que denuncia el recurso estuvo comprometido el mismo, en términos tales que los jueces y el laudo no pudieron ignorarlas y al incurrir en esta falta, debe necesariamente anularse la sentencia dictada."

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conflict was basically that the goods delivered for distribution were not according to the specifications given by the Contract.

The Arbitral Tribunal ruled in favor of Gold Nutrition, and decided that Garden House was obliged to pay an interest of 1% over a 6% interest of the initial amount established in the award.

Garden House affirmed that the provision to pay interest on interest is prohibited by Chilean law and therefore results contrary to Chilean public policy.

However, the Chilean Supreme Court stated that in the case at hand it cannot consider the allegations regarding the award of interests, since this would constitute a revision of the merits of the award.

The Court further expressed that it is not allowed to review the merits of the award neither by the Chilean law nor the New York Convention, ratified by the country.

III. PARAGUAY

Paraguay has an enviable legal framework on arbitration, starting with the Constitution, which allows arbitration and the applicability of international principles and transnational law. This is followed by an extensive set of rules contained in treaties (among them, the New York Convention of 1958) and legislation, including an arbitration law (1879 of 2002) which almost entirely replicates the Model Law proposed by UNCITRAL.

A change with respect to the Model Law was introduced in Section b), of Article 40, stating as cause for annulment, if the tribunal's verification shows that: "according to Paraguayan law the subject of the controversy cannot be subject to arbitration or that the award is contrary to *international public policy* or the *public policy of the Paraguayan State*." This same formula (*international public policy* or *public policy of the Paraguayan State*) is used in Article 46, sub paragraph b) regarding the enforcement of the award in a State that is not the one where it was rendered.

These provisions depart from the Model Law, which only refers to public policy.

This merits an evaluation with regard to the general framework of the Paraguayan legal system, as follows:

It is well known that there are usually two aspects of public policy in the transnational setting. A negative one, which constitutes its application as a

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corrective means to "indirect" or conflict rules in case the emergent solution violates essential postulates of the judging forum. The positive one is represented by "direct" norms in each legal system, which in the first instance does not allow the application of another law different from their own. In this sense, it coincides with mandatory rules.

In Paraguay, an example of a direct or mandatory rule is given by Law 194 of 1993 regarding International Representation, Agency and Distributorship, which states in Article 9 that the parties may exercise their free will in these contracts, subject to the mandatory rules of the Civil Code. Without using the terminology of "mandatory rules" but rather "public policy", the Paraguayan Supreme Court has made this rule prevail over the agreement of the parties *(Acuerdo y Sentencia N° 827 de la Corte Suprema de Justicia, Sala Constitucional, caso* "*Electra Amambay SRL vs. Compañía Antartica Paulista Ind. Brasileira de Bebidas,*" November 12, 2001).

In turn, the Civil Code has other provisions such as the one given by Article 669 that uses the terms mandatory rules (*reglas imperativas*), whereas Article 9 uses other expressions such as "public policy" and "good customs". Article 22 refers to the respect owed to "political institutions" and "moral". Article 299, related to legal acts, also mentions moral and good customs.

All these terms refer indistinctively to the general interest that should prevail over any other contractual stipulation of the parties which require a flexible evaluation to be performed on a case-by-case basis. Therefore, this is the sense given by Paraguayan Law to the expression "public policy."

The scope of the expression "international public policy" introduced in Paraguay by the Arbitration Law 1879 of 2002 is yet to be seen. This expression, public international policy, is today widely used in doctrine and received in the legislation of some countries, but is not present in any normative text of Paraguay, except in the arbitration law.

Conventions ratified by the country, such as the New York Convention (Art.V, 2 b), and the Inter-American Convention (Art. 5.2.b) use the expression public policy, whereas other instruments more recently ratified by Paraguay include the terms, but add the adjective "manifestly" (when referring to contraventions to public policy)[16]. With this, they implicitly accept what is understood as the notion of international public policy.

[16] The Inter-American Convention on Extraterritorial Validity of Foreign Judicial Decisions and Awards, Montevideo (article 2.h); the Inter-American Convention about Letters Rogatory (Article 17), the Protocol on Cooperation and Jurisdictional Assistance in Civil, Commercial, Labor and Administrative matters (Article 17), and the Inter-American Convention on General Rules of Private International Law (Article 4).

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Arbitration has consolidated with the recognition of party autonomy and of a transnational or supranational legal order as a framework, manifested not only through normative instruments of the state of origin, but through usages, customs, and principles, which are many times institutionalized by private or intergovernmental entities. In Paraguay, these even have constitutional status, since the Constitution recognizes a supranational legal order (Art. 145), out of which, in addition to duly ratified international instruments, usages, custom and principles of international law arise. Furthermore, Article 143 of the Constitution states that the country accepts principles of international law such as equality among states, solidarity and international cooperation, etc.

Well, it is precisely from all this that in international transactions, notions such as public policy and the question of mandatory rules in general must be interpreted under a cosmopolitan and not a closed domestic perspective.

The matter has not, however, been dealt with by Paraguayan Courts[17].

Another issue, related to public policy, has reached the Supreme Court of Paraguay in regards to the scope of Law 194 of 1993 on Agency, Representation and Distributorship.

Here, the matter relating court jurisdiction and arbitration has been very controversial. One question widely discussed in the application of Law 194 is the obligation to submit controversies to the jurisdiction of Paraguayan tribunals (Article 10). In its *Acuerdo y Sentencia* Number 827 of 2001, the Supreme Court held that Article 10: "constitutes a guarantee for the parties so that the matter at stake can be discussed in the place of performance of the contract. Nothing more logical or fair... the State, through this law, intervenes in the relationship by establishing clear rules to which the parties shall adhere."

Article 10 also allows arbitration (and another discussion was held regarding whether it could be conducted in a foreign country) with the possibility that arbitrators might not apply Paraguayan law.

The matter was settled by *Acuerdo y Sentencia* 285 of 2006 in the case: "*Acción de Inconstitucionalidad en el juicio: Gunder ICSA c/KIA Motors Corporation s/ indemnización de daños y perjuicios*".[18]

The Supreme Court did not deny that these issues could be submitted to arbitration, but states in its decision that given the mandatory character of Law

[17] The author of this report has expressed his position, in accordance with what is stated above, in several contributions, such as, for instance, in his Paraguay report for the WAR Arbitration Reporter, Loukas Mistelis and Laurence Shore, Editors, Second Edition, Juris, 2010 and updates.
[18] The case started in 2004 – No. 3804.

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194, arbitration should be conducted in Paraguay[19]. This has the obvious objective of allowing a possible later scrutiny by the local Supreme Court regarding whether the award observes the mandatory Paraguayan law.

The *Gunder* case has an additional important factor: the express provision made by the parties that the appointed arbitrators should apply Korean law. With this, there was an obvious attempt to fraudulently evade the mandatory applicable law. The Paraguayan Supreme Court did not admit this[20].

IV. Paraguay - MERCOSUR

At a regional level of the South American Common Market (MERCOSUR), controversy related the Paraguayan Agency, Representation and Distributorship Law was submitted to the MERCOSUR Permanent Revision Tribunal.

The matter was about Court jurisdiction and not arbitration. However, it regarded a MERCOSUR convention which is also applicable to arbitration according to its Article 4 (Buenos Aires Protocol on International Jurisdiction

[19] In Spanish, the Supreme Court literally states the following: "…Además, cuando dicha ley expresamente consagra el principio de libertad contractual, imponiendo como limite la imposibilidad e renunciar a los derechos reconocidos por ella, está evidenciando el carácter de norma de orden público. Esta calidad priva a las partes de modificar o dejar sin efecto lo expresamente dispuesto en ella y en tal sentido la competencia ha sido determinada a favor de los Tribunales de la República. Como ya hemos dicho, es cierto que la ley reconoce la posibilidad de que las partes puedan transigir o someter toda cuestión de origen patrimonial al arbitraje, pero ello no implica que el mismo sea realizado fuera de la jurisdicción territorial de la República. Cabe mencionar igualmente que esta Corte en el Acuerdo y Sentencia N° 827 del 12 de noviembre de 2001 con respecto a la ley 194/93 ha sostenido. "…No es verdad que exista una violación a la jurisdicción cuando el art. 10 de la ley 194/93 establece la obligatoriedad de la competencia de los Tribunales Ordinarios de la ciudad de Asunción. Esta norma constituye una garantía para las partes a fin de que la cuestión que se suscitare se pueda discutir en el lugar de la ejecución del contrato. Nada más lógico y justo… el Estado al promulgar esta ley interviene en esta relación señalando reglas precisas a las cuales deben ajustarse las partes…".

[20] In relation to jurisdiction and, specifically, arbitration, precedents in Belgium are along the same lines as what was decided by the Paraguayan Supreme Court (*Decisions No. JC04AF2 of 2004* and *No.JC06BG5_1 of 2006*). It is known that this European country has liberal views towards arbitration. However, this openness does not exist with regard to distribution contracts, because the Belgium law of 1961 presumes –as does the Paraguayan law – that the distributor does not exercise free will due to his particular disadvantageous bargaining position. Consequently, the prevailing interpretation is to allow for arbitration "as long as the arbitrator applies Belgium law". This was decided in the Belgium *Cour de Cassation* in an important decision rendered in 2004. The Court stated that if the arbitration clause submits these types of disputes to a foreign law, the Belgium judicial authority can exclude the possibility of arbitration when permitting it would be a violation of its law and legal order. This was confirmed in a 2006 decision.

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Regarding Contracts - Decision CMC 1 of 1994.)

In the Consultative Opinion (*Opinión Consultiva*) Number 1 of 2007, the prevailing position of said Tribunal expressed that imperative norms correspond to two orders of interests to be safeguarded. On one hand the so-called public policy of direction, that is, the power that the State has to intervene in matters affecting its sovereignty or economic authority, such as for instance with regulations regarding currency or antitrust. And on the other hand the public policy of protection, that each State establishes and normally regulates to safeguard the rights of weak parties in contractual relationships, such as consumers. This protection is established in the understanding that there are situations where contracting is not a result of the free will but of other factors. In the end, it depends on each State the scope of its public policy of direction or protection as exceptional limits to party autonomy. The concrete abuses or violations to rules or principles of mandatory nature will be in the end subject of judgment of the intervening national Court[21].

V. Peru

Peru has a liberal and forward-looking Arbitration Law of 2008 (approved by Legislative Decree 1071)[22], which taked into account the amendments to the 2006 UNCITRAL Model Law and other recent developments and regulations[23].

Regarding public policy, the new legislation states that in international arbitrations awards may be annulled (Article 63) or denied recognition (Art 75, 3, b) when contrary to international public policy[24].

[21] "Las normas imperativas corresponden fundamentalmente a dos órdenes de intereses que se pretenden resguardar. Por un lado, el llamado orden público de dirección, es decir, la potestad que tiene el Estado de intervenir en cuestiones que afecten su soberanía o accionar económico, como ocurre con regulaciones relativas a la moneda o a defensa de la competencia, por citar ejemplos. Y, por otro lado, el llamado orden público de protección, que cada Estado lo establece y regula normalmente para salvaguardar derechos de partes débiles en la contratación, como por ejemplo los consumidores. Esta protección se establece en el entendimiento de que hay supuestos en que la contratación no es fruto de la libre voluntad sino de otros factores… En definitiva, depende de cada Estado el alcance de su orden público de dirección o protección como límites excepcionales a la autonomía de la voluntad".

[22] See F. CANTUARIAS SALAVERRY/R.J. CAIVANO, "La Nueva Ley de Arbitraje Peruana: Un nuevo salto a la modernidad", *Revista Peruana de Arbitraje*, No. 7, Lima, 2008, pp. 43-84.

[23] F. MANTILLA-SERRANO, "Breves comentarios sobre la nueva Ley Peruana de Arbitraje", in http://limaarbitration.net/LAR4/Fernando_Mantilla-Serrano.pdf,p. 39.

[24] In Spanish: "…si el laudo es contrario al orden público internacional".

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Recently, the Superior Court of Lima referred to the notion in a dispute regarding a purchase contract containing submission to arbitration to the London Court of International Arbitration (LCIA)[25].

This in the case *"Stemcor UK Limited v. Guiceve SAS". 28 April 2011. Superior Court of Lima (First Commercial Chamber).*

Once the arbitration began, Guiceve SAC did not submit the claim within the time provided for it by the applicable procedural rules. Accordingly, the sole arbitrator issued an award ordering Guiceve SAC to pay arbitration costs.

Stemcor UK Limited requested the award on costs to be recognized by Peruvian courts. The First Commercial Chamber of the Superior Court of Lima ordered its recognition on April 28, 2011.

The Court's ruling relies on substantive provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, while conducting the recognition procedure pursuant to the Peruvian Arbitration Act from 2008.

The Court made a reference to Article V.2.a of the New York Convention. The Court stated that the general principle is that disputes over which the parties can dispose freely could be submitted to arbitration; therefore, the mentioned exception should be interpreted in a restrictive way, and in case of doubt should be decided in favor of arbitrability.

With regard to the public policy ground (Article V.2.b of the New York Convention), the Court contended that the international public policy should be defined restrictively as a group of principles and institutions that are considered essential in the organization of a State and inspire its legal system[26].

[25] This information has been kindly provided for this report by Fernando Cantuarias Salaverry.

[26] The pertinent part of the decision states, in Spanish, the following: "... El orden público se define ordinariamente como un conjunto de principios e instituciones que se consideran fundamentales en la organización social de un país y que inspiran su ordenamiento jurídico; de acuerdo a ello, esta causal sería amparable si el Laudo contraviniera los principios esenciales que inspiran nuestro sistema jurídico nacional, lo cual no sucede en el presente caso, donde el mismo Laudo se advierte que se han garantizado en el proceso arbitral los principios, derechos y garantías consagrados constitucionalmente que le asisten a las partes del mismo, advirtiéndose además que ha sido emitido conforme a nuestras normas imperativas así como los tratados, principios, usos y costumbres internacionales que son fuente del derecho internacional".

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VI. Venezuela

Venezuela ratified the New York Convention and has an Arbitration Law of 1998 inspired in the UNCITRAL Model Law of 1985[27].

Article 44, f, of the Venezuelan Arbitration law admits the declaration of annulment of an arbitral award when contrary to public policy[28].

The matter was considered by a Venezuelan Appeals Court in the case *"Gabriel Castillo Bozo v. Adolfo E. Jiménez"* of 22 April 2013[29].

In this case the award was rendered in Miami.

The proceedings regarded a contractual controversy between a number of Venezuelan citizens in relation to the transfer of shares of certain Venezuelan financial and insurance entities. The laws of Florida were applicable to the matter.

The Venezuelan Court considered that there was a violation of domestic public policy rules aimed at the protection of the interests of the Venezuelan State. This because the arbitral tribunal ignored Venezuelan mandatory rules on governmental authorizations for the transfer of certain types of shares, which the parties did not obtain, and this authorization was considered a matter of public policy in the view of the Venezuelan Court

The Court stated that domestic public policy was a limitation imposed on any arbitral tribunal, whether domestic or international. It further stated that an international arbitration award cannot result in fraud of the Venezuelan legal system and a violation of a series of constitutional guarantees.

[27] C. VALEDÓN H. / F. ROLAND MATTHIES, *El Arbitraje en Venezuela, Estudios con Motivo de los 15 Años de la Ley de Arbitraje Comercial*, Sabias Palabras C.A., Caracas, 2013.

[28] In Spanish, the text expresses: "…la materia sobre la cual versa es contraria al orden público".

[29] First Superior Court on Civil, Commercial, Transit and Banking Affairs of the Judicial Circuit of the Metropolitan Area of Caracas. The award was kindly provided by Eugenio Hernández-Bretón, and is included in his report related to Venezuela presented to the International Academy of Comparative Law in 2014.

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Therefore, the Court concluded that the award was notoriously contrary to the Venezuelan constitutional public policy[30].

[30]Among other considerations, the Court literally stated in Spanish: "…tal y como lo señala la doctrina especializada, al examinar los límites de la autonomía de la voluntad en materia arbitral frente al orden público, se ha sostenido: "La voluntad encuentra, sin embargo, un límite en el orden público. Así entendido, parece que en este estado del arbitraje actúa el orden público interno, lo cual impide que una controversia determinada sea susceptible de ser sustraída a la jurisdicción ordinaria para ser sometida a la decisión de los árbitros o, en otras palabras, provoca que la controversia no sea arbitrable. Arbitrabilidad refiere, en opinión de Bucher, la aptitud de una causa para constituirse en objeto de un arbitraje (Bucher, 1988: 37). Conclusión lógica resulta entonces que un litigio no arbitrable ha de resolverse necesariamente ante la jurisdicción ordinaria" (C. MADRID MARTÍNEZ, "El rol del orden público en el arbitraje comercial internacional", in *Revista de la Facultad de Ciencias Políticas y Sociales* No. 126, UCV, Caracas, 2006, p. 83)". The Court further expressed: "…Ignorar eso las partes de un contrato, y sujetar a arbitraje, para más internacional, futuras controversias que sólo pueden resolverse aplicando esas normas de orden público interno, sí que llevaría, pero por causa atribuible no al Juez interno respetuoso del orden público interno, sino a las partes y al Tribunal Arbitral que se haga eco de la vulneración, a afectar la institución del arbitraje, por intentar burlar mediante un acuerdo de voluntades viciado en este sentido, la jurisdicción del Estado cuyo Derecho rige la relación jurídica, y cuyos Tribunales, por lo tanto, tienen la obligación y el deber irrenunciable, de impedir que tal burla se concretice, mediante el restablecimiento o prohibición según el caso, de órdenes violatorias del orden público interno, con base en lo previsto en la ley adjetiva civil: "La jurisdicción que corresponde a los tribunales venezolanos, según las disposiciones anteriores, no podrá ser derogada convencionalmente en favor de tribunales extranjeros, o de árbitros que resuelvan en el extranjero, en aquellos casos en que el asunto se refiera a controversias relativas a derechos reales sobre bienes inmuebles situados en el territorio de la República, o se trate de materias respecto de las cuales no cabe transacción o que afecten los principios esenciales del orden público venezolano"… "Debe insistir esta Juzgadora en que no se trata de entrar a examinar el fondo del laudo para verificar y corregir la aplicación de las normas jurídicas, lo cual está impedido a la jurisdicción estatal conforme los principios del arbitraje comercial. Se trata de una consideración del resultado que presenta el laudo, frente a las normas imperativas y principios fundamentales del Derecho venezolano. Autorizada doctrina española advierte al respecto que "el test de orden público no es un test de compatibilidad teórica, sino de compatibilidad del resultado a la luz del contenido concreto de la decisión extranjera y de la valoración que los tribunales hagan de los principios y decisiones legislativas en juego" (M. VIRGÓS SORIANO and others, *Derecho Procesal Civil Internacional - Litigación Internacional*. Editorial Thomson-Civitas, Madrid, 2007, p.780)".