Abstract

This dissertation examines the tension between globalization and local legal contexts by reference to the interpretation in Mexico of the public policy exception in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Globalization has promoted convergence of legal norms and institutions that materialize in international conventions and organizations to facilitate trade. This has forced states to adopt global standards and reform their legal systems to effectively participate in the global trade arena. However, the effects of these dynamics on local legal systems are often disregarded or not considered.

This dissertation demonstrates that the interpretation and implementation in Mexico of the public policy exception under the New York Convention reflect the impact of local legal arrangements on globalized standards. Additionally, it reveals that a pluralistic approach to this exception advances a more inclusive perspective for the implementation of globalized standards while at the same time offering certainty. A pluralistic approach to the public policy exception creates a space to acknowledge and honor the diversity of legal systems coexisting globally and legitimizes local approaches to public policy. Accordingly, local legal systems do not need to import foreign definitions but can define their interpretation of public policy from within by using their local elements.

Using historical, doctrinal, documentary, and qualitative analyses, this study examines the development of international standards, by reference to the public policy exception, and Mexico as an example of a local legal context. For examining local contexts, this study suggests the use of four factors—language, legal tradition, legal context, and legal culture—to understand the local approach to public policy in combination with relevant local elements. In the case of Mexico, the relevant elements examined are legislation, scholarship, court precedents, cases, and the perspective of local legal actors. These factors and elements are used to suggest components to establish a guideline for the interpretation and implementation of the public policy exception in Mexico.
Lay Summary

This dissertation examines how the local legal context of a country affects the implementation of international rules established in international treaties or conventions. It explains this tension using the interpretation and implementation in Mexico of the public policy exception established in the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards. The exception of public policy protects the fundamental principles of a legal system. Instead of importing definitions from other legal systems or from international documents, this study suggests that each country’s interpretation of the concept ‘public policy’ should be equally recognized. This study suggests using four factors (language, legal tradition, legal context, and legal culture) and relevant elements of the local legal context (legislation, legal literature, decisions from the courts and the opinion of local legal actors) as a framework that countries can use to establish their local definition of public policy.
Preface

This dissertation is an original intellectual product of the author, Erika M. Cedillo Corral.

The list of court precedents was created using a public database from the Mexican Supreme Court of Justice, the Federal Judicial Weekly (Semanario Judicial de la Federación). The classification and analysis are an original work of the author.

The interviews reported in different parts of this dissertation were conducted with the approval of the UBC Behavioural Research Ethics Board. The certificate No. H12-00340 was issued on April 2, 2012.

The data obtained from the interviews done for this project was used for the following publication:
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<th>Full Form</th>
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<tbody>
<tr>
<td>BCP</td>
<td>Binding court precedent</td>
</tr>
<tr>
<td>CONDUSEF</td>
<td>National Commission for the Protection and Defense of Users of Financial Services</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
</tr>
<tr>
<td>UN ECOSOC</td>
<td>United Nations Economic and Social Council</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>FECC</td>
<td>Federal Economic Competition Commission</td>
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<tr>
<td>ILA</td>
<td>International Law Association</td>
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<tr>
<td>NBCP</td>
<td>Non-binding court precedent</td>
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<tr>
<td>NYC</td>
<td>New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>UNCITRAL Model Law</td>
<td>UNCITRAL Model Law on International Commercial Arbitration</td>
</tr>
<tr>
<td>US</td>
<td>United States of America</td>
</tr>
<tr>
<td>SCJN</td>
<td>Supreme Court of Justice of the Nation – Mexican Supreme Court</td>
</tr>
<tr>
<td>TCC</td>
<td>Collegiate Circuit Courts</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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Glossary

Administrative nullity trial  Procedure to contest the validity of an administrative act, such as the administrative rescission, before the Federal Tribunal for Administrative Justice.¹

Amparo  Mexican constitutional trial for the protection of human rights as established in the Mexican Constitution and in the international treaties subscribed by Mexico.² Literally, the word means ‘protection’.

Binding court precedent (jurisprudencia)  Mandatory interpretive criteria established by a Mexican court authorized to do so (Supreme Court of Justice, collegiate circuit courts, plenary circuit courts).³

Complainant  The person who claims to be the owner of a subjective right or a legitimate individual or collective interest, provided that he alleges that the claimed norm, act, or omission violates the rights provided for in Article 1 of the Amparo Law and thereby makes a real and actual impact on his legal sphere, either directly or by virtue of his special situation vis-à-vis the legal order.⁴

Contested act  The act that the complainant attributes to the responsible authority in an amparo trial as violating his human rights.

Contradiction  Decision from the Mexican Supreme Court of Justice or collegiate circuit courts which settles the contradiction found between divergent court precedents.⁵

Direct amparo  Challenges the judgements, awards, or decisions ending a trial before judicial, administrative, agrarian, or labour courts; whether the violation is committed in the final decision or during the proceedings, it affects the defenses of the complainant transcending the result of the judgement.⁶

³ Amparo Law, Articles 215 to 230.
⁴ Amparo Law, Article 5, section I.
⁵ Amparo Law, Article 225.
⁶ Amparo Law, Articles 170-174.
| **Indirect amparo** | Challenges any other act of authority that is not the final decision in a trial, such as, general norms that affect the complainant by entering into force or with its first application; acts or omissions of authorities different from judicial, administrative or labour courts; acts, omissions, or resolutions of an administrative procedure; acts issued as part of a trial whose effects are impossible to repair; among others.\(^7\) |
| **Judicial review in amparo** | Action by which a complainant or an authority challenge the court decision in an amparo. Depending on the type of amparo and the decision, the judicial review is decided either by the Collegiate Circuit Courts or the Supreme Court of Justice (in chambers or in plenary).\(^8\) |
| **New Amparo Law** | Colloquial way to refer to the Amparo Law after its substantial amendment in 2013 to differentiate it from its previous version, given that it retains the same name. |
| **Non-binding court precedent (tesis aislada)** | Single interpretive criteria established by a Mexican court authorized to do so—Supreme Court of Justice or collegiate circuit courts. It is not mandatory but has a guiding character.\(^9\) |
| **Responsible authority** | Authority that dictates, orders, executes or tries to execute an act which creates, modifies, or extinguishes legal situations unilaterally and mandatory; or the authority that omits to perform the act that would create, modify or extinguish those legal situations.\(^10\) |
| **Suspension in amparo** | Request made to the court to stay the effects of the contested act, either provisionally or definitively. The purpose of a suspension in an amparo trial is to prevent the contested act to take its full effects. The ‘provisional suspension’ preserves the act until the court decides if the definitive suspension is granted or not. The ‘definitive suspension’ preserves the contested act until the court renders its final decision on the amparo.\(^11\) |

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\(^7\) Amparo Law, Articles 107-111.


\(^9\) Amparo Law, Articles 222-224.

\(^10\) Amparo Law, Article 5, section II.

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Chapter 1: Introduction

This dissertation examines the tension between globalization and local legal contexts by reference to the interpretation in Mexico of the public policy exception in the New York Convention on the Recognition and Enforcement of Arbitral Awards. The dynamics of institutional convergence and the establishment of international standards to facilitate trade continue progressing in a highly interdependent world. Trade continues to be the principal activity requiring the use of standards to improve and facilitate practices. Globalization, understood as the closer integration of the countries and peoples of the world and as a multidimensional phenomenon -economic, environmental, political, and cultural- has facilitated and advanced trade. It has also advanced convergence of legal norms and institutions that materialize in international conventions and organizations. This has forced states to adopt global standards and reform their legal systems to effectively participate in the global trade arena. However, the effects of these dynamics on local legal systems and their practices are often disregarded or not considered. Arbitration is the mechanism widely used to solve commercial disputes. The public policy exception to the enforcement of foreign arbitral awards provides an opportunity for examining convergence and pluralism in the implementation of trade standards in diverse local contexts.

This dissertation advances that the interpretation and implementation in Mexico of the public policy exception under the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards reflect the impact of local legal arrangements on the implementation of globalized standards. Additionally, it demonstrates that a pluralistic approach to this exception advances a more inclusive perspective for the implementation of globalized standards while at the same time offering certainty.

In 1958, the New York Convention was created to facilitate the recognition and enforcement of arbitral awards made outside of the territory where enforcement is requested or

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4 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 38, (entered into force 7 June 1959) [New York Convention or NYC, hereinafter].
are not considered as domestic awards in the state where enforcement is requested. This convention enhanced the conclusion of commercial disputes solved by arbitration by facilitating the enforcement of awards in cases when one of the parties did not voluntarily complied with the award. The contracting states of the Convention agreed to recognize awards as binding and enforce them in accordance to their rules of procedure. The New York Convention created a set of common norms that up to now has been adopted by 157 parties around the world and is recognized as one of the most successful international agreements. The Convention establishes the requirements to present an award for recognition and enforcement as well as certain exceptions in which local courts can refuse it. In its Article V 2. b), the Convention establishes the public policy exception according to which the recognition and enforcement of a foreign arbitral award can be denied if the arbitral award violates the public policy of the requested state.\(^5\) There exists a debate as to whether establishing a more universal interpretation of public policy for the operation of this clause would be preferred for enhancing the system that the Convention has created. In this study, I argue that giving space for local understandings of public policy to be acknowledged and accepted is desirable and more adequate because it gives recognition to the plurality of legal systems and, by defining the meaning of public policy from within, local legal systems can also provide the certainty expected in the international arbitration arena.

This dissertation identifies that there is a tension between the expectations of globalization and legal convergence, exemplified by the New York Convention, and the local conditions where the Convention is implemented. The interpretation and implementation of the public policy exception is a space where this tension manifests as global standards are adapted and affected by local settings. On one side are the international expectations of how the public policy exception should be interpreted according to proposed standards, while on the other is the way in which local courts interpret and apply it. Using Mexico as an example, this study evidences how the tensions play out in a local setting where interpretive communities apply the public policy exception, and how the local legal arrangements –understood as the legal framework, culture, and practices– influence its application. Thus, the research question that leads this dissertation asks how is ‘public policy’ interpreted and applied in the Mexican legal

\(^5\) For the full text of Article V of the New York Convention see Appendix 1.
field when the public policy exception, as established in the New York Convention, is opposed against the recognition and enforcement of a foreign arbitral award?

The public policy exception has been a point of concern and debate within the arbitration community at different points in time. Among the efforts to establish harmonized approaches to this exception, the 2002 International Law Association (ILA) Resolution on Public Policy stands out and suggests how local courts should understand and apply the public policy exception.6 The trend has been moving towards increased convergence and even concepts like ‘international’ and ‘transnational’ public policy have been suggested. However, when the public policy exception was incorporated into the New York Convention it was meant to be a space that allowed recognition of the fundamental principles of each state. Thus, it is necessary to bring attention back to the original purpose that it serves.

The relevance of the interpretation and implementation of the public policy exception in any given jurisdiction lies in the idea that it can affect the position of a country as an arbitration-friendly jurisdiction which also affects its attractiveness as trade partner or destination of foreign investment because trade actors rely on arbitration for the effective resolution of their disputes. Trade actors expect certainty in the interpretation and implementation of this exception. The approach of the local courts to the public policy exception can increase the ‘risk level’ of a jurisdiction for trade and business purposes because if the courts interpret public policy in ‘unexpected’ ways, trade actors could be left a drift for the enforcement of an arbitral award.

To better understand local approaches to the public policy exception, this dissertation proposes the use of four factors for contextualizing public policy—language, legal tradition, legal context and legal culture—along with the analysis of several local elements—scholarship, legal framework, judicial practice, and the experience of local legal actors. The proposed four factors bring attention to matters that differentiate legal systems which are often overlooked because their understanding is assumed, but they significantly influence the local approach to the concept of public policy.

The public policy exception was created as a mechanism within the New York Convention to protect the fundamental principles of the enforcement country. This dissertation also advances that to stay truthful to its purpose, the public policy exception needs to be

understood as a pluralistic space where local perspectives on public policy are accounted for, valued, and respected.

The supporters of convergence suggest harmonizing the interpretation and application of the public policy exception as the most effective way to secure certainty and to underpin the arbitration system on this topic. While certainty on the implementation of the public policy exception in each state is needed, it is not conditional to having a universal interpretation of it. Pursuant to the spirit of the New York Convention, the intentions of their drafters and signatory states, and the general interpretation of the text, public policy should be understood as that of the state where recognition and enforcement is requested, therefore the meaning is given by each state. If according to its objective the public policy exception should serve to protect the fundamental principles of a country, then it is necessary to acknowledge the diversity implied in it, consider that its meaning will vary accordingly in each state, and recognize the legitimacy of each interpretation. This is referred to in this study as a ‘pluralistic approach’ to the public policy exception. The drafters of the New York Convention were a group with quite homogeneous ideas about their expectations for this agreement, thus the creation of a ‘safety valve’ within this context was considered reasonable. Nevertheless, they could not have foreseen how its application was going to evolve to the point in which developing countries would be using this exception to resist convergence and transnational ideas. The original intention of the incorporation of the public policy exception is to bring forward the plurality of legal systems and to consider it as a space to account for the diversity of perspectives, including those from

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10 See Anton G. Maurer, *The Public Policy Exception under the New York Convention. History, Interpretation and Application* (New York: JurisNet, 2013) at Chapter 6 where he analyzes jurisdictions that have caused unrest regarding this topic like Brazil, Russia, India, and China. Also see infra Chapter 3 section 3.4 Challenges in the implementation of the public policy exception.
countries considered to be ‘in the periphery.’ A pluralistic approach, that maintains certainty as a fundamental goal, would contribute to the efficiency of the arbitration system, while staying true to the purpose that the exception serves.

Certainty about the local implementation of the public policy exception could be strengthened if states clarify how they are interpreting ‘public policy’ for the purposes of this exception. This dissertation suggests that states need to define ‘public policy’ by approaching the concept from within, using their own legal history and framework, instead of importing or adopting models from abroad. Legal transplants, the moving of a rule from one country to the other,11 have been used to advance the globalization of western legal forms.12 ‘Legal aid’ or ‘development’ programs were promoted since the 1970s by the United States to establish the rule of law in ‘less developed’ countries. The critical assessment of these programs has evidenced their failure due, in great part, to their disconnection from local contexts.13 Therefore, by defining their approach to public policy using their local elements, each state can claim in its own terms which are its most important values and principles enclosed in the term ‘public policy’. This can offer the desired certainty to support the efficiency of the international arbitration system. The findings from Mexico’s case study reveal the impact of local contexts in the implementation of the public policy exception and suggest a way in which a legal system can use the elements of its own legal framework and context – such as its legal scholarship, legislation, court precedents, and the perspective of local legal actors - to define what public policy is.

Mexico as a case study reveals the relationship between pressures of globalization and legal convergence, and the resiliency of local legal arrangements. Mexico has been keeping pace of international developments on arbitration by incorporating the UNCITRAL Model Law on International Commercial Arbitration, signing the New York Convention, updating its national legal framework, and encouraging a judicial practice that has been recognized – and often

1 Alan Watson, Legal Transplants, 2nd ed. (Atlanta: University of Georgia Press, 1993).
praised— as favorable to arbitration. However, certain cases, like COMMISA Case, reveal the struggles that local interpretive communities in Mexico face when international standards encounter more particular ideas and values of the local legal culture and system.

In 2014, COMMISA Case brought renewed attention to problems faced by local actors with the interpretation of the public policy exception and serves to illustrate the tension exposed in this study.¹⁴ This case involved an arbitral award that was nullified in Mexican courts on public policy grounds and was recognized and enforced also on public policy grounds in the courts of the United States. COMMISA, a Mexican subsidiary of a US company, had contracts for the construction of offshore oil platforms with PEMEX – Exploración y Producción (PEP), a subsidiary of PEMEX, the Mexican state-owned petroleum company. In 2011, Mexican courts nullified an award issued in favor of COMMISA due to violations of Mexican public policy because it decided on an non-arbitrable matter, the administrative rescission, and because administrative contracts involve very delicate decisions that cannot be decided by arbitral tribunals. The administrative rescission is the early termination of an administrative contract for the breach of obligations from the private company (the contractor). In the Mexican context, administrative contracts are a sensible topic since they involve the government, the use of public funds, and the public interest since these contracts are meant to satisfy public purposes. Additionally, this case involved petroleum which is an strategic area of the Mexican economy and, as per established in the Mexican Constitution, it is ‘property of the Nation.’ After these result in Mexican courts, COMMISA requested the recognition and enforcement of the arbitral award before the courts of the United States who in 2016 granted it in favor of COMMISA on the grounds that the decision from Mexican courts violated US basic notions of justice.

The way in which Mexican courts applied the public policy exception was cause for concern for the arbitration community, at the national and international levels. Even though one case should not be considered as a generalization of national practices, this case provides opportunities for insight and analysis on the international debate over how ‘public policy’ should be interpreted by national courts, pursuant to the New York Convention. This case also serves to emphasize the importance for Mexico to develop guidelines for the interpretation of the public exceptions.

¹⁴ See infra Chapter 5 section 5.5 COMMISA Case.
policy exception in terms that are aligned with its legal system and provide certainty for other international actors.

The answer to the question leading this study is that Mexican courts interpret public order first and foremost within the context of amparo trial, according to which public order is the maximum expression of the social interest and prioritizes the collective good of society over individual interests. According to the interpretations of the Supreme Court, judges must keep in mind the harmonic development of the community when analyzing cases that affect public order. In the past fifteen years, some federal courts have brought attention to public order within contractual relationships, specifically to address cases involving arbitration, and explain it as a limit to party autonomy to protect Mexico’s most important principles. There is consensus that it should be strictly interpreted to protect only the ‘most expensive’ principles of the Mexican legal system. The interpretation of public order in Mexico is contained within the national context without direct consideration of international trends.

Consequently, the analysis of the four factors in the Mexican context and its specific local elements reveal that local legal arrangements impact the implementation of globalized standards, i.e. the New York Convention and the public policy exception, because these standards were developed at the international level and are not implemented locally following the frameworks declared in the international instruments or their later interpretations. Local legal systems apply the concepts using their local framework. Public policy is a local concept and its meaning depends on the legal system and society that it protects, hence, the proposal of applying a pluralistic approach to the public policy exception to advance a more inclusive perspective. This entails, first, to truly acknowledge the plurality of legal systems and their legitimacy to define core concepts like public policy. If local interpretations are recognized, and if local legal systems provide the guidelines according to which public policy is interpreted in their legal system, then, the plurality is recognized and legitimized, certainty is provided, and the effectiveness of the arbitration system can be enhanced.

1.1 Researcher position

In using Mexico as a case study in this dissertation, it is important to disclose my position as researcher. I am Mexican and obtained my law degree in Mexico, thus I have a personal connection to the country I am using in this study. The Mexican legal system is the basis of my
own legal education and the results of this dissertation are also intended to contribute and enhance it. It has been conceded now that it is difficult to assert that research can be objective because the researcher’s own perspective –i.e. the background, personal connections with the topic, assumptions, and stand on the topic– plays a role in deciding how the research is designed and developed. In this case, my previous knowledge of the Mexican legal system gave me the advantage of understanding its elements for choosing the sources of data. At the same time, my position could be considered a bias for being an insider. However, the fact that I am doing this research from outside of Mexico and that I am confronting my own knowledge of the Mexican legal system with the perspectives that I have explored by being in Canada, has enriched my perspective and allowed me to think more critically of the Mexican legal system and of the international dynamics involved.

My position as both, an outsider and an insider, has benefited the design, development, and analysis of this project. The contrast created with studying outside of Mexico enabled me to appreciate strengths and challenges of the Mexican legal system and put them into perspective. It led me to recognize that the local discourse and the culture I was embedded in was highly influenced by the developmental discourse in which bringing legal institutions and models from abroad by doing legal transplants was, in many instances, the default way to solve some –if not most– of the challenges faced by the local legal system. As I identified how the developmental discourse had impacted the local context, I decided it was necessary to take a different approach to offer solutions to the challenges faced in the interpretation and application of the public policy exception. This led me to inquire into options to bring a pluralistic perspective to the interpretation and application of the public policy exception, which led in the direction of looking within a local legal system rather than abroad.

1.2 Organization of chapters

International instruments like the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration are tools of convergence in that they have created common rules for states on two important areas, the recognition and enforcement of foreign

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arbitral awards and by offering a model to follow for the drafting of national arbitration laws. The New York Convention includes the public policy exception as an avenue for each legal system to uphold their fundamental principles when an arbitral award goes against them. These international instruments do not provide a definition of what should be understood by public policy; it is somewhat expected that its interpretation would vary across different jurisdictions, given its nature as a dynamic and culturally dependent concept. In the interest of convergence, there have been attempts to suggest a uniform interpretation of the public policy exception. The interpretation and application of the public policy exception is thus, a site of contestation where global standards and local approaches intersect.

In order to answer the main research question of this project, I start this dissertation by examining the side of the tension in which globalization and legal convergence set global standards, exemplified here by the New York Convention. Using a historical and doctrinal analysis I present ways in which globalization of legal forms has been advanced, the reality of diversity it has encountered, and the responses that have challenged it. Throughout Chapter 2, I introduce theoretical frameworks that are useful to examine the tension that this dissertation explores. I bring special attention to programs created under the Law & Development discourse and the use of legal transplants as a tool to bring ‘development’ to ‘less developed’ countries as part of the strategies of legal aid programs, which assert that legal concepts can be transplanted and successfully implemented in other legal systems. By understanding law as a social phenomenon, I present a theoretical framework which recognizes the US American liberal legalist paradigm from the ‘development decades’ as problematic and opens the perspective to approaches that have challenged this view. The realities of diversity, explored here through studies assessing development projects and the use of concepts like legal field and legal culture, lead the way to introduce responses that have been more engaged with diversity. In these responses, the work of Robert Cover and Paul Berman laid a foundation to explore Third World Approaches to International Law (TWAIL), Subaltern Studies, and Legal Pluralism, which are examples of resistance to the globalization of Western ideas of law and the continued efforts for convergence. These perspectives serve to understand the idea of avoiding another legal transplant that suggests a definition of public policy for Mexico, to consider instead Legal Pluralism as a more adequate response to the tension exposed here, and, thus, to support the idea of making an analysis which engages with the specific characteristics of the Mexican legal field.
With this context, I introduce four factors to understand local approaches to public policy: language, legal tradition, legal context, and legal culture. These factors, which I later apply to Mexico, serve to bring attention to distinctions among legal systems that are generally overlooked.

Through a historical and doctrinal analysis of the origins and purpose of the public policy exception in Chapter 3, I bring forward the original objectives that led to its incorporation into the New York Convention. These analyses expose the importance of recognizing that public policy is a concept whose content is expected to be filled by each jurisdiction. In this chapter I present reasons why this exception has been problematic for the international arbitration system, and the efforts of convergence to advance a uniform and narrow interpretation, as manifested in the Resolution of the International Law Association on this matter. Additionally, I introduce diverse approaches to public policy in the literature, which have also led to the creation of new ‘levels of public policy’ with the introduction of concepts like ‘international public policy’ and ‘transnational public policy’ to the framework. The complexity of the concept of public policy and the diversity of approaches in national legislations and practices have caused tensions within the international community and the international arbitration system. Using the analysis of the creation and development of the public policy exception and considering the resisting perspectives explored before, I conclude Chapter 3 by examining the feasibility of a pluralistic approach to the public policy exception.

The tension between global standards and local approaches is then tested in the Mexican legal context, specifically in its interpretation and application of the public policy exception for the recognition and enforcement of foreign arbitral awards. Coming from a perspective of understanding the local context in its own terms, I introduce Mexico in Chapter 4 using a historical and doctrinal analysis. I start by providing further details about two important characteristics of the Mexican legal system fundamental for this study: its court precedents system and amparo. Then I move to other relevant general aspects like the development of Mexico’s trade policies, the local development and practice of arbitration, and the local procedure for the recognition and enforcement of a foreign arbitral award. The four factors of language, legal tradition, legal context, and legal culture introduced in Chapter 2 are directly analyzed in the Mexican context to understand the local approach to public policy and how these factors function locally. The significance put on language for the purposes of understanding the
local context, along with the differentiation between civil and common law legal traditions derived from the analysis of the four factors, led me to shift the terminology to ‘public order’ for the rest of this dissertation. This change allows me to make the analysis and explain Mexico’s context in terms aligned with its specific characteristics.

In Chapter 5, I examine the interpretation and application of the public policy exception in the Mexican legal context using doctrinal, textual, and qualitative analyses. I explore the interaction between global standards and local contexts by reference to the Mexican legal framework, Mexican scholarship, Mexican court precedents (jurisprudencia), interviews with local legal actors, and the COMMISA case. In this chapter I focus on presenting the local perspective on public order and on bringing light to underlying elements that pose challenges to local actors. First, I introduce four main uses of public order in Mexican legislation that illustrate the scope of public order in the Mexican legal framework: a) to characterize a law as being of public order; b) public order as a restriction for the application of foreign law; c) public order as grounds for nullifying an arbitral award or denying its recognition and enforcement; and d) to deny the suspension of an act of authority (contested act) in amparo trials. Second, Mexican scholarship explains the traditional understanding of public order and how scholars are suggesting the importance of delineating better the interpretation of public order for the public policy exception. Third, the analysis of Mexican court precedents illustrates how the courts have interpreted and used public order in the last 40 years and the diverse avenues that this term leads to in the Mexican context. Fourth, the interviews with local actors provide an account from those who are active in local practice. The interviewees provided valuable insights as they reflected on the development of arbitration as they have witnessed it in Mexico. Through their experience and expertise, they allow us to see the current state of affairs regarding the use of public order in Mexico, and how global standards have played out locally. They suggested avenues to continue improving arbitration practice regarding the public policy exception. Fifth, the COMMISA case presents one of the most recent experiences in Mexico with the public policy exception that renewed attention on the topic and heightened the importance of purposefully addressing it.

17 Binding court precedents in Mexico are interpretations of the law issued by specific courts entitled by the law to do so. Binding court precedents are considered one of the primary sources of law in the Mexican legal system. The details of their creation are presented in infra Chapter 4, section 4.1 Court precedents system and amparo.
I conclude this dissertation by explaining how the interpretation and application of the public policy exception in Mexico exemplifies the challenges and opportunities—the tension—of the interaction between globalized standards and local legal arrangements. I explain the benefits of advancing a pluralistic approach to the public policy exception, and that local legal orders can define their interpretation using the four factors and their local elements following the analysis done for Mexico, rather than continuing to look for foreign legal transplants. Finally, I suggest elements to advance a national guideline for the interpretation of public order in Mexico for the public policy exception.

1.3 Data analysis

In this dissertation, I use a collection of methods to explore the different elements that intersect in it, which have been addressed in the preceding section when explaining the organization of this project. The two subsections regarding Mexican court precedents and interviews with local actors, which are part of the analysis of the local context in Chapter 5, require a more detailed description of the processes involved in selecting the sources for the collection of data and the methods used for the analysis. These are described in the following sub-sections.

1.3.1 Mexican court precedents

In Mexico, ‘jurisprudencia’, binding court precedents (BCPs) are mandatory interpretations of the law issued by specific courts authorized by law and are the second most important source of law in the Mexican legal system.\(^\text{18}\) For this dissertation, I analyze federal court precedents to understand how the highest national courts had interpreted the concept of public order (orden público - public order). The analysis includes binding court precedents (BCP) and non-binding court precedents (NBCP)\(^\text{19}\) on public order issued by Mexican federal

\(^{18}\) See infra Chapter 4 section 4.1 Court precedents system and amparo for details on which courts can create binding court precedents and the methods to create them. According to those methods, there are three types of binding court precedents: by reiteration, by contradiction and by substitution. In this project ‘binding court precedent’ (BCP) refers to any mandatory interpretive criteria, and their type is specified only if necessary.

\(^{19}\) The difference between non-binding court precedents and binding court precedents is the mandatory character of the latter. The non-binding court precedents are interpretations from the courts that can later become a binding court precedent, if they meet the requirements established in the law. Non-binding court precedents are frequently used as guiding interpretive criteria by the courts. BCPs are mandatory for the court that issues them and the courts below it. The BCPs from the Supreme Court are mandatory at the national level.
courts. These precedents capture the diversity of uses of the term since the search was not limited to arbitration related cases. In this project, every precedent that was analyzed is referred to as a "precedent" and when necessary, it is specified if it is a BCP or NBCP.

Court precedents are published in the Federal Judicial Weekly (*Semanario Judicial de la Federación*), the Judiciary’s official media. In 2013, the Plenary of the Supreme Court decided the Federal Judicial Weekly would be permanently published electronically and it is featured as “a digital system for compiling and diffusion of binding court precedents and non-binding court precedents issued by the courts of the Federal Judiciary; of the corresponding decisions, as well as of the normative instruments issued by the organs of the Federal Judiciary.” The Federal Judicial Weekly was created in 1870 and its chronological organization is done in ‘Epochs’, whose periods have been decided according to significant social and political events, as well as by relevant constitutional amendments. The 1st to the 4th Epochs contain decisions issued before 1917, the year when the ruling Mexican Constitution entered into force; these precedents are considered historical and not applicable anymore. Currently, this system is in its 10th Epoch. The Supreme Court started this Epoch with the decisions issued from October 4th, 2011 onwards due to the major Constitutional amendments that occurred in 2011.

The process to select the precedents analyzed for this project started with a search in the Federal Judicial Weekly database using the 7th to 10th Epochs and the Appendices of the Federal Judicial Weekly. The search started on the 7th Epoch because Mexico ratified the New York Convention in 1971 and the 7th Epoch started in 1969; therefore, any ruling related to the enforcement of foreign arbitral awards would be contained in this segment. I made the search for all the precedents containing the words “orden público” (public order) in its title.

On April 15th, 2014, the search returned 289 precedents including: NBCPs, BCPs by reiteration, BCPs by contradiction (unifying criteria), constitutional controversies, and

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21 It was called the Amparo and Human Rights Amendment and it established new obligations regarding the respect and protection of fundamental rights. For more details see: Suprema Corte de Justicia de la Nación, *Reformas Constitucionales en materia de Amparo y Derechos Humanos publicadas en junio de 2011* (Constitutional Amendments on Amparo and Human Rights published on June 2011), online: <http://www2.scjn.gob.mx/red/constitucion/inicio.html>.

22 A Constitutional Controversy is an exclusive procedure of the Supreme Court to solve conflicts that arise between federal powers –Legislative and Executive-, between provincial powers –Legislative, Executive and Judicial-, between the organs of the Federal District, or between different levels of powers –federal, provincial, and municipal-
unconstitutional actions. From these precedents, I selected those that talked about “orden público” and disregarded those that contained the words “orden” and “público,” separated from each other. After this filter, 178 precedents were left. The search was updated on May 6th, 2014 to confirm the number of items, it returned 189 precedents, and this is the number that constituted the final list of precedents that were analyzed for this project. According to the classification system of the Federal Judicial Weekly, the 189 precedents are distributed in the following categories according to the method by which they were created or the decision that gave them origin:

Table 1-1 Distribution of precedents by type

<table>
<thead>
<tr>
<th>Type of precedents</th>
<th>Number of precedents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Binding court precedents</td>
<td>36</td>
</tr>
<tr>
<td>Action of Unconstitutionality (1)</td>
<td></td>
</tr>
<tr>
<td>Constitutional Controversies (1)</td>
<td></td>
</tr>
<tr>
<td>By Reiteration (20)</td>
<td></td>
</tr>
<tr>
<td>By Contradiction (14)</td>
<td></td>
</tr>
<tr>
<td>Non-binding court precedents</td>
<td>153</td>
</tr>
<tr>
<td>Total</td>
<td>189</td>
</tr>
</tbody>
</table>

Regarding BCPs derived from actions of unconstitutionality or from constitutional controversies, the Plenary of the Supreme Court, when deciding these cases, considered that there should be a new mandatory precedent that the national courts should follow and thus issued a BCP. The Constitutional Amendment of 2011 introduced a new method to create BCPs, i.e. due to invasion of competences or for violations of the Federal Constitution by any of the afore mentioned. Suprema Corte de Justicia de la Nación, ¿Qué hace la Suprema Corte de Justicia de la Nación? (What does the Supreme Court of the Nation do?), online: Suprema Corte de Justicia de la Nación <https://www.scjn.gob.mx/conoce-la-corte/que-hace-la-scjn>.

23 An Action of Unconstitutionality is a means of constitutional control that is exclusive of the Supreme Court, whereby is denounced the possible contradiction between the Constitution and some general rule or provision of lower hierarchy –law, international treaty, regulation or decree–, with the aim of preserving or maintaining the supremacy of the Constitution and to override the rules declared unconstitutional through this process. Suprema Corte de Justicia de la Nación, ¿Qué hace la Suprema Corte de Justicia de la Nación? (What does the Supreme Court of the Nation do?), online: Suprema Corte de Justicia de la Nación <https://www.scjn.gob.mx/conoce-la-corte/que-hace-la-scjn>.
BCP by substitution, but given its recent incorporation there were no precedents of this type at the time when the precedents were selected for this study.

An additional way of looking at the distribution of precedents that can give the reader further context is in Table 1-2 which shows the precedents classified according to their court of origin.

<table>
<thead>
<tr>
<th>Type of court</th>
<th>Number of precedents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court of Justice (issued either by the Plenary or its Chambers)</td>
<td>41</td>
</tr>
<tr>
<td>Collegiate Circuit Courts</td>
<td>148</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>189</strong></td>
</tr>
</tbody>
</table>

The Mexican Supreme Court of Justice sessions either in Plenary or in Chambers, and regardless of which chamber issues the precedent, all BCPs they issue are mandatory for all the courts in the country. As for the Collegiate Circuit Courts, there are 32 circuits in the country, one for every state in the country. In the distribution of precedents from Collegiate Circuit Courts, 70 out of 148 (47.29%) of the precedents come from the First Circuit which is Mexico City (before, Federal District), the capital of the country. The remaining 78 precedents come from the other 31 circuits. The Sixth Circuit (Puebla), the one with the most items after the First Circuit, only has 14 items, which shows the relevance of the First Circuit in the Mexican judicial system.

For the analysis, the precedents were organized into categories according to the multiple ways in which the courts had used “orden público” in the past forty years, and the results are presented in Chapter 5. The results evidence the complexity of the task for understanding the local approach to public order and the importance of approaching it from within and following

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24 See infra Chapter 4 section 4.1 Court precedents system and amparo.
25 The Constitutional amendment of 2011 and the New Amparo Law from 2013 established one more type of courts that can create jurisprudence, the Plenary of Circuit Courts. The database for this project does not contain jurisprudences from these courts since there were no precedents from these courts reported at the time when the list of court precedents was defined.
26 After Mexico City and Puebla, Nuevo León (4th Circuit) has 10 theses. The remaining 54 are distributed among 17 circuits.
1.3.2 Interviews with local actors

The interviews with local actors complemented this project by adding the professional perspective of members of the local interpretive community. These interviews offered information on historical, contextual, and normative elements that the interviewees considered to be connected to the application of the public policy exception in the Mexican legal field.

The three types of actors interviewed for this project were chosen according to the main roles involved in the recognition and enforcement of a foreign arbitral award. These are: lawyers acting as counselors of a party in an arbitration, lawyers acting as arbitrators in an arbitral tribunal, and federal judges who have jurisdiction to decide on the recognition and enforcement of foreign arbitral awards in Mexico. These three categories provide insight on both, the perspective of practitioners and the perspective of the judiciary in the interpretation of ‘public order’ for the purposes of the public policy exception.

The fieldwork was conducted in Mexico City (D.F.) for reasons related to the judiciary and the practitioners. First, Mexico City is the most important federal judicial circuit (First Circuit) for the amount and type of cases that its courts decide and it is where most of the international arbitration cases occur. Secondly, the main arbitration institutions, as well as prominent law firms that are either fully dedicated to arbitration or have a specific arbitration practice department are in Mexico City.

For the recruitment of interviewees, I was already familiar with some names because of cases they had decided or been involved in, legal commentaries they have written on the topic, having met them at arbitration academic events, or because of the cases they had been involved in that had been covered in the media. With this previous knowledge, I created a list of prospects and contacted them a couple of weeks before I travelled to Mexico City in 2012. The final criteria to include them had to do with their availability while I was there. I met with each one personally in their offices and completed the necessary protocol of signing the consent forms, pursuant to UBC’s Behavioural Research Ethics policies. Regarding practitioners, because most

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27 Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Harvard University Press, 1982).
28 One example of its relevance is the distribution of binding and non-binding court precedents explained in the previous section 1.3.1 Mexican court precedents.
of them have acted in both capacities as counselors and arbitrators, it was decided with them in which capacity they preferred to be interviewed and then I conducted the interview following the corresponding script. The interviewees were invited to take part in this research as anonymous participants, therefore there are no details included that could lead to identifying them.

The interviews were audio taped and transcribed for analysis. They were analyzed using ATLAS.ti software for qualitative data analysis. This software facilitated the coding process, made it easier to analyze the frequency of codes and was particularly useful to draw connections between the codes and to create family codes for the interpretation of the data. The codes for the analysis were created in an inductive way following the topics touched upon in the interviews.

All the interviewees have a law degree. Table 1-3 details their years of experience and education; it shows that eight of them obtained their law degree from a public university, while only four from a private university. Ten of the interviewees have completed graduate studies, which include specialty programs, masters, and five of them hold doctorate degrees. Seven completed studies in universities outside of Mexico—in the United States (US), Europe, and one in Nicaragua.

<table>
<thead>
<tr>
<th>Interviewee</th>
<th>Years of Experience</th>
<th>Legal Education (Public/Private University)</th>
<th>Post-graduate Education</th>
</tr>
</thead>
<tbody>
<tr>
<td>Counsellor 1</td>
<td>17</td>
<td>Public</td>
<td>Seminars in international trade and arbitration from Mexican private university.</td>
</tr>
<tr>
<td>Counsellor 2</td>
<td>15</td>
<td>Private</td>
<td>Legal Writing course from US university</td>
</tr>
<tr>
<td>Counsellor 3</td>
<td>20</td>
<td>Public</td>
<td>Masters from US university Doctorate from Mexican private university</td>
</tr>
<tr>
<td>Counsellor 4</td>
<td>+30</td>
<td>Private</td>
<td>Doctorate from European university</td>
</tr>
<tr>
<td>Arbitrator 1</td>
<td>+40</td>
<td>Public</td>
<td>Masters from US university 2 specialty programs from Mexican private university Certificate on international arbitration from Mexican private university.</td>
</tr>
<tr>
<td>Arbitrator 2</td>
<td>19</td>
<td>Public</td>
<td>Masters from US university 2 specialty programs from Mexican private university Certificate on international arbitration from Mexican private university.</td>
</tr>
<tr>
<td>Interviewee</td>
<td>Years of Experience</td>
<td>Legal Education (Public/Private University)</td>
<td>Post-graduate Education</td>
</tr>
<tr>
<td>------------</td>
<td>---------------------</td>
<td>---------------------------------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Arbitrator 3</td>
<td>20</td>
<td>Private</td>
<td>Degree in business and finance from US university. Masters and Doctorate from US university</td>
</tr>
<tr>
<td>Arbitrator 4</td>
<td>20</td>
<td>Private</td>
<td>Speciality program from Mexican private university</td>
</tr>
<tr>
<td>Federal Judge 1</td>
<td>39</td>
<td>Public</td>
<td>Specialty program from Mexican private university</td>
</tr>
<tr>
<td>Federal Judge 2</td>
<td>+50</td>
<td>Private</td>
<td>Masters from a European university 2 Masters from Mexican universities (one private and one public) Doctorate (Honoris Causa) from a Mexican private university</td>
</tr>
<tr>
<td>Federal Judge 3</td>
<td>28</td>
<td>Public</td>
<td>Masters from Mexican private university Doctorate (Honoris Causa) from a Nicaraguan university</td>
</tr>
<tr>
<td>Federal Judge 4</td>
<td>19</td>
<td>Public</td>
<td></td>
</tr>
</tbody>
</table>

The counsellors have an average of over 20 years of experience in their practice, and they have represented parties –Mexican and foreign– in national and international arbitrations. The arbitrators average over 22 years of experience participating either as sole arbitrators or as members of an arbitral tribunal. They have participated in national and international arbitral proceedings involving national and international parties. In these two categories, the interviewees are highly experienced individuals with remarkable international credentials. Some have participated in international forums like UNCITRAL conferences on arbitration, negotiations of NAFTA, among others. As is often the case in arbitration, the counsellors and arbitrators have performed both roles, some of them have also worked in arbitration institutions, having the perspective of managing arbitral procedures. These two groups of interviewees are familiar with arbitral rules from national and international arbitral institutions like the Mexican Arbitration Centre (Centro de Arbitraje de México, CAM), Arbitration and Mediation from the National Chamber of Commerce (Cámara Nacional de Comercio, CANACO), the International Chamber of Commerce (ICC), American Arbitration Association (AAA), London Court of International Arbitration (LCIA), International Centre for Settlement of Investment Disputes (ICSID), among others. Given their average time of practice, it could be said that most of them have witnessed –and sometimes influenced– Mexico’s development into an open market.
economy and the changes made to the Mexican legal framework for the introduction of arbitration and its continuous development.

The federal judges who participated in the interviews are well established members of the Judiciary who average over 30 years of experience. Each of them were members of a Collegiate Circuit Court in the First Circuit (Mexico City) at the time of the interviews. Collegiate Circuit Courts decide on requests for direct amparos, appeals to decisions from District Courts (review of indirect amparo), conflicts of jurisdiction among District Courts and Unitary Circuit Courts, and cases delegated by the Supreme Court, among others. Collegiate Circuit Courts are the second highest level of the federal judiciary, only below the Supreme Court, and are among the courts allowed by law to create binding court precedents (BCPs). The First Circuit, as mentioned before, is the one that receives most cases related to arbitration. The federal judges interviewed for this project explained that the number of cases related to arbitration that reach national courts is minor. There is not one specific court which specializes in arbitration matters, therefore the number of cases that arrive to the courts are diluted among the existing number of circuit courts.

The contributions from local legal actors to this project complements the purpose of bringing attention to the local perspective on public policy from within. Their insights are both positive and critical, which overall allow us to obtain a more complete vision of the local context.

29 See infra Chapter 4 section 4.1 Court precedents system and amparo.
Chapter 2: Approaches to Understanding the Public Policy Exception in Local Contexts

The starting point of this study is to examine the development of approaches that go from convergence and globalization of legal forms to the recognition of diversity, as well as theoretical frameworks that are useful for examining the public policy exception in local contexts. Core to the analysis done throughout this study is to frame public policy as an essentially contested concept, which is a perspective that sets this dissertation as one voice to enrich the discussion about how this concept should be locally studied and interpreted. In the examination of convergence and diversity, this chapter presents the law and development discourse and the use of legal transplants as foundations for convergence, with the corresponding problems they have exposed. This examination leads us to approach law as a social phenomenon in order to acknowledge diversity. Once recognized as such, the realities of diversity are brought to light through studies that have evidenced the need to purposefully consider the local context in which norms are applied. These realities invite consideration of the legal field and legal culture as theoretical tools to examine local contexts.

Following, using the work of Robert Cover and Paul Berman as theoretical foundations to pluralistic perspectives, this chapter introduces responses to diversity that have emerged to bring marginalized voices to the front such as Third World Approaches to International Law (TWAIL), Subaltern Studies, and Legal Pluralism. This exploration of convergence and diversity sets the ground to consider the public policy exception as a space for acknowledging and upholding diversity. Finally, this chapter introduces four factors – language, legal tradition, legal context, and legal culture- suggested for examining local approaches to public policy within a framework that takes legal pluralism as a characteristic of the international legal field but also as a perspective that is more inclusive of the diversity of legal systems and conducive to more effective ways of communication to solve the challenges of implementing the public policy exception.
2.1 Public policy as an essentially contested concept

Public policy is approached in this dissertation as an “essentially contested concept,” which is a distinctive feature that W.B. Gallie\[^{41}\] assigned to certain concepts for which it is difficult to attain a specific meaning due to their complexity and the challenges that their analysis poses. An essentially contested concept “has a relative nature and is a culture dependent concept that enriches with the process of discussing it.”\[^{42}\] Jeremy Waldron argues that it is a myth that we need to do a philosophical analysis of certain terms because they have lost clarity. He affirms those terms whose ordinary usage is perceived as confused have almost always been perplexing. Regardless of the “numerous attempts that have been made to pin them down with clear definitions, or precisely because of this, they have presented themselves throughout their history as sites for contestation as to what counts as their proper use.”\[^{43}\] Recognizing the usefulness of this approach, Waldron applied it to ‘the rule of law,’ and explains that ‘essentially’ refers to the location of the disagreement or indeterminacy about a concept, meaning it lies at its core. He explains that “essential contestability is a combination of normativity and complexity: only normative concepts with a certain internal complexity are capable of being essentially contested.”\[^{44}\] Gallie argues that essentially contested concepts have a dynamic nature and to be able to participate in the debate for their clarification one should offer a conception of it. It is precisely that debate which gives the term presence and relevance. For these reasons, I suggest that public policy fits as an essentially contested concept. Public policy is a fundamental element in the organization of a social group and although it seems to be clearly understood, its meaning has not been agreed upon. Thus, when its use and interpretation is studied in a specific context, one realizes that it is a site of continuous contestation. Nevertheless, Waldron and Gallie suggest that the constant debate of this type of concept is what better contributes to continuing to build layers of understanding for their application.

Waldron agrees with Gallie that it is the contestation on the use of the term that advances the quality of argumentation using that concept. Each contestation adds to the debate, enriching it, regardless of establishing a definite conception or not. It is expected that new contestations

\[^{42}\] Ibid.
\[^{44}\] Ibid.
will join the discussion. Thus, the process of offering new contestations and the ongoing debate between contestants contributes to “deepen and enrich our sense of what is at stake in a given area.”

Public policy has a strong normative character in the context that will be analyzed in this project. It has the capacity to deny the enforcement of an arbitral award; it is a mechanism that has been strongly endorsed by most jurisdictions around the globe. To look at public policy as an essentially contested concept, in Waldron’s and Gallie’s terms, provides a framework within which to acknowledge the complexity of the notion and to be aware that this study is one contestation that aims to enhance the application of public policy within a specific context.

The public policy exception within the New York Convention is thus a place of tension in which the local and the global intersect in a significant way. While the exception was created as a space to allow for national interpretations, the idea of pursuing convergence for the effectiveness of global systems like arbitration restricts this purpose. It is an example of how the divide between the global and the local creates tension that needs to be explored within a local context to better understand the challenges that local interpretive communities encounter.

2.2 Convergence and diversity in local implementation of international standards.

Globalization of legal forms, the rapid growth of trade, and the increased interdependence between countries are some of the processes that have made convergence an underlying assumption needed to advance progress in the relationships among transnational actors and to make processes more effective. Convergence materializes in the creation of institutions, forums, conventions, and agreements that bring states together toward common goals and to create common rules. In these efforts, top-down approaches are used to define those goals, rules, and their interpretations. Many of them emerged from perspectives which considered that legal concepts, institutions, and processes could be exported and successfully implemented in other legal systems, regardless of the local context.

Most, if not all, efforts toward convergence at some point have encountered questions and challenges from those who acknowledge diversity. However, the challenge has been that those who advocate and work for achieving convergence, have not usually paid enough attention to the diversity of local conditions. Top-down approaches generate problems for the lack of

\[45\text{Ibid.}\]
consideration of the contexts in which the norms will be applied. It is not until problems of local compliance arise that attention is given. The diversity of local conditions and the problems that local actors experience with compliance invite consideration of pluralism to bring local accounts to the forefront and explore new ways in which local actors can solve these problems considering their perspectives and realities.

2.3 Foundations for convergence: development and transplants

Globalization has been a driving force for convergence, particularly since the second half of the 20th century. In the 1960s Western countries, represented mainly by the United States and Western European States, embarked on a ‘crusade’ to bring ‘development’ to less developed countries referred to as the ‘Third World’. Under the Law and Development (L&D) discourse diverse efforts were included for advancing the promotion of the rule of law in developing countries. In the 1970s the main objective was to promote liberalism. Later, emerged the ideas of advancing development based on economics and the Washington Consensus. In the 21st century this has evolved into promoting models of good governance and protection of human rights. In all these stages, the premise has been that the Western idea of law is the one that will bring development to less developed countries if they adopt certain laws and legal institutions that consolidate the “rule of law” model in their countries.

The Law and Development studies emerged from the development assistance programs set in the 1960s by the United States government, international agencies, and private foundations that worked with the governments and legal institutions of developing countries. The interest was at first on development assistance, mainly with an economic approach. The legal element of the development assistance programs came late to the development agenda. The interactions between lawyers and developers brought attention to study the role of law in development. Based on the assumption that a strengthened legal profession would foster development, scholars and researchers chose legal education as the point of entry to advance development.

46 Trubek & Galanter, supra note 13 at 1065. Trubek and Galanter analyzed the L&D movement, showed its origins and explained how it got into a crisis, which led to questioning its basic assumptions and therefore the feasibility of establishing L&D as a field of inquiry. Their thoughts are particularly relevant as they recognize themselves as part of this movement and supporters of the law reform projects. They wrote with the aim of understanding how the L&D studies fell into this crisis and tried to offer a future for this field.

47 Trubek & Galanter, supra note 13 at 1066.

48 Ibid at 1075.
Thus, began the legal development projects aimed at reforming law and legal education in developing countries funded by agencies and foundations like the Ford Foundation, the U.S. Agency for International Development (USAID), or the Rockefeller Foundation. For example, the Ford Foundation created the International Legal Centre (ILC) as a specialized agency to assist ‘Third World’ countries in achieving their goal of rapid development giving attention to the role of law in the development of modern nations.49

Legal development assistance to ‘Third World’ countries was justified as “… a rational and effective method to protect individual freedom, expand citizen participation in decision making, enhance social equality, and increase the capacity of all citizens rationally to control events and shape social life.”50 However, these programs and their objectives were defined according to the US-American idea of development and a group of assumptions that were later questioned. The ‘liberal legalism paradigm’ underlay the Law and Development discourse and those who advanced the assistance programs truly believed that by implementing this model, the ‘Third World’ countries would achieve development.51

The propositions of liberal legalism build on each other and help us to understand why those creating and promoting law and development projects assume that by advancing legal reform in ‘Third World’ countries behaviour would change and, consequently, development would be achieved. From their perspective, they just needed to transfer the right laws for this to happen; thus, law was a fundamental element and instrument in the development discourse. They believed in pursuing the ideal of development to bring an overall better life for people in ‘Third World’ countries.

In the 1970s, the critiques of these projects seriously questioned their effectiveness on advancing development and more importantly on the disconnect of the projects from the realities

50 Trubek & Galanter, supra note 13 at 1063.
51 Ibid. at 1071-72. They explain that the components of this paradigm are: a) the state is the primary locus of supra-individual control in society, state action involves coercion of individuals, and state control furthers individual welfare; b) the state exercises its control over the individual through law (universal bodies of rules); c) rules, made through a pluralist process, are consciously designed to achieve social purposes or effectuate basic social principles; d) when rules are applied, they are enforced equally for all in a fashion to achieve their consciously designed purposes; and e) the courts are the central institutions of the legal order since they have the principal responsibility for defining the effect of legal rules and concepts on individual and group behaviour.
and needs of Third World countries. The results from certain legal reform projects put into question the assumptions of liberal legalism. The challenges were strong and the evidence contradicting the model made it hard for scholars to argue back. Trubek and Galanter recognize that the crisis in which L&D fell allowed them to understand their own ideas about law and to see more clearly their own legal institutions. This process served as a reflection for scholars to recognize that the initiatives they wanted to implement abroad were not even working within the United States as they thought.

Robert A. Packenham studied notions of political development in the United States, and his work provides an example that explains the development policy broadly underlying convergence. His study explains how the doctrines and theories used by government officials concerned with economic and technical assistance programs abroad, and by social scientists in comparative politics, were profoundly affected by the assumptions of the ‘liberal tradition’. According to Packenham, the four propositions, or beliefs, about economic and political development that the US ‘exceptional experience’ engendered among US Americans were a) change and development are easy; b) all good things go together; c) radicalism and revolution are bad; d) distributing power is more important than accumulating power.

Packenham addressed the exceptional way in which the United States became a state; they arrived at democracy with the premises of equality and individual liberty at the core, rather than enduring a revolution. Therefore, their experience was exceptional, compared to the struggles that most ‘Third World’ countries had to go through. Packenham suggests the beliefs of the liberal tradition are useful for understanding why the US doctrines and theories took the shape they did, and to criticize their extension to and application in the ‘Third World’.

53 By ‘notions of political development’ Packenham meant “ideas regarding nature, conditions, and consequences of highly valued types of political systems” (at xv) and he understood ‘political development’ as the “will and capacity to cope with and to generate continuing transformation toward whichever specific values seem appropriate in particular contexts” (at xxii). Robert A. Packenham, Liberal America and the Third World. Political Development Ideas in Foreign Aid and Social Science (New Jersey: Princeton University Press, 1976).
55 Packenham, supra note 53 at 20.
56 Ibid at 18.
57 Ibid at 20-21.
development in the Third World, and they distorted US American perceptions and actions in those countries.

These studies reveal that legal aid programs were ethnocentric and functioned under assumptions disconnected from the realities of their recipients; the guiding premises were not even functioning as they presumed within the US. Regardless, the number of projects and resources put into developing countries reached numerous jurisdictions and by the time these critical analyses were done, the projects had already had an effect on the receiving legal systems. Legal reforms, changes in legal education, training of judges and lawyers, among other actions had been taken. The premise of an ‘ideal’ form for implementing the ‘rule of law’ to achieve ‘development’ had already been spread and planted in the minds of local actors.

2.3.1 Legal transplants

Legal transplants have been a common tool to advance the globalization of western legal forms, and had been used in multiple legal aid projects to advance the rule of law in ‘less developed’ countries. Alan Watson explains legal transplants as the “moving of a rule […] from one country to another, or from one people to another” and considered that change in the law is independent of “social, historical or cultural substrata, so that historical factors and habits of thought do not limit or qualify the transplantability of rules.” He uses this term to explain that legal change does not come from local innovations in a society, but rather from borrowing rules from other societies. Watson strongly argues against the predominant idea of the dependent relationship between law and society. His approach was endorsed by scholars who reacted to the functionalist-positivist view of law in which law is considered a set of rules created by a ruling power in response to society’s needs, supported by the use of force. For Watson, transplanting is one of the most fruitful means of legal development and in order to use law to understand society, legal transplants need to be carefully considered.

Pierre Legrand responds strongly to Watson's approach arguing that those who have followed this approach had a formalist understanding of law, and they were reducing the legal to

59 Watson, supra note 11.
rules, and rules to bare propositional statements. For Legrand, formalists were assuming law is autonomous, without any connection to its historical and cultural context, and suggesting that law has a fixed meaning irrespective of interpretation or application. Legrand argues that law cannot be separated from society, since law serves a purpose to a particular society, which has its own historical and cultural characteristics. The functionalists’ basic error, from Legrand’s perspective, stems from the failure to understand the way law is inseparable from its social and cultural context because a rule’s existence depends on its interpretation and application within an interpretive community, and this is historically and culturally conditioned. For Legrand the meaning of a rule is itself culture-specific so he cannot conceive a rule traveling to another society because its meaning, the crucial element of a rule, does not survive the journey from one legal system to another. Transplants, from his point of view, cannot happen in a “meaningful” way therefore they are simply impossible.

This connection between law and society suggested by Legrand, is one of the fundamental ideas guiding this study. Law needs to be considered in conjunction with the context in which it is applied, including historical and cultural factors. The suggestion of new laws for a legal system needs to be done with careful consideration of the local framework.

In the last two decades, scholars have found that legal transplantation, also called legal transfers or legal borrowing, is a trend that continues apace regardless of the multiple studies and approaches that have offered evidence of their failures, half-successes, or the challenges they pose for the receiving legal systems.

The process of transplantation often emerges from the assumption that one legal system is more developed or advanced than the other. However, there is a part that is lost and missed in this process of importation and adaptation of legal institutions and standards when the local context is not adequately considered. These processes can provoke positive changes in recipient legal systems by exposing them to foreign ideas and legal institutions they can incorporate for

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61 Pierre Legrand, supra note 13.
62 Ibid at 117.
63 Ibid at 120.
64 Dezalay & Garth, Internationalization of Palace Wars, supra note 13; Chrisje Brants, “Legal Culture and Legal Transplants. Netherlands National Report” in Jorge A. Sánchez Cordero, ed, Legal Culture and Legal Transplants Reports to the XVIIIth International Congress of Comparative Law by the International Academy of Comparative Law (Washington, D.C., 2010).
their advantage. However, this needs to be done with conscious consideration of the local context.

The importing of legal norms or their interpretation is one of the resources that developing countries have used to keep the pace of rapid global developments. This is particularly significant in trade related topics. In the preliminary stages of the development of this project, the initial idea was to do a comparative study on the interpretation of public policy in order to suggest an interpretation for the Mexican legal system to solve the problem of uncertainty provoked by the lack of clarity in the interpretation of ‘public policy’ for the purposes of the public policy exception. This meant finding the best interpretation, or combination of them, and bringing it to the Mexican legal system. The literature on development and transplants revealed the disconnection of this path, while legal pluralism opened the possibilities for an option originating from within rather than from abroad. This dissertation advances the premise that acknowledging ‘the other’ is necessary for generating dialectical conversations in which diverse actors recognize each other as equals and open themselves to discover their differences and commonalities to construct better ways for co-operation. Here, the ‘others’ are those states that remain on the margins and usually struggle the most when incorporating the standards that result from the transnational processes in which global standards emerge.

Legal transplants have supported the efforts of globalization and legal convergence while local contexts struggle to incorporate and adapt to them. This project identifies that there is a tension between what is expected from local legal systems to advance convergence and the implementation of global standards in local contexts. Convergence suggests top-down solutions to problems of plurality by creating norms to which all members adhere, like the New York Convention or the UNCITRAL Model Law on Arbitration. Regardless of how much the processes for creating these international and transnational rules try to convey a message of inclusion, at international forums the conversations are still dominated by a small number of actors, who have gained a privileged, hegemonic position. Thus, the solutions offered there have not emerged from processes in which the ‘others’ were truly considered.

More recently, the next level of convergence uses the term ‘transnational’, conveying an idea of moving beyond the realm of nation-states to consider the diversity of actors that participate in the conversations, like transnational corporations or arbitral institutions. Yet, these
conversations are also dominated by hegemonic powers. Most of the transnational conversations occur at specialized forums, such as arbitration meetings, to which invitation is extended broadly but diverse representation of states is not secured. Thus, the outcomes of the forums and the suggested norms are built up from one specialized forum to the other. While the conversations are carried forward, they continue to leave voices marginalized. When common solutions or standards are advanced in these forums, they become akin to industry-specific customary agreements that are later used in practice under the argument that such standards have become the norm within that particular industry, market, or field.

2.3.2 Law as a social phenomenon

Following on the idea of the relationship between law and society, and the importance of considering the social and cultural context in which norms operate, law is approached in this study as a social phenomenon using a perspective that emerges from considering the effects of legal aid projects in Latin America. James Gardner studied the US-American legal assistance programs in Latin America and offers important reflections on the complexity of the task attempted and reasons to understand their failure. He argues that these attempts to bring North American models into Latin America “often failed to appreciate strikingly different social, economic, political, and legal realities in Latin America.” 65 Gardner explains that these programs were characterized in part by “a rather awkward mixture of goodwill, optimism, self-interest, arrogance, ethnocentricity, and simple lack of understanding.” 66 He identifies at the center of the Law and Development movement a problematic ethnocentric view of the US-American lawyers and a mistaken attempt to reform the ‘Third World’ on an idealized self-image that neglected to consider the different social, political, economic, and legal realities of these countries. From his point of view, the legal assistance to Latin America “was inept, culturally unaware, and sociologically uninformed.” 67

According to Gardner, US-American legal aid programs found a constituency in certain Latin American countries seeking to leave behind formalistic legal models. They opened the door for these new ideas which took root among particular groups. From the four models that the

66 Ibid.
67 Ibid at 9.
US-Americans aimed at transferring to Latin America—methodological, educational, professional, and jurisprudential—\(^\text{68}\), the professional (problem solving lawyers called ‘legal engineers’) and jurisprudential (their instrumental perspective of law) had a higher level of acceptance. These models were used to support parallel models already emerging in these countries, but the US models were also flawed and vulnerable to executive ordering and authoritarian abuse in the local contexts.

Latin American countries, along with other ‘Third World’ countries who were recipients of similar aid programs from the US, were not neutral recipients. The models were selectively rejected or adapted by local legal cultures. In particular, Gardner observes they were rejected, taken advantage of for the money they brought, or received and adapted to advance the interests of the local groups advocating for them. The reasons for these reactions were related to the local scenarios that the US-American lawyers encountered.\(^\text{69}\) The US-American ‘legal missionaries’ concurred with local initiatives already underway to create a symbiotic relationship from which both sides benefited for several years and worked under the Law and Development label.

Gardner argues for the importance of acknowledging diversity in the Latin American case studies which made him consider a unitary concept of law as inadequate for understanding the rich and complex ‘law and change process’. He suggests there are multiple types of law interacting with each other and, at many times, in law-against-law conflicts which he considered to be a complex and comprehensive, yet more realistic approach. For Gardner law is not a unitary entity or instrument that causes social change in a linear fashion, it is “a complex and differentiated social phenomenon, with various types of law and elements of legal culture

\[^{68}\text{These models are explained in detail in Gardner, supra note 65 at 249-275. Briefly, the methodological model is the US-American case and Socratic method of teaching law; educational is the basic US-American model and structure of legal education; professional is the US-American model of the lawyer as a pragmatic problem-solver and social engineer; and jurisprudential is the anti-formal, “rule skeptical”, and “instrumental” vision of law drawn mainly from American Legal Realism.}\]

\[^{69}\text{Gardner found that the models that were better received –professional and jurisprudential- were so because they met with local reformist movements that were already in place or gestating. There were initiatives that emerged from within the recipient countries that aimed at shifting their formalistic professional traditions, and the US-American assistance projects arrived just in time to provide an alternative that local groups were looking for. Gardner offers as an example the First Conference of Latin American Faculties of Law that took place in Mexico City on 1959, which produced a “Declaration of Principles on the Teaching of Law” which was a call for fundamental reorientation of Latin American legal education. See Gardner, supra note 65 at 56.}\]
interacting, and conflicting, with each other and with broader processes of social and economic change.\textsuperscript{70}

This framework brings awareness that law-related problems are not unidirectional but more like a network in which there are several factors that determine the content and effects of law. Some of those factors are as complex as law itself and need to be explored with careful consideration. Mexico has been the recipient of multiple aid programs in topics such as economic growth, technology transfers, environment, agriculture, health, and democratic governance, and its legal system has received multiple influences from the US. One of the ‘expected’ avenues to address the problem of defining what is public policy in Mexico, could have been to import the approach from other ‘more advanced’ jurisdictions. However, this approach would have also been disconnected from the social and cultural factors that are related to law at the local level. It would continue the legal transplants trend while disregarding the results from those studies that have showed it has not been a fruitful avenue.

By considering law as a social phenomenon with various factors interacting and conflicting, local contexts can be analyzed in a holistic manner that is more aligned with their complexities. In order to make a contextualized analysis of public policy, this dissertation later suggests four factors –language, legal tradition, legal context, and legal culture– to understand public policy and analyzes how they inter-play in local settings to give meaning to the public policy exception. The analysis of these factors, in combination with the analysis of the Mexican framework and expertise of local actors, allow us to better understand the local context in which global standards on the public policy exception are interpreted and applied.

2.4 Realities of diversity: legal fields and legal cultures

A couple of relevant studies bring attention to the realities of diversity by studying local conditions. These studies evidence the failures of transplants but more importantly pay attention to local dynamics; they further support the idea that the avenue for this project could not be the search for another transplant. First, Dezalay and Garth analyzed the processes of doing transplants of political and economic models from the United States to Latin America, using the

\textsuperscript{70} \textit{Ibid.}, at 279.
cases of Argentina, Brazil, Chile, and Mexico. Their study is key to exposing dynamics that are still relevant regarding legal transplantation. They looked at the attempts done through various legal assistance projects in these countries and they found that there were certain cases where some transplants were successful. However, these successes were due to specific local situations at that moment that paired up with a development project; these projects found themselves immersed in what the authors call ‘local palace wars.’ Like Gardner, they found that development projects supported a particular elite or interest group in Latin America that endorsed them and opened the recipient country to advance the transplant. Dezalay and Garth explain the United States marked the path to be followed according to their interests, with the ‘well intentioned’ objective of bringing development to Latin American countries.

Dezalay and Garth bring attention to the fact that in the early 2000s, law was again central to the development agenda, despite the evidence offered by the several studies done on the conceded failure of the L&D movement. The new wave of L&D was also giving minimal attention to the social context and the local structures of state power. The authors renewed attention to the place of law in the specific contexts to which law was exported. They argue that individuals and groups in the north and south, center and periphery, fight for power and influence by pursuing ‘international strategies.’

These authors found that local situations or struggles (local palace wars) influenced the success of the ‘imports’ as they were shaped by national agendas and national histories. For

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71 Dezalay & Garth, Palace Wars, supra note 13.
72 Yves Dezalay and Bryant Garth, “The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars” in David Nelken & Johannes Feest, eds, Adapting Legal Cultures (Hart Publishing, 2001) [Import and Export]. This chapter was published before the full study was made public, in it they identified concrete examples of successful transplants like the model of the corporate law firm in Mexico, compulsory mediation in the judicial process in Argentina, the environmental impact statement in environmental regulation, the public interest law firm in Argentina.
73 Similar to Gardner, they addressed in detail the interest of the USA, the events happening there and in the world, as well as how these shaped the changes in the model to be followed by Latin American countries.
74 Their research strategy had two main components: to use law, legal actors and legal institutions as the point of entry to local struggles in the selected countries and to use the concept of ‘international strategies’ to study the relationship between global influences and state transformations. International strategies are the way in which local actors use foreign capital (resources, academic degrees, contacts legitimacy, expertise) to gain local power.
75 As part of their research design, Dezalay and Garth tried to avoid the use of the terms ‘legal transplants’ and ‘legal culture,’ instead they focus on the processes of import and export. They explain that this language is used by those who define transplants in terms of center and periphery, north and south, while their import/export approach is better suited because we all participate in them. See: Dezalay and Garth, Import and Export, supra note 72 at 243.
example, the “technopols” — well educated local elites with political power — supported processes of legal transplantation in the last decade of the 20th century and the beginning of the 21st. Dezalay and Garth’s research further explored local struggles, influences, and motivations that promoted transplants or imports and how they were received. The authors concluded that transplants had either failed outright or were partial successes mainly because they failed to acknowledge the local context, the role that law has in these countries, their local structures, and the power relationships they sustain. Nevertheless, they concluded that the transplant trend continues apace as if it is the duty of every new generation to complete the attempted transplant or make it right.77

The second study by Nicholson and Guillespie also recognizes that legal transfers continue and explains that interpretive approaches scholarship seeks to understand whether and how transfers take hold.78 They argue that the mere recognition of plurality and localness of legal systems, and how they influence law and development are insufficient to advance the field; they suggest to refocus on the interpretation of legal transfers by local stakeholders and actors involved in the field.79 According to their findings, development aid in the 21st century places support for the rule of law alongside economic reform to emphasize the ‘social’ side of development — which includes good governance, international human rights, and poverty alleviation.80 Nicholson and Guillespie point to evidence that legal transplants take root in ways that most of the time do not align with the donors’ vision of them. Meanwhile, donors explain the failures as problems of design or implementation, and on the lack of abilities of recipients to

76 Technopols promoted political reforms to protect liberal economic policies; they were highly educated in US universities and endorsed neoliberal economic models in Latin America, while supporting the discourses of human rights and democracy. Technopols invested much in their international state expertise to gain legitimacy with their connections to the US — in the form of academic degrees, publications and teaching experience — and to situate themselves in the market of expertise modeled on the US. They were part of an elite that was counter attacking the establishment and they used international strategies to find new opportunities to produce state transformations. This is what the authors identified as the internationalization of palace wars, a strategy that is used to challenge the hegemony of a traditional state elite. Dezalay & Garth, Palace Wars, supra note 13 at 28 & 34.

77 Ibid at 235.


79 Ibid at 8.

80 Ibid at 20. According to the authors, only in 2008, the funds for legal and judicial development reform projects exceeded US$1.8 billions, in addition to the funds allocated by transnational donors like the World Bank, EU Institutions, and United Nations agencies. The leading donor countries were the United States, Australia, the United Kingdom, Germany, Canada, and Sweden.
incorporate the transfer. Nevertheless, donors continue having faith in these projects and continue funding them. The authors point out there is still an assumption to underestimate local regimes with the perpetuated view among donors that legal knowledge is concentrated in the ‘developed core’.81

Nicholson and Guillespie suggest refocusing the analysis on the social demand for legal transfers in recipient countries. For them, it is problematic that there is a continued assumption that legal meaning is an objective reality, which is encoded in specific ‘global scripts’82 that can travel from one system and be adopted in another. What donors are not considering is that the recipients can and do construct their own meanings, therefore Nicholson and Guillespie suggested that future projects need to be designed taking into account the local interpretation of legal transfers because absolute transfers do not happen, they are adopted by local interpretive communities.83 This requires considering what is being transferred and who is interpreting it at the local level, both factors which will determine how the transfers take root. While these factors continue to be neglected, the aid projects will continue to take root in ways that do not necessarily align with the donors’ objectives because “recipients often interpret global scripts according to a set of norms, epistemic assumptions, and power frameworks that differ from those advanced by donors.”84

By considering the realities of diversity, these studies invite us to pay closer attention to the local dynamic and the way in which local interpretive communities receive foreign influence, incorporate it, and interpret it. The import/export or legal transplant dynamics are a current issue but there is expanded awareness of the effects of attempting to do pure transplants. These studies broaden the consciousness of doing contextualized initiatives building on their results. Globalization and convergence are forces that will continue but these studies bring the attention back to consider the particular characteristics of a legal system, including its legal framework and more particular elements like legal culture and local dynamics to understand them in their own terms. These studies lead us to engage in ways to look at national legal systems with more

81 Nicholson and Gillespie, supra note 78 at 5-6.
82 Nicholson and Guillespie use this term to refer to international treaties, legal principles and standards that are defined in the international arena, mainly by the dominant Western actors. Ibid at 12.
83 Ibid at 15.
84 Ibid at 14.
openness and curiosity. Two elements that facilitate paying attention to diversity and making contextualized initiatives are the legal field and legal culture that are examined next.

2.4.1 The legal field

Acknowledgment of diversity and giving attention to local conditions has brought more careful and purposeful consideration of the place where law is expected to generate change. If legal pluralism is recognized as a feature of social organization\(^8^5\) and it is agreed that law and the social context must be inspected together to understand how certain legal institutions work, it follows that the space where these interactions happen is of fundamental importance to understand the local arrangements where global standards are applied. The individuals act not in a vacuum but in norm-filled spaces. Law is created and applied within a specific space. Sally F. Moore’s idea of ‘semi-autonomous social fields’ has been useful to understand the constant interactions and reciprocal influences among social fields.\(^8^6\) Bourdieu’s concept of ‘field’ is, thus, a useful tool to look at the space of study. Bourdieu’s field is a structured, bounded space where social agents, i.e. individuals or institutions, have a position they compete to maintain; where there are dominant and dominated actors.\(^8^7\) He argues that fields can have different shapes and their boundaries are often contested. Furthermore, a field is a human construction with its own set of beliefs, it constitutes a little self-contained world with its own patterns that has a certain degree of predictability and operates semi-autonomously. Bourdieu argues that social agents belong to more than one social field at a time. Social field practices and dominant social agents are similar between social fields and they function in a process of mutual influence and in an ongoing co-construction among themselves.

One of these fields is the ‘juridical field’, which Bourdieu explains is a social universe that “cannot be neglected if we wish to understand the social significance of the law, for it is within this universe that juridical authority is produced and exercised.”\(^8^8\) The juridical field takes into account the social side of law; it acknowledges that the field’s specific logic is determined

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86 Sally F. Moore, “Law and Social Change: the semi-autonomous social field as an appropriate subject of study” (1972-1973) 7 Law and Society Review 719.
by factors that include the power relations that structure it and the internal logic of juridical functioning which constrains actions within it. From this point of view, law does not exist in isolation but interacts and is influenced by social and cultural factors.

The ideas of semi-autonomous social fields and legal fields are used here to look at phenomena that occur at the national and transnational levels that are examined in this study. On one side, the globalization of liberal legal norms looks at the dynamics at the transnational level by examining issues of convergence and pluralism, the law and development discourse, its critique, responses to diversity, and by presenting the New York Convention as an expression of globalization and convergence. At the national level, the Mexican legal field is used as an example of local legal arrangements to evidence challenges in the implementation of those global standards. This study aims to understand the logic of a legal field around the public policy exception by looking at Mexico’s legal framework, scholarship, court precedents, and perspectives of local legal actors.

2.4.2 Legal culture

Bourdieu’s idea on legal fields invites examination of legal culture. Robert Cover suggested that the creation of legal meaning takes place through an essentially cultural medium and the process of creating legal meaning is collective or social. Since this research is looking at how the local actors give content to the notion of public policy in their context, then legal culture, is considered an important element for this analysis. Gardner’s approach to law and Gallie’s idea of essentially contested concepts, both refer to culture as an element that influences how certain institutions are studied, analyzed, and applied. Legal culture is that element which reminds us of our differences, and can be useful to advance a pluralist approach towards the study of legal concepts that impact the trade arena. David Nelken explained, “the main reason for resorting to the concept of legal culture is the way it reminds us that aspects of law normally come in “packages” of one sort or another… The idea of legal culture thus points to differences

in the way features of law are themselves embedded in larger frameworks of social structure and culture which constitute and reveal the place of law in society.”

Pitman Potter suggests that legal culture can be a “basis for understanding the relationship between imported and local norms... [as] legal culture constitutes the cognitive environment in which local and imported law norms intersect.” It is not part of the objectives of this research to define the specific content and boundaries of Mexican legal culture, but rather to examine how it operates to shape the notion of public policy and the way in which local actors use the concept in the context of international arbitration standards.

The importance of pondering the relevance of legal culture is evident in studies that have looked at the struggles derived from post-colonialism, as well as in legal pluralism studies, and strongly in the research on legal transfers. Lawrence Friedman puts significant attention on legal culture when analyzing the elements of a legal system – structural, substantive, and cultural–; he suggests the cultural elements are the “values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole.” Friedman emphasizes how little has been studied on the cultural attitudes towards law and for this reason there are details that have been missing when trying to understand the functioning of a particular legal system. Friedman explains legal culture “influence[s] all of the legal system [and the cultural aspects of law] are particularly important as the source of demands made on the system... It is the legal culture, the network of values and attitudes relating to law, which determines when and which and where people turn to law or government, or turn away.” Since then, studies on legal culture have increasingly connected legal culture with other variables that influence the study of law.

95 Lawrence Friedman, “Legal Culture and Social Development” (1969) 4 Law and Society Review 29 at 34.
96 Ibid.
Legal transplants studies, although divided on the opinion of their feasibility, concur that legal culture is a very particular element to each society, and it is the one thing that cannot be transplanted. At the same time, they seem to agree that legal culture is a fundamental factor that plays a major role determining the outcome of the transplant. For example, following on Legrand’s argument that law is inseparable from its social and cultural context, Nelken adds that “a rule’s very existence depends on its interpretation and application within an interpretive community, and this is historically and culturally conditioned.”

Legal culture is a factor that helps to understand the attitude of local actors toward the international standards on public policy within arbitration practice. Legal culture reflects the complexities of the local setting involved in understanding the way in which local actors approach public policy, and invites consideration of diversity and the responses to diversity that have emerged in legal scholarship.

2.5 Responses to diversity

The work of Robert Cover suggests a pluralistic approach that has been fundamental to address diversity and the responses to diversity that have emerged at the transnational level. Cover does not accept the monopoly of state as norm creator and he offers a perspective that recognizes alternative normative visions that emerge from the multiple normative communities that can be found in a nomos—or a normative universe.

Cover recognizes, and celebrates, the creative possibilities that derive from the existence of multiple overlapping jurisdictional assertions made by the states and by other non-state entities in diverse contexts. He sees the state as one of the many actors who participate in the nomos and aim to assert the legitimacy of their rules. For Cover, law is a bridge in the normative space that connects the world-that-is with worlds-that-might-be; and jurisdiction is that space where normative visions collide and where the normative communities use the language of law to create new alternative visions. Additionally, Cover’s idea of ‘jurisgenerative processes’—that in which “interpretive communities do create law and do give meaning to law through their

98 Cover, Nomos and Narrative, supra note 89.
narratives and precepts—also recognizes the importance of each one of those communities, without putting one over the other, but rather all engaged in an interactive, creative process.

His work has been influential for those advancing a pluralist perspective at the international and transnational level as his point of view is inclusive, it changes traditional labels, removes the state from the central role, and recognizes the diversity of actors who influence the process of norm creation. These are some reasons that make his approach relevant to this research and allow us to see pluralism as a possible solution for some of the problems that globalization, convergence, and global standards have brought to certain legal systems.

In the context of international law, Paul Berman explains that international relations realists do not see international law as “real” law worthy of study; realist scholars treated it as a byproduct of political power, and social scientist as domestic imposition of, and resistance to, normative orders. Thus, social scientists have resisted the claims of international law for being a hegemonic imposition of Western norms onto indigenous communities. In regards to transnational norms, Berman suggests that since the guiding principles of international law have eroded –where law is only the acts of official, state-sanctioned entities and is an exclusive function of state sovereignty- the processes of international norm development inevitably have led scholars to consider overlapping transnational jurisdictional assertions made by a wide array of actors like nation-states, international bodies, nongovernmental organizations, multinational corporations and industry groups, indigenous communities, transnational terrorists, networks of activists, and so on.

Berman captures the relevance of pluralism for supporting dialectical conversations among the diversity of actors in the international and transnational arenas. He recognizes that the state does not have the monopoly for norm creation, which allows for law to become “a terrain of engagement, where various communities debate different visions of alternative futures.” Berman affirms:

“A pluralist account encourages a more microempirical analysis of how transnational, international, and nonstate norms are articulated, deployed, changed, and resisted in thousands of different local settings. Such studies focus on the extent to which such norms have real impact on the ground. Therefore, a pluralist approach provides an

100 R.M. Cover, Nomos and Narrative, supra note 89 at 40.
102 Ibid at 230.
103 Ibid at 231.
important alternative both to traditional doctrinal international law and to rational choice and realist models of law’s impact.”104

There are several discourses that have emerged to challenge globalization, hegemony, and convergence. They also question the use of top-down approaches to solve the problems that exist in diversity, and criticize prevalent West-centered approaches. In their own unique ways, they bring forward the view of those who have been considered as the ‘others’, have been left at the margins, or have suffered the effects of colonialism. The following sections introduce three illustrative discourses in this regard Third World Approaches to International Law (TWAIL), Subaltern Studies, and Legal Pluralism. The latter is examined in more detail and considered as a possible answer to the tension explored in this study.

2.5.1 Third World Approaches to International Law (TWAIL)

Within TWAIL discourse, scholars are concerned with understanding how international law can be used by the peoples in the ‘Third World’ “to advance their own interests, to protect themselves against an oppressive state, to improve their standards of living, and to make their voices heard in the international arena.”105 Antony Anghie, for example, examines the impact of globalization on third world people on international human rights, and the role of international financial institutions in promoting globalization. Karin Mickelson makes a detailed examination of what has been lumped together as Third World, which is not a homogenous entity. She explains that TWAIL is not exactly a cohesive discourse but one that helps us to understand a particular and complex set of realities. Mickelson sees the ‘Third World’ as “occupying a historically constituted, alternative and oppositional stance within the international system.”106 She speaks of the ‘Third World’ as a chorus of voices that engage in different ways to bring attention to their common set of concerns.

Those who identify within this discourse demand responses to situations that have been created by international law, its system and structures but more importantly they argue for a fundamental rethinking of such order. Two main trends in TWAIL scholarship are the

104 Berman, supra note 101 at 236.
affirmative reconstructionists who seek for a total transformation of international law and the ‘Third World’, and the reformists who have a more moderate stance, however both stand in opposition to international law.\textsuperscript{107} One of the significant contributions of TWAIL is to bring forward voices that are generally spoken over rather than engaged in conversations that directly affect them, and to clarify that there is a larger plurality within the label ‘Third World’ which needs to be differentiated.

2.5.2 Subaltern Studies

Subaltern Studies discourse focuses on postcolonial criticism for a “radical rethinking of knowledge and social identities authored and authorized by colonialism and Western domination.”\textsuperscript{108} In contrast to what nationalism or Marxism did not do, Subaltern Studies aim to break free from Eurocentric discourses. They question how the explanation and narrative of reality from the European/imperialist perspective became the normative one. Gayatri C. Spivak explains that Subaltern Studies aim to offer a theory of change in which moments of change are seen as confrontations that allow us to see the histories of domination and exploitation and where these changes are marked by functional changes in sign-systems to ultimately shift the perspective and locate the agency of change in the insurgent or ‘subaltern’.\textsuperscript{109} Subaltern Studies soon got the attention of scholars in Latin America and provided inspiration for ‘progressive scholars’ who were doing emancipatory, bottom-up analysis.\textsuperscript{110}

Boaventura de Sousa Santos brings attention to legal pluralism as an alternative to the state-centered and scientific nature given to law by the modern conception of law; for him, “modern societies are regulated by a plurality of legal orders, interrelated and socially distributed in the social field in different ways.”\textsuperscript{111} De Sousa argues we are living in a period of

\textsuperscript{111} Boaventura De Sousa Santos, Toward a New Legal Common Sense: Law, Globalization, and Emancipation, 2d ed. (Butterworths, 1995) at 2.
paradigmatic transition and critiques the modern conception of law because it has led to a great loss of legal experience and practice, he thinks it has legitimated a massive *juricide*, i.e. the destruction of legal practices and conceptions that did not fit the modernist conception of law; thus he offers legal multiculturalism as an alternative. De Sousa proposes oppositional postmodernism as a third stand between modernism and celebratory post-modernism and suggests subaltern cosmopolitanism as a cultural, political, and social project.

De Sousa sees legal pluralism as a fact and as a solution to bring to the surface the accounts that for a long time have been kept marginalized. He offers a new perspective to approach the problems that arise from interactions of a plurality of legal orders by, first, recognizing this plurality. He brings attention to the three levels—local, national and transnational—at which individuals interact and consequently influence each other. De Sousa argues it is necessary to communicate in mutually constitutive ways and gives the different spaces, levels or clusters, an equal degree of importance by recognizing the ability to influence each other. This point of view opens a perspective of mutual recognition of capabilities on both sides of any conversation or exchange between normative orders. The Subaltern, particularly De Sousa, consider all actors at the same level to provoke conversations that co-create solutions, rather than impose them.

### 2.5.3 Legal Pluralism

John Griffiths explains legal pluralism as a universal feature of social organization which is arranged in a variety of semi-autonomous social fields. In its origins, legal pluralism addressed the situations that derived from the colonialist and post-colonialist times; the studies explored the situations where local or indigenous norms conflicted with the norms imposed by the colonial states. However, it has proved to be useful in explaining similar or parallel situations at different levels of norm making and norm following, including the international arena. Griffiths introduces legal pluralism as a descriptive theory of law that refers to an attribute of the

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112 *Ibid* at 16.
113 De Sousa suggested six interactive structural clusters of social relations to understand that the social relations among their members create a web and that these dispersed laws need to communicate not as domination but in a mutually constitutive way.
114 Griffiths, *supra* note 85.
social field, not of law or of a legal system. He shifts the focus from the legal system of a social field, to the social field as the place in which the law is created, interacted with, and applied. For Griffiths, a social field shows legal pluralism when more than one source of ‘law’ or more than one ‘legal order’ is observable. He argues against a state’s legal centralism and shifts attention to the anthropological conception of the law. Anthropologists “define law not in terms of the state but of the authority or institutions, [they] have no problem in recognizing legal pluralism in the strong, empirical sense as a feature of the social groups with which they are concerned.” Accordingly, law emerges from the social field, but at the same time, he admits that in a society there is a plurality of social fields interacting, each of which generates law – understood as norms– to self-regulate those within that social field.

S.F. Moore’s ‘semi-autonomous social field’ complements Griffiths’ approach as she is interested in locating the space –the field of observation– for the study of law and social change in complex societies. Moore affirms that individuals belong to many different social fields that demand their compliance with each fields’ rules; therefore law and the social context in which it operates must be inspected together. Moore draws on Weber’s idea that each social field has its own legal order, culture, rules, customs, and means of demanding compliance to them. The semi-autonomous social field is the place where these interactions happen. The social matrix has an effect on the semi-autonomous social field because its members simultaneously belong to more than one and they bring external influences and are influenced by each social field.

Using these perspectives and taking them to the transnational arena, legal pluralism is also a characteristic at the transnational level where there are several semi-autonomous social fields represented by nation states and by diverse actors that participate at this level, like multinational corporations, non-governmental organizations, or industry-based groups. All these semi-autonomous social fields interact and influence each other.

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115 Ibid at 2.
116 Griffiths, supra note 114 at 38.
117 Ibid at 14.
118 Moore, supra note 86.
119 Ibid at 719.
120 Ibid at 721.
121 The fundamental features of the semi-autonomous social field are its capacity to generate rules, to induce or coerce compliance to them, and that it is not completely autonomous or isolated because it is part of a larger social matrix.
Emmanuel Melissaris suggests that legal pluralism means “being attentive both to the plurality of norms but also to the ways in which they are organized in and around practices.” He highlights the multi-tasking character of legal pluralism as its differentiating factor and that its promise is to facilitate a spherical view of the legal universe that will help to achieve a multiplicity of points of view and can legitimately oscillate between them. Once the diversity of legal discourses is recognized, it is necessary to understand that legal discourses are accompanied by a certain degree of commitment from their participants and it is from their participation that the legal discourses become genuine cases of communication. Thus, for Melissaris, the way to approach a legal discourse and doing justice to it is by having an account of the participants themselves, who explain what they do when entering that discourse and why they are committed to it. To understand the legal discourses in a plurality, we need to approach the field from inside the community that is committed to them. Melissaris suggested that for a constructive communicative process to happen among legal discourses, the conversation cannot be done having preconceptions of the legal discourse of the other party. It is observation and participation that support the communication process among legal discourses. He argued that once the value of any legal discourse (from a corporation, a social group, a state) is recognized at the same level of relevance, there would be a mutual understanding of the internal reasons to follow a legal discourse. Then, the communication process can happen to decide on a common rule or solve disputes among differing legal discourses.

Recognizing the plurality of legal systems and approaches to law is the first step to adopting a pluralistic perspective. With this comes the recognition of the ‘other’ as an equal, which opens conversations based on mutual understanding. Under this premise, there is curiosity in understanding the perspective of the other from their point of view, not by using a foreign framework. In the context of this study it means that once we recognize the diversity of legal systems and their legitimacy, it follows to examine the local account, this is, to understand their perspective about public policy from the inside.

Ehrlich’s concept of “living law” offers an approach that looks at the different normative orders that coexist in a given group or society. He brings attention to the different sources of

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122 Melissaris, supra note 93 at 58.
normativities to which individuals respond and act upon. His approach has been used to bring the original ideas about legal pluralism where there was little examination of this phenomena at an international level, into the new, more globally oriented legal pluralism in which international and transnational interactions are examined.\textsuperscript{124}

It has been recognized that the “legal pluralist framework proved highly adaptive to analysis of the hybrid legal spaces created by a different set of overlapping jurisdictional assertions in the global arena,”\textsuperscript{125} and has been labeled as ‘global legal pluralism’. This account of legal pluralism provides a framework for this dissertation to draw connections to examine the tension between global expectations and local contexts.

Berman argues legal pluralism offers descriptive and normative answers; it is a fact that there will always be resistance to universal norms because there are multiple communities with different normative commitments. Most importantly, Berman reminds us that although harmonization is an important element, it does not—and cannot be expected to—dominate the entire field. It is necessary to consider that extremes do not serve us well, we cannot expect to have a solid set of universal rules, nor can one group can think of isolating itself from the others. It is fundamental to recognize the dialectical quality of the interactions among semi-autonomous social fields and be willing to manage the plurality in a mutually constitutive way.

“In a plural world, law is an ongoing process of articulation, adaptation, rearticulation, absorption, resistance, deployment, and on and on. It is a process that never ends, and international law scholars would do well to study the multiplicity and engage in the conversation, rather than impose a top-down framework that cannot help but distort the astonishing variety of law on the ground.”\textsuperscript{126}

Legal pluralism in the above terms provides a framework to examine the tension between global expectations and local contexts and can be considered as a solution. Through pluralistic lenses it is possible to provide spaces for local interpretive communities to recognize their own voice and thus frame core important concepts, like public policy, in terms that align with their

\textsuperscript{125} Berman supra note 101 at 226.
\textsuperscript{126} Ibid at 239.
legal systems and in ways that allow them to engage more effectively in the plurality that exists within the practice of international commercial arbitration.

2.6 The public policy exception as a space for diversity

International commercial arbitration is being analyzed by some scholars as a system of global governance which has evolved from a contractual, to a judicial, and into a constitutional model where arbitrators are considered agents of a wider international economic legal order.\(^\text{127}\) Arbitration is an expression of globalization and convergence where harmonization is constantly pursued to strengthen the effectiveness of the system. It has proved to be a successful system to solve commercial and investment disputes and the New York Convention has been a key element for that. In this context, the space for diversity is tight. Nevertheless, within the New York Convention there are spaces recognized for diversity, and the public policy exception is probably the most important one. The way in which some countries have used this exception to uphold their values tells us that it is an important window for diversity. A pluralistic approach to it can increase the effectiveness of the arbitration system without compromising certainty.

The studies on legal transplants have offered evidence that they lead to problems of incorporation, perception, enforcement, and, therefore, of performance. This dissertation deviates from the commonly followed path of doing a legal transplant to rather studying Mexico’s local context and examining the tension between global standards and the local settings where they are applied. The path chosen for this dissertation leads us to consider legal pluralism as a response that can offer a more open and inclusive approach to the public policy exception.

To further contextualize the pluralistic perspective advanced in this study, it is relevant to address the matter of cultural relativism and to draw some distinctive lines. Cultural relativism is a key methodological concept used in anthropology which suggests that “all cultures are of equal value and need to be studied from a neutral point of view. The study of a and/or any culture has to be done with a cold and neutral eye so that a particular culture can be understood at its own merits and not another culture’s”.\(^\text{128}\) This approach emerged as a response to Western


ethnocentrism and to reject the comparative school of the 19\textsuperscript{th} century and its evolutionary conclusions. In the context of law, cultural relativism has also been raised, for example, to challenge the universality of human rights, in the so called “universalism – cultural relativism” problem.\textsuperscript{129} This study does not go into the realm of cultural relativism, which in its radical perspective holds that “culture is the sole source of the validity of a moral right or rule.”\textsuperscript{130} To argue in term of cultural relativism would take us away from developing ways for better cooperation among states. Therefore, this dissertation argues for using Legal Pluralism as a framework that recognizes diversity, the multiple levels of conversations in the plurality, and that looks for mutually constitutive ways of moving forward.

To argue that we need to understand local contexts in their own terms, it means to approach each legal context with the intention of understanding its internal operation. In this sense, local legal systems would determine their approach to public policy using their legal system as a framework with the further objective of offering clarity and certainty for foreign parties. Additionally, legal culture is one of the factors that is later suggested to contextualize local approaches to public policy. Legal culture is used in here to acknowledge subjective elements that impact the interpretation of legal concepts by local courts. This gives further information about the local context and it is used to build up the understanding of that local context but not to make relativistic claims.

Legal pluralism invites us to think beyond usual structures, it acknowledges diversity and looks for ways to create mutually constructive conversations between parties that recognize each other at the same level, not one over the other. While legal pluralism is often criticized for being only a descriptive theory, this way of describing the legal fields has the potential of changing the perspective through which actors look at each other because each one is recognized as an equally important element of the diversity.

Once diversity is recognized and the parties are engaged in mutually constructive conversations, the need to have inside accounts of the local struggles becomes more evident; this means it is necessary to listen to the local interpretive community. While globalization and

\begin{itemize}
\item On this debate see Guyora Binder, “Cultural Relativism and Cultural Imperialism in Human Rights Law” (1999) 5 Buffalo Human Rights Law Review 211.
\item Jack Donnelly, “Cultural Relativism and Universal Human Rights” (1984) 6 Human Rights Quarterly 400 at 400.
\end{itemize}
convergence advance a top-down approach that includes a series of assumptions about the superiority/inferiority of certain legal systems, a pluralistic approach invites us to recognize each other and learn about the other’s perspective from a point of mutual recognition, curiosity, and respect, which could potentially lead to better mutual understanding.

Therefore, the public policy exception as implemented in Mexico can be usefully examined by reference to the tensions between convergence and diversity where convergence is seen as the global standards established in the New York Convention. It is necessary to address how the global discourse led to those standards and the objectives that drove them, which is examined later in Chapter 3 for the case of the public policy exception. At the same time, it is necessary to acknowledge that international law has embedded spaces for divergence, such as the public policy exception, which allows for the recognition of interpretations that are aligned with local contexts.

It has been addressed here that legal pluralism allows the recognition of diversity in legal discourses that interact in a social field and that a mutually constitutive dialogue is fundamental for effective communicative processes to happen. Pluralism leads to exploring this diversity with an open perspective and connected with the actors and elements of a specific legal field, hence the research question focuses on how public policy is interpreted and applied in the Mexican legal field. In this way, the tension between convergence and diversity is explored by looking directly at the local interpretive community and to factors that influence how they construct this concept. The arbitration system could be strengthened by provoking mutually constructive conversations to foster understanding on fundamental concepts like public policy, instead of using preconceived ideas of what it should mean.

2.7 Four factors for understanding public policy in local contexts

It has been frequently specified in the literature that in the context of international commercial arbitration and of the New York Convention, public policy is used in the sense of public order which relates to the French *ordre publique* that in Spanish is called ‘orden público.’¹³¹ It is assumed there is common understanding on the equivalence of these terms. But there has not been further exploration of elements underneath these conceptions that distinguish

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¹³¹ See *infra* Chapter 3: The Public Policy Exception in the New York Convention.
the way local interpretive communities understand them. Considering a pluralistic perspective as explained in previous sections, and the importance of examining local approaches to public policy by paying attention to their context, I suggest the use of four factors: language, legal tradition, legal context, and legal culture. These factors surface differences among legal systems that need to be considered since they influence the local understanding of public policy and serve to bring attention to issues that are often overlooked or assumed.

The first factor, language and translation, explains how even though the words when used in English (public policy) and in Spanish (orden público) are used as equivalent for translation purposes, the scope of one is larger than the other. This can lead to confusions in the interpretation or application of the concept in a specific case. The second factor, legal tradition, reviews the origins of the civil and common law traditions and the development of their approach to the role of judges. It provides elements to understand some of the difference on how public policy is understood and used within these legal traditions. The third factor, legal context, functions as a clarification factor to specify the subject matter from where public policy is approached in this project, i.e. private international law. The fourth factor, legal culture, needs to be accounted for to show that beyond the pure legal aspect of public policy, there is a subjective element that influences how the concept is used that comes from how it is understood by the actors who apply it in practice. Each factor is addressed separately but they are all related and have effects one over the other as will be later exposed and problematized.

2.7.1 Language

Language is the way we communicate with others and make sense of our world; we create categories, we describe the world around us, and we use it to convey our ideas. But language has a strong power, it can create and it can destroy, it can unite or can take apart. It is not something to be taken lightly. In the context of law, much emphasis is placed on the idea that the language of the law should strive for consistency, certainty and predictability. The law, the dynamic of the law, is a constant process of interpretation and justification of the texts that encompass the law, i.e. statutes, cases, and norms that are applied to a specific situation. Language plays a fundamental role in the creation of the law and it generates possibilities to create common understandings across cultures and legal systems.
This section draws on Ludwig Wittgenstein’s approach to language to explain the connection of the speaker and the context. Then, it addresses the challenges that multilingualism poses for the creation of international instruments and looks at word choices, translation, and spaces left purposefully open in international instruments.

2.7.1.1 Meaning and language-games

In the process of making sense of our world through language, we establish the definition of concepts. Their shared meaning allows us to establish a common framework within a social group to legitimize the use of certain word(s) to refer to an object, situation, or phenomena. Wittgenstein affirms that the meaning of words and of a proposition lies in its function, on how it is used in the language; \(^{132}\) when we try to understand the meaning of a word, we are asking how it is used. Given that a word can have multiple uses, the correct use of a word or a proposition is determined by the context in which it is used. According to Wittgenstein this context will always be the reflection of the life of the speaker and he calls this context a ‘language-game.’ \(^{133}\) A proposition makes sense when it is used in the corresponding language-game and would mean something different if taken to a different language-game.

Each legal tradition can be considered a language-game, and within each legal tradition there are other sub-sets of language-games because each country is a different language-game on its own. There are some concepts that even need to be framed within a specific context according to the subject matter in which they are used. For example, the concept of public policy would need this type of subject matter clarification here as it is studied in the context of private international law, where international commercial arbitration fits in. This subject matter specificity is addressed later in the third factor, \(^{134}\) but serves here to illustrate the multiplicity of language-games in which a word can be placed and according to which it might, and most likely will, vary its meaning, even if lightly. Wittgenstein also affirms that to use a proposition outside of its language-game makes it illogical. Accordingly, to keep a language-game consistent, the meaning of a concept should make sense to the participants in that determined language-game. Then, a further step is to make it compatible with equivalent terms in different language-games.

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\(^{133}\) Ibid.

\(^{134}\) See *infra* section 4.5.3 Legal context: private international law or conflicts of law.
However, once we are clear that the meaning makes sense within a specific context, the awareness of the context helps translators to be more careful when choosing the words for the translated text.

The study of language grew exponentially in the past century and Solan and Tiersma offer three important advances that served as foundations for the growth of the study of language and law.\textsuperscript{135} First, they suggest that the study of language has taught us that while languages differ from each other, people are largely the same, therefore people that share a language have a common competence and this assumption allows a group to rely on language for the creation of social and legal institutions. They suggest that a language-based rule of law assumes a basis of language common to all members of a group. Second, our learning process and usage of language is particular to each individual, therefore, the assumption that others speak, write, and understand language like we do is just that, an assumption, and one that leads to misunderstandings. Third, and most important, is that language is a social phenomenon and its use is instrumental. Solan and Tiersma accurately suggest that “the more we know about the use of language in institutional settings, the better we can study particular institutions –legal ones in particular- and learn about their structure and the relationships among them.”\textsuperscript{136} These authors also touch upon law in a multilingual world; they recognize the constant efforts to create supranational legal systems and the harmonization of laws to facilitate transactions at the international level. There are multiple challenges involved in these processes that are the focus of study of the intersection of language and law.\textsuperscript{137}

2.7.1.2 Language in international instruments

Within a legal system caution is taken on the language that is used to create norms that would establish a shared meaning. The words are chosen (or are expected to be chosen) in ways that will capture and become the expression of the values and principles of that legal system, organizing the actors within a shared framework. In our globalized world, multilingualism is a fact that poses a complexity to how to generate common frameworks and create legal instruments that encompass the objectives that the international actors aim to achieve with them.

\textsuperscript{136} \textit{Ibid}, at 3.
The long debates and discussions that involve the drafting of an international instrument, of any kind, attest for the fact that in our globalized world, language matters, and translation is part of it when cooperation is needed between people that speak different languages.138

Regarding the public policy exception, during the drafting of the New York Convention, one of the first challenges was how to include it and phrase it within the process of constructing a common meaning. This process took several rounds of debates and consequently several drafts before the final wording was chosen.139 Another dilemma emerged when international organizations, due to the diversity of national approaches, analyzed and proposed interpretations to define standards as to how the public policy exception should be interpreted and applied by local courts in order to comply with the ‘spirit’ of the New York Convention.140 These discussions added intricacy to the already complex status of public policy when they suggested there should be an ‘international’ public policy, or that the courts should have a looser or more restrictive approach to it. All these efforts aimed at offering solutions to the challenges that cultural and linguistic diversity pose for international law. Menezes de Carvalho argues that translating terms without considering practical differences leads interpreters to distort reality; and since the effectiveness and legitimacy of international law depend on a potential consensus, the interpreters cannot ignore language. Therefore, he highlights “the semantic analysis of legal norms as a way of gaining access to the meaning of reality in normative expressions.”141 As such, the influence from the diversity of languages is relevant for building meaning in international law.

Language and word choices at the international level are items that need to be completed with caution. In the international arena, there are shared expectations of certainty and predictability, as in national levels; however, they are attained in different ways and by giving a certain degree of flexibility and adaptability. If the aim is to create common understandings, it is necessary to continuously be aware that each country would look at the same issue with a, largely or slightly, different perspective, due to the cultural lenses through which they look at the

139 See the details of this process in infra section 3.3 The origins of the public policy exception.
140 These studies and interpretations are addressed in infra section 3.6 Reccomendation from the ILA Resolution to promote a uniform interpretation.
141 Evandro Menezes de Carballo, Semiotics of International Law (Rio de Janeiro, Brazil: Springer, 2011) at xiii. (emphasis in the original).
issue. It is important to find a common ground, a shared language, for an instrument to work effectively and deliver its objectives.

In the construction of international instruments, Balekjian affirms that international treaty texts generally are not drafted for the purpose of maximum clarity and precision. He suggests “functional ambiguity” as one of the characteristics of the language of international law that fulfills a useful and necessary purpose; it is closely linked with the way contractual obligations are generated under international law. ¹⁴² According to him, international instruments leave those open spaces on purpose as they allow the parties to reach an agreement and use a term in a rather indeterminate way, until there comes a time for the parties to work further to elaborate on it and maybe reach a more fixed meaning. Consequently, it could be said that these open spaces give an opportunity for local interpretations to surface. Functional ambiguity also provides a space for the voices of the multiple participants in the agreement to be accounted for. These open spaces become the expression of a pluralist approach that underpins international agreements. They are at risk when homogeneity and transnationalism try to close or delimit these spaces within too strict boundaries or according to the view of a small group.

The generally assumed equivalence between public policy and ordre public is an example that Balekjian uses to illustrate that the multilingual dimensions of international treaties could be the cause of ambiguities; absolutely equivalent terms in other languages cannot be found because they do not exist.¹⁴³ He argues that, “very often, international treaty texts are not drafted for the purpose of maximum clarity and precision. They are so-to-say least common denominators serving the twin purpose of (i) clarifying the minimum obligations and rights of the contracting parties at the time of treaty conclusion, and (ii) committing the parties to an undertaking possibly to elaborate, clarify, or even expand the scope of ambiguities in the text through further negotiations.”¹⁴⁴ The public policy exception in the New York Convention illustrates these issues regarding the drafting of international instruments and their translation. The parties reached a consensus on the wording of the exception and agreed to understanding it as an ‘escape valve’ so

¹⁴³ Ibid, at 359.
¹⁴⁴ Ibid, at 360.
that national legal orders could address local concerns.\textsuperscript{145} This exception offers an open space to allow for national particularities to be taken into consideration.

Balekjian illustrates this idea explaining that, “a very positive function fulfilled by the vagueness, generality, or ambiguity of international texts is that it enables states with heterogeneous historical, cultural, ideological, geographical, and economic interest backgrounds, to establish, in the form of least common denominators, a common ground of legal commitments.”\textsuperscript{146} Heterogeneity is probably the most descriptive adjective of the international arena and if we want to give opportunity for all actors to participate in an equal capacity, spaces that acknowledge differences and allow for these differences to surface and be acted upon, are necessary. These spaces are created through language. Certainty and clarity are not left aside when these spaces are created in international instruments; they continue to be fundamental goals but they can be secured when each state provides its interpretation of a specific concept, like public policy, for the purposes of that instrument and within the agreed upon common ground.

Justice Holmes said, “a word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”\textsuperscript{147} This idea is true for many words and more so for ‘public order.’ The words we choose to communicate, the way we use language, and make sense of the world is a constant, dynamic process that requires us to adapt and change. To make emphasis on language in this project is a way to keep this study aware of its temporality and of the fact that it adds to the conversation at this point in time. It aims at giving more clarity to the current circumstances to facilitate understanding among actors from different jurisdictions.

\subsection*{2.7.2 Legal tradition}

The classification of legal systems according to their legal tradition is a taxonomy that is usually helpful to identify certain common or differing characteristics when studying national legal systems. Once you have identified which legal tradition a legal system belongs to, there are several assumptions that come into play for studying the institutions of that particular legal system. The relevance of identifying the legal tradition of a legal system is that “the legal

\begin{footnotesize}
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\item \textsuperscript{145} Refer to the drafting history of the exception in \textit{supra} section 3.3 The origins of the public policy exception.
\item \textsuperscript{146} Balekjian, \textit{supra} note 142, at 363.
\item \textsuperscript{147} \textit{Towne v. Eisner}, 245 U.S. 418, at 425. Emphasis added.
\end{itemize}
\end{footnotesize}
tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.” 148 It also follows that there is a distinction between a legal tradition and a legal system. A legal system “is an operating set of legal institutions, procedures, and rules.”149 Thus there are as many different legal systems as there are states and these legal systems are grouped according to a legal tradition they share.

Patrick Glenn sees two dimensions involved in a tradition; one is time, as it refers to the extension of the past into the present. The second dimension is the necessity of continuously transmitting the tradition in a specific social context so it becomes relevant and thus, a tradition. Glenn suggests that tradition and its continuity “are closely linked to the question of identity and to the relations of different people. Tradition must be assessed as a constitutive element of societies or as an internal element of them.”150

These two dimensions are also the same elements that make more complex to understand the approach to certain topics within a given society. Tradition is continuously transmitted in a social context over time and the transmission is eventually affected by the transmitter and their values and experiences on the issue. Sometimes, there is a point where the answer for why a certain approach is taken is that it has been ‘traditionally’ done that way and there is a perception that it is fixed. This makes it harder to understand why certain activities are followed in a given tradition or how the approach to a concept has arrived at the point where it is today. In the case of a concept like public policy, the understanding of its meaning is often assumed within a legal tradition. Therefore, the details of how an approach has been adopted require us to trace back into the development of a specific tradition to gain a better understanding of that point of view.

Among the traditions that Glenn presented in his taxonomy, civil law and common law are the two most represented in the legal systems in the world. The following brief review of their origin and of some of their the principal characteristics is useful to highlight those elements that allow us to understand the differences in their approaches to public policy. It is relevant to examine this background since transnational approaches tend to erase or overlook these

148 John Henry Merryman & Rogelio Pérez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America, 3rd ed (Stanford: Stanford University Press, 2007) at 2. They explain that “a legal tradition… is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.”
149 Ibid, at 1.
differences, which lead to unnoticed problems of interpretation. Civil and common law traditions have been highly influential in the development of arbitration; it is continuously noticed that this field combines the best of both traditions and has brought them together in important ways.

2.7.2.1 Origins of civil and common law traditions

Civil law tradition is the older and more widely distributed legal tradition; it is the dominant tradition in Europe, Latin America, and many parts of Asia and Africa. Its origins trace back to the Twelve Tables in Rome, however the most representative origin for it is found in the Justinian Code, the *Corpus Juris Civilis*, in which the Emperor Justinian asked to compile and organize systematically the vast authoritative legal material accumulated up to that time. The Justinian Code addressed topics like persons, family, inheritance, property, torts, unjust enrichment, contracts, and remedies. The first three books—Of Persons, Of Things, and Of Obligations—contain the three main subjects considered as the core of the civil law tradition and the basis for the legal systems that follow this tradition.\(^{151}\)

Roman law regained attention in the Medieval Renaissance when Italian universities became the legal center of the Western world and where the Justinian Code was studied, in particular the *Digest*. Schools of thought like the Glossators and Commentators emerged from these universities and determined the proper way to study the *Corpus Juris Civilis*. The Roman civil law and the scholarship of Glossators and Commentators became the common law of Europe, the *jus commune*. In France, with a more humanist and rationalist approach, the jurists gave more attention to the book *Institutes* from the Justinian Code. As the new nation-states emerged in Western Europe, Roman law and the *jus commune* consolidated. In the 19th century, the Western European states adopted civil codes following the Napoleon Code of 1804 from France. Its influence can be noticed up to present times in the civil codes from most European and Latin American countries, like in Mexico’s Civil Code.

The three basic components of the civil law tradition are the *Corpus Juris Civilis*, canon law from the Roman Catholic Church, and commercial law. There was some space for indigenous law in every territory to address local interests but it was exceptional, the focus was

\(^{151}\) This sub-section draws on the work of Merryman & Pérez-Perdomo, *supra* note 148.
the *jus commune*. The emergence of nation-states brought up the concern of preserving some indigenous institutions and this is what drew some differences among civil law countries.

Commercial Law had its main development in Italy with the Crusades. Merchants formed guilds and established the rules applicable to their specific commercial relationships to facilitate trade and address their interests. Merchant judges consulted educated jurists to keep their practice in good terms with the Empire but they were self-regulated. These commercial rules were later incorporated into commercial codes adopted by the nation-states in the 18th and 19th centuries. This way of creating commercial law has been carried forward to our days in a great number of legal instruments that have developed based on the needs of merchants and with the ultimate goal of facilitating commercial relationships. In this topic, the civil and common law traditions have greatly converged.

The origins of the common law tradition refer back to the Normans conquest of England. Patrick Glenn explained that the creation of this tradition was mostly a result of the historical accident of this conquest and a combination of circumstances, which led to the creation of the first state in Europe, with clear boundaries and a central government. The Normans aimed at creating a legal order that would be responsive to theirs and local needs. The military conquest did not imply a legal conquest, thus they needed to establish a system to which the locals would buy into and therefore facilitate the ruling of the realm. They worked on the idea of a loyal judiciary to establish a legal order that could be common for the realm. There was a process of ‘judicialization’ of royal disposition of complaints to the crown. At first, the king and his council solved the disputes, then the disputes were referred to the chancellor, and finally the chancellor started passing them on to a judge.

The three major influences for the creation and in the early years of the common law tradition were, the Islamic tradition because of the conquest from the Normans, Roman law due to its re-emergence in the Continent, and Talmudic practices for commercial matters. The elements taken from each were useful to consolidate the conquest by the Normans. They created a system by bringing their ideas as conquerors and by creating ways that would be accepted by locals across the realm. The local circumstances and the intelligent local response were essential for the birth of the ‘common law’ of the realm.

152 This sub-section draws on the work of Glenn, *supra* note 150, Chapter 7.
The common law at that time was mainly a law of procedure. The basis of this system were the writs, which were royal commands that established a procedure dictated by the chancellor and given to the judges for the resolution of individual disputes. The writs were specific procedures for a particular type of dispute that once it was chosen, it could not be changed. The lawyer (barrister) should choose the writ he considered more appropriate for the case to ask for a specific remedy, and he would present the case before the jury and the judge. The decision on the case belonged to the jury, they knew all about the case because they were the local people. The jury had the monopoly on substantive decision-making, including the applicable law. The role of the judge was to decide if the case fell within the chosen writ and had no responsibility of finding objective fact, he did not have an investigatory role.

The common law of England was supplementary law, just like the jus commune was in the Continent. It was the best approach to have a system that harmonized the realm and also gave space for local law. It was called common law as a way to distinguish it from the local law with which it interacted. This strategy gave the locals control over the decisions (through the jury) and the reliance on local ways gave legitimacy to the royal process.

2.7.2.2 The role of judges in each legal tradition

The English judges were different from Roman judges but the manner of judging was very similar. The decision of cases in Rome was done by judges and in England was done by a jury. Both acted according to instructions received, from the preator in Rome and from the judge in England. The complaint had to go through a screening process to conform to the praetor’s edict in Rome and in England it had to fit within the categories of written royal commands, or writs, used to start up royal procedures.

In the civil law tradition, the regulations regarding government and the sources of public law were significantly influenced by the intellectual revolutions of the 18th century like the American and the French Revolutions, and other movements like independence movements in Latin America, the unification of Germany, and the liberation of Greece from Turkish domination. These movements had a great impact in the way of thinking about law and thus influenced the whole administration of the legal system. They were driven by the ideas of suppression of the monarchy, aristocracy, and the elimination of the feudal system. Some of the fundamental tenets of these revolutions were the secular natural law (natural rights), the
separation of governmental powers, rationalism, the glorification of the secular state, and a strong nationalism.

The idea of separation of powers endorsed mainly by Montesquieu was an important element that differentiated the approach to public policy between the civil and common law traditions. Montesquieu argued that this separation is fundamental for the development of a rational government, in particular, the clear separation between the legislative and the executive branches from the judiciary. He was concerned with the judges’ failure to distinguish between applying and creating law, and the abuses in which they had fallen. His idea was that the judiciary should restrict itself to applying the law enacted by the legislative power and should not interfere in the administrative functions of the executive. Therefore, the judges are only there to apply and to interpret the law, but cannot create it.

This is a significant distinction from the common law tradition because in the US and the UK there was a different approach to the role of judges. They had been considered a more progressive force that can protect the individual against abuses of power by the government, and an important element in advancing the centralization of power and the extinction of the feudal system. The influence of judges on shaping and advancing the development of the common law was recognized and accepted. In these countries, the judiciary was not an important target of the revolution as it was in France and other countries of Continental Europe.

For the new Continental nation-states, centralization was key, nationalism was the ideology, and the fundamental expression of it was the idea of sovereignty. The emerging nation-states abandoned the jus commune to adopt their own laws to express their sovereignty. The state became the sole source of law. From these times emerged the Western school of international law that is based on the idea of sovereign states that decide when and to which extent to be bound by any international rules.

In England, indigenous common law was not rejected but rather embraced; it was a key element in its consolidation as a nation-state and considered an element of national identity. While in the Continent, the states focused on rejecting and departing from the jus commune and only followed their newly codified systems. The ideas on the separation of powers, so forcefully defended by the revolutionary movements, created dogmatic positions towards law and the functions of government. Civil law countries adopted the idea that the law was only the statutes enacted by the legislature, while the common law countries followed the stare decisis doctrine,
which did not align strictly with the idea of separation of powers. Some elements that were added later in the civil law tradition were the written constitutions as the superior source of law, and the judicial review that was included in almost every jurisdiction in the 20th century.

For civil law countries, the sources of law were strictly statutes, regulations, and customs, but customs were not a relevant source because they were not codified. This hierarchical order of the sources of law is a fundamental element of civil law systems. The strict definition of the sources of law forms the basis of the civil law tradition, which contrasts with the common law tradition in which the sources of law are statutes, judicial decisions, and customary practices but without a strict hierarchy. One of the reasons for this approach is that during the formation of the nation-states that follow the common law tradition, they did not try to break with their past systems, but they saw it as a continuation or evolution of the previous one, while adopting the instruments and institutions that were emerging in other countries, like written constitutions.

Since the common law emerged to harmonize the law of the realm and of local law, its limits came from the society it emerged from. “The common law therefore had to express itself in terms of its surrounding society. To do otherwise would be to risk non-recognition, and non-acceptance. It had to reflect the society to be recognized as part of it.”¹⁵³ This type of law, a law of relations, was not focused on the legal powers or interests of the individual. The whole notion of subjective rights, contrary to the civil law tradition, was not a central idea in the common law of England, as these ideas were not introduced until the 19th century. As well, the judiciary in common law countries, in this case in England, was not seen as a hostile and distant autocracy. The judges had stayed out of these types of political conflicts and advanced the idea of common law; they did not need the rights-based discourse used in the Continent. Meanwhile, in the civil law tradition the role of judges was constrained to interpret and apply the law according to their jurisdiction and they could only use the law to decide cases.

The leading figure for the common law system has been the judge and it has sustained its role along with the judicial decisions. Three major changes in the 19th century, based on the ideas of Jeremy Bentham, moved the common law from a procedural system to one based on substantive law. First was the opening of the courts, which brought the idea of a right to action. The second was the open pleading or fact pleading; law was not secreted law anymore but there

¹⁵³ Glenn, supra note 150, at 248-49.
was a substantive law that should be applied. And third, was the decline of the jury which became optional, except in the United States where it was protected by the constitution.

The developments in the common law tradition led to the establishment of the principle of independence of judges as a fundamental one. “They are freed to be law-seekers, and not law-appliers.”154 This marked an important contrast to the approach taken by the revolutions during the Enlightenment in the civil law countries where judges were forced to be just law-appliers. The developments brought more compatibility of the common law tradition with the civilian tradition of the Continent, moving on towards a general idea of national, positive, constructed law. However, the common law developed its own logic expressed mainly in the principle of *stare decisis*, which emerged from two important ideas that judges make law, binding law, and the creation of systematic, doctrinal treatises explaining the law of the judge.

Despite the differences among common law countries, one distinctive characteristic that remains is the independence of judges and that federal courts exercise major powers of supervision and control over state courts. The judiciary continues to hold a distant role from other government powers and the idea that it can be called in for aid in protecting citizens still holds, as it was in its origins.

The role of judges can then be considered a differentiating factor between these traditions. While the civil law tradition, influenced by the French Revolution ideas, focused on restricting the role of judges to be merely law-appliers (and later also as interpreters), the judges in the common law tradition were perceived as law-creators and social shapers for having an important influence in creating the laws that ruled the society. In the civil law, they were seen for a long time as a power to be restricted and controlled, while in the common law they were a resource or a figure to resort to for protection. Therefore, protecting the judges’ independent status in the common law tradition was key. Both traditions have influenced each other in that the civil law countries have created legal structures to underpin the independence of the judiciary while the common law countries have put supervision and control measures in place. It is understandable why Glenn suggests that their problems have intersected in a way that collaboration to generate problem-solving ideas is more feasible in current times, “the problems

154 Glenn, *supra* note 150 at 257.
of the civil law are also becoming the problems of the common law, and there is much greater room for collaboration and mutual understanding, even given the magnitude of the problems.”

When it comes to public policy, in the civil law tradition, its development and the strong emphasis on the separation of powers also helps us to understand the use of separate concepts to differentiate between the public order and the governmental policies. If the role of the judges is to apply and interpret the law, by fulfilling this role, they keep public order. On the other side, the executive branch, as the administrative body, is the one that creates the government’s public policies that will direct the actions of its agencies. In the common law tradition, although there is also a structure that supports separation of powers, the delineation is not as strict and because they recognize the law-creating role of the judges, it is admissible for the judges to have the double task of keeping public order and creating public policy. Judges are specifically seen as policy-makers. From this distinction we find there is a specific body of scholarship in the US that studies the role of judges as policy-makers and developed Policy Analysis as an area of study.

2.7.2.3 Policy Analysis

Thomas Dye explains Policy Analysis as the thinking man’s response to demands that social science become more relevant to the problems of society. For Policy Analysis, public policy is understood as that which governments –through its agencies- choose to do or not to do. It is related to the actions taken by government to address the problems of society. Dye explains that Policy Analysis entails a primary concern with explanation rather than prescription, a rigorous search for the causes and consequences of public polices and an effort to develop and test general propositions about the causes and consequences of public policy and to accumulate reliable research findings of general relevance. For doing this, there are a variety of models and approaches that have been taken and the difference among them lies in how they interpret policy –an institutional output, a political activity, a group equilibrium, elite preference, efficient goal achievement, variations on the past, rational choice in competitive situations or as a system output.

155 Glenn, supra note 150 at 264.
157 Ibid, Chapter 2.
Policy science, pioneered by Harold Lasswell, aims to integrate the study of political theory and political practice without falling into the formality of legal studies. Lasswell suggests multidisciplinary, problem solving, and explicitly normative as three characteristics of policy studies. His ideas are the foundation upon which the study of public policy has been conducted.\textsuperscript{158} Howlett & Ramesh make a differentiation between policy studies and policy analysis, where the first one is done by academics, relates to meta-policy, understands overall public policy processes and improves theories and methodologies. On the other hand, policy analysis is done by government officials or think-tanks, it is applied research directed at systematically designing, implementing, and evaluating existing policies.\textsuperscript{159}

The rise of Policy Analysis in the U.S. happened in the 70’s with the objective of improving the efficiency and testing the impact and effectiveness of government programs. The foundational idea was that Policy Analysis would not replace politics but could help decision makers make more sensible decisions. As mentioned above, Laswell prefers to separate Policy Analysis from the formality of legal studies, however Sigler & Beede suggest that law also sets the framework for public policy.\textsuperscript{160} Stuart Nagel emphasizes this relationship suggesting that ‘virtually all policy problems are capable of at least attempted resolution by legislatures, courts or lawmaking administrative bodies.’\textsuperscript{161}

Two issues stand out, the inclusion of courts as an avenue for solving policy problems, which reveal again the more active role in these matters that is attributed to them in common law traditions. Second, the above brings attention to an important feature that grew strong in US jurisprudence, the idea that law can be used as an instrument or tool to direct social change.

Roscoe Pound, as the founder of the sociological jurisprudence movement, argues against the legal formalism that prevailed in US jurisprudence at that time and brings attention to the importance of social relationships in the development of the law and vice versa. Pound conceptualizes law as social engineering, suggesting that lawmakers are social engineers who attempt to solve problems in society using law as their main tool.\textsuperscript{162} He brought the social aspect

\textsuperscript{159} \textit{Ibid}.
\textsuperscript{160} Jay A Sigler & Benjamin R. Beede, \textit{The Legal Sources of Public Policy} (Toronto: Lexington Books, 1977) Chapter 1.
\textsuperscript{161} \textit{Ibid}.
of law to the forefront and emphasized the relationship of law with many other disciplines. His ideas also paved the way for the American Legal Realism movement. Sigler & Beede suggest that if law is conceptualized as a tool for social change, then we need a broader understanding of its role in the social and economic system; they thought that law could become a positive instrument for social benefit. These authors caution planners and policy analysts about the competing notions of the primary functions of law in the US and, following Pound’s ideas, explain that law was moving more toward economic distribution and redistribution. They further explained that even though most laws do not involve redistributive policies, many of the US statutes have that effect, therefore, law should not be considered a neutral policy instrument.  

The whole idea of law as an instrument of change is pervasive in US jurisprudence and continues to be studied as well as challenged, it strongly influences the approaches to law in the common law tradition and its relationship with the study of public policy when understood as governmental policies. These are also part of the ideas behind the developmental projects and the interest in advancing legal transplants.

The role of courts as policy makers, has been a subject of great interest in US jurisprudence for decades, most importantly from the 1950s onwards. The increased interest came from the observation of an expanded ‘judicial activism’ prevailing at those times in the US. In his review of the book “Governing through Courts,” Lawrence Baum explains three points that help to illustrate the dimension of this issue. First, regarding the source of judicial activism, he inferred that this growth in judicial power to define critical issues stems from the perceived tendency to adopt open-ended statutes that eventually would require a detailed interpretation from the courts. He argues this is something they are pushed to do when the statutes do not provide a clearer guidance.

The second point is the appeal to the development of the history of the common law in the process of establishing judicial policies around significant issues like torts, contracts, or

163 Sigler & Beede, supra note 160, Chapter 10.
liability in the workplace. Judicial policies had had an impact similar to that of legislation on these topics. Judicial common law policy making is a feature of the common law tradition that has been evolving and is not only a recent tendency. Finally, on judicial capacity, the criticism of the courts’ capacity is related to the doubts about the legitimacy of judicial activism. For Baum, policy making is a function of the courts’ integral task of protecting rights, but the question of capacity should not be dismissed.

The role of courts in policy making in the common law tradition contrasts with how judges focus on applying and interpreting law in the civil law tradition. Hence, the relevance of considering these contrasts between traditions for understanding the way in which public policy functions in a particular local context.

2.7.3 Legal context: private international law or conflict of law.

The third factor to understand local approaches to public policy is legal context. It is understood here as the subject matter within which public policy is studied for cases of international commercial arbitration, that is private international law, also known as conflict of laws. In this legal context, public order is understood as those core values and principles that would prevent the application of foreign law, and thus would prevent the recognition and enforcement of a foreign arbitral award by national courts on public policy grounds.

This factor serves as a reminder that when we talk about public policy in this context it involves diverse jurisdictions. The rules of a state are looked at within a wider context and beyond its borders. Since private international law involves conflicts between laws from different states that need to be resolved, it sets a framework that makes a state aware of its position versus a larger community.

This section draws mainly on a work by Paul Lagarde167 who offers three theoretical approaches to public policy –better law principle, autonomous connecting factor, and exception to the operation of choice-of-law rules–, and two theories on its relative character –Theory of Inlandsbeziehung and Theory of Reduced Effect of Public Policy. This section helps us to understand some of the approaches and rules that are applied to solve cases in which multiple

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jurisdictions are involved. They have been addressed by private international law theorists and have served as a framework for arbitration cases, especially regarding the principle of party autonomy in contract law.

Traditionally, there is a fundamental divide in law between public and private matters. This dichotomy serves to differentiate the issues in which the state plays a superior role and acts as the sovereign that provides and decides for the common good. On the other side, private matters are those where individuals create a framework to oblige themselves, within the parameters established in the law. The parties are bound by their commitments pursuant to the party autonomy principle. Although the strict line between the private and the public might be blurring or not so relevant for certain matters in recent times, it still plays a part in the way that subject matter is organized for studying law.

Private international law is the area of law that pertains to situations involving actors from different jurisdictions or whenever there is a foreign element in a specific legal relationship between private citizens. In contrast to public international law, which regulates relationships between sovereign states, private international law is part of a state’s law that deals with situations involving a foreign element. It is not a rule between states but rules of a specific state that decide on the application of foreign laws within their jurisdiction. In common law jurisdictions, it is usually referred to as conflict of laws while in civil law jurisdictions is called private international law.

Arbitration fits within the private sphere due to its nature and origin, which is the agreement between private parties to submit their disputes to arbitration. Arbitration was created as a resource within the business community to facilitate the solution of disputes and has proved to be very effective for disputes between parties from different jurisdictions. However, when a losing party refuses to voluntarily comply with the arbitral award, it is not fulfilling one of the fundamental objectives of arbitration. Thus, the successful party would need to resort to national courts to enforce the arbitral award. When the successful party requests the recognition and enforcement of an arbitral award, the rules of private international law or conflicts-of-law rules come into play.

The New York Convention can be considered a conflict-of-laws rule since it provides the framework to decide upon the recognition and enforcement of a foreign arbitral award. Accordingly, every signatory state has agreed to make this Convention its guiding rule to decide
upon such a request. The Convention emerged as the result of a consensus among sovereign states that are bound by norms of international law. Although this framework of relationships between sovereign states has been changing in the last decades and it is not the most accurate description of the current state of affairs due to the different types of actors that now participate in the international arena, it is still the one that provides legitimacy to the Convention and has made it the successful instrument it has been so far.

A fundamental element of a country’s rules of private international law is its approach to public policy. Each country, by means of legislation, case law, or court rulings, establishes what the matters of utmost importance are or its most important values and principles that would not allow the application of foreign law. This specific approach to public policy is what serves as guidance for national courts to allow or not the enforcement of a foreign law, judgment, or arbitral award. Public policy becomes a critical threshold because what is contained in it or understood by it, determines the enforceability of a foreign award that, in general terms, should be enforceable. Furthermore, the way in which public policy is framed within a jurisdiction – also referred to as ‘forum’ in conflict-of-laws scholarship – influences the general perception of a country as an arbitration friendly jurisdiction. In current times, this perception influences the possibilities of a country for expanding trade and attracting foreign investment.

2.7.3.1 Theoretical approaches to public policy in private international law

Lagarde explains that the study of public policy starts with the problem of the study of the conflict of laws as local courts decide the applicable law to a specific situation in which laws from two or more jurisdictions converge. He identifies mainly three approaches to the use of public policy in this context:

1. The better law principle: it is the oldest approach and has been characteristic to the United States. According to this approach, the applicable law is the one that offers the more suitable solution for the dispute at hand. The courts need to evaluate the effects of each law on a case to choose the applicable law. It makes it possible directly apply the law and eliminates the often-complex route of the public policy exception.

2. Autonomous connecting factor: in this approach, public policy is put on equal footing with nationality or freedom of choice as an autonomous connecting factor. It draws on Mancini’s point of view that considered nationality the primary connecting factor in cases
of private international law. This approach, according to Largarde, starts from the assumption that certain provisions of the *lex fori* are fundamental and must be applied within a specific territory in all circumstances because they express public policy. It follows that public policy is a positive connecting factor and not an exception to the application of the normally applicable law. Pursuant to this perspective, it is not public policy that objects to the foreign law; rather the foreign law is incapable of excluding the binding rules of the forum. Those rules that integrate the forum’s public policy would have a priority position when conflicting with foreign rules.

3. **Exception to the operation of choice-of-law rules**: this is the most orthodox approach to public policy. According to it, the normally applicable law is rejected and replaced by a rule that is usually, but not always, borrowed from the *lex fori*. Authors like Dumoulin, Waechter, and Von Savigny endorsed this approach. According to it, the foreign rule might be applicable but because the results affect the forum’s public policy, the foreign rule cannot be applied. Here, public policy is the reason for not allowing the application of a foreign rule within a specific jurisdiction.

Lagarde further explains that Von Savigny’s view encompasses the two arguments that are most frequently used in the international sphere to push forward the notion of ‘the public policy of the state of the forum.’ On one hand, laws having the character of public policy cannot be replaced even by applying foreign law because they stand outside of the community of laws and remain for this reason outside the operation of the rules of the conflicts-of-law. On the other hand, the foreign law, which is normally applicable, can be excluded in exceptional cases. Franz Kahn strongly criticizes the dual character of these processes, he disagreed on the territoriality approach and proposed the notion of *Inlandsbeziehung* (connection with the forum), which refers to the link with the forum.

According to Lagarde, legislative developments around the globe reflect the changes in doctrinal development and he observes the tendency to adopt mainly two perspectives. According to the first one, public policy is determined by certain mandatory laws in each forum

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170 This is address in *infra* section 2.7.3.2 The relative character of public policy within private international law.
that are generally prohibitory and, because these constitute a minimum standard, they are applicable without question. According to the second, public policy forms an exception to the application of the law that would generally govern, if its application would lead to an unacceptable result to the law of the forum. Most of the international treaties and conventions, considered as modern legislation (including the New York Convention), adopt the notion of public policy as the basis for refusing to apply foreign law; these are the public policy exception clauses included in international instruments. What this entails, according to Lagarde, is that the court seized of the dispute must follow three steps before disregarding the foreign law and drawing the consequences of its rejection:

(a) The court must examine the foreign law and must not start from the *lex fori*, at least in principle,
(b) The court must examine the circumstances of the case to determine what the result of the application of foreign law would be, and
(c) The result must be compared with another legal system as a standard, which is most frequently that of the forum, in order to assess its possible incompatibility with public policy.

Most of the concern around the study of the rules of conflicts of law revolves around the process that happens at local courts to decide the applicable law and/or its interference with the forum’s public policy. However, in this process less, or little, attention is given to how public policy is understood and applied in the forum for the purposes of deciding the applicable law and/or its violation of the forum’s public policy.

### 2.7.3.2 The relative character of public policy within private international law

Determining which rules of the forum are rules of public policy has been the object of multiple scholarly discussions. In practice, the courts have been given the task of deciding whether or not to reject the application of a foreign rule on a case-by-case basis. From nationality to territoriality, the diverse approaches expose the relative nature of public policy. Husserl explains that the function of a norm regarding public order is relative and varies in each case. Therefore, what matters is whether there is substantial contact between the case and the forum,
and whether the interest of the forum is superior to the interest of the foreign state. The countries from the civil law tradition, identified with the Romanic school, have been guided by the “rule of relativity” in cases involving public policy. They have left to the judges the task of determining if the forum’s public policy is involved in a case. However, in common law countries like the United States and the United Kingdom, there was once resistance to this idea because it was considered more a political question dependent on factors that were not considered suitable to be decided by the judiciary.

The fact that public policy is a concept that is affected by circumstances of time and place, as well as by culture and legal tradition, reveals its relative character and makes it more challenging to clarify. Its relativity has prevented “the establishment of definite principles for the operation of ordre public, and makes it almost impossible to tell a priori whether a rule of the domestic law belongs to the province of ordre public.”

The relative character of public policy has been addressed in at least two identified theoretical approaches. According to Lagarde, “what offends against public policy is thus not the foreign rule as such, as it can be applied in many cases, but as it is particularized and rendered concrete in the individual circumstances of the case; it is the legal solution of the question in dispute by the foreign rule.” The theories he identifies to explain this relative character are, the Theory of Inlandsbeziehung (link with the forum) and the Theory of the Reduced Effect of Public Policy.

a) **Theory of Inlandsbeziehung**: was developed by Franz Kahn and plays an increasing role in contemporary law. Inlandsbeziehung is a subsidiary connecting factor regulating the application of certain substantive rules of the forum and correcting, to a certain extent, the insufficiency of the positive conflict-of-law rule. It follows that the existence of a positive link with the country of the forum is more important than the conflict of foreign law with public policy for determining and justifying the application of a mandatory substantive rule of the forum. According to Kahn, at the same time as it highlights the offense against public policy it will help to smooth out

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172 Ibid at 67, see footnote 97.
173 Ibid at 66.
174 Lagarde, supra note 167 at 21
175 Ibid, at 22.
the imperfection of the conflicts rule. If the connecting factor turns out to be weak, it may trigger the modification of such a rule.

b) **Theory of the Reduced Effect of Public Policy:** it originated in France, *effet atténué*, and attempts to provide a theoretical framework to the relative character of public policy. It evolved from French courts’ practice in different cases from 1860 to 1953, from which emerged two notions of the reduced effect of public policy. The first one was based on Antoine Pillet who rejects Mancini’s doctrine of the nationality link and affirms that every state is bound to apply within its territory its own laws embodying public policy and correspondingly, having regard to the sovereignty of other states, not to question the application in their territory by other states of their laws having the character of public policy. The second, developed with the *Riviére* case176 in which the French court decided that the applicable law to a divorce between spouses of different nationalities was the law of the domicile, and not the law of their nationality. It rejected the idea that French law prevails if one part is of French origin. At that time, *Riviére* was considered a decision that brought the civil and common law traditions closer because the rule of ‘the law of the domicile’ was one of the greatest differences between them. It was a new application of the distinction between the ‘ordinary’ and ‘reduced effect’ of public policy. The court in *Riviére* decided that a divorce by mutual consent properly pronounced under a competent foreign law did not violate French public policy because public policy “is less exigent relative to the effects in France of rights acquired abroad than with respect to rights which one wishes to acquire in France by the application of a foreign law.”177

Lagarde prefers the Theory of *Inlandsbeziehung* to the Theory of Reduced Effect because the latter resulted in excessive indulgence toward situations originating abroad than what the Theory of *Inlandsbeziehung* would allow. For him, one cannot isolate the effect from its cause. The Theory of Reduced Effect leads to the disappearance or to the weakening of the control that

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public policy can offer. “The relativity of public policy amounts, in the end, to a greater or lesser control of the law of the forum over the situation governed in principle by foreign law.”

When studying the public policy exception, it is important to keep in mind this relative nature as it reminds us that there are different factors that affect how the courts construct it when deciding a case. It is useful to acknowledge that due to its nature public policy is a source of uncertainty and poses many challenges. One of the most important challenges is identifying the links with the forum that justify the rejection of the foreign law. This uncertainty generates legal insecurity and thus, affects the predictability of a legal system. When it comes to arbitration, business actors value certainty, legal security, and predictability. The judges need clearer guidance from legislators or they will have to develop legal interpretations to decide these cases. If it is preferable that these criteria are given by the legislature or by the judges, is something for each legal system to decide. What is certain is that it is necessary to have a guiding principle for the interpretation of the concept of public policy, despite, and because of, its relative nature.

2.7.3.3 Recent developments within private international law

While countries developed, or refined, their internal rules of private international law or conflicts-of-law rules during the 20th century, new ‘types’ of public policy have also emerged — ‘international public policy’ and ‘transnational public policy.’ ‘International public policy’ refers to the international public policy of the country where the enforcement of an arbitral award is requested. ‘Transnational public policy’ refers to rules and principles of universal justice and general principles of morality accepted by civilized nations. Both concepts are addressed in detail in the next chapter but they are included in this section to give a more complete perspective of the factor of legal context. ‘International’ and ‘transnational’ public policy developed from efforts aimed at creating a concept with a more universal reach and because of the homogenizing efforts advanced in a variety of areas of law, particularly in business and trade. These ideas have provoked various reactions of acceptance and resistance. They are part of the current discourse and legal systems are facing the challenges of incorporating them or at least defining their own approach toward them.

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178 Lagarde, supra note 167 at 43
179 See infra Chapter 3 section 3.5.1 Definitions of public policy in the context of enforcement of awards.
It was explained above that the rules of private international law are not international rules but the rules of a country regarding the effect of foreign law within its territory; they are created to solve problems where laws from different jurisdictions coincide in a case. However, the development of the concepts of ‘international’ and ‘transnational’ public policy has created another dimension because one of its assumptions is the existence of a legal system above the national legal systems. The latter is a highly contested idea in the area of international law therefore it is necessary to be cautious in making claims based on that assumption.\(^{180}\) Lagarde argues that the “principal objection against this truly international public policy is that it would only be useful if it differed from the international public policy of the country of the forum, but that in this case a court seized on the matter could not call it in aid without rejecting its own law.”\(^{181}\) Therefore, in this scenario, using truly international public policy would go against the cohesion of a national legal system. Therefore, these concepts face numerous challenges to secure their legitimacy at the international and national levels. An additional challenge is the hierarchy of the sources of law to decide the applicability of these concepts. It is suggested by those who advance these concepts that, in case of conflict, priority should be given to the international sources.\(^{182}\) However, as Lagarde suggests, giving priority to international public policy presupposes at least that the international source exists in the form of an international treaty. In order to claim the superiority as an international source of law, each country would need to have incorporated such concepts via national legislation or international treaties. Concepts that intend to have a universal reach are constrained by the willingness of states to incorporate them into their national legal systems, a situation that is common to rules and standards that aspire to have such scope.

Over the last twenty years, the incorporation of international and transnational public policy in national legal frameworks, arbitration practice, and in arbitral awards has evolved significantly from when Lagarde addressed them. Nevertheless, and despite the criticism they have encountered, both concepts have had significant influence in arbitration practice. An important contributor to their incorporation, and extended application, in practice is the often-


\(^{181}\) Hurd, ibid at 5.

\(^{182}\) See infra section 3.8.3 2014 ICC Meeting: a transnational legal order.
discussed situation that arbitrators do not have a national legal system, and thus need a non-national legal system — and concept of public policy — as a standard they can use to decide their cases.

2.7.3.4 Public policy in arbitration

It is useful to clarify two points in the arbitration procedure where the arbitrators encounter the need to consider issues of public policy within a specific case. A brief mention of them at this point, allows us to exemplify how the subject matter in which public policy is contextualized here — that of private international law — is an important factor that delineates public policy in a specific way for understanding local approaches.

The first moment in an arbitral procedure where the arbitrators could face the need to take into account the public policy of a country is at the early stages when they are deciding the applicable law to the arbitral procedure, if the parties did not agree to it in the arbitral clause or agreement. There are generally two systems that can be followed in these cases, the conflictual or the material method. The system applied by the arbitral tribunal depends on the law of the arbitral forum or the rules of the arbitral institution that administers the procedure. The conflictual method entails that the arbitrators, to decide the applicable law for the case before them, can choose the conflict-of-law rules that they consider more appropriate for the case. This is the system followed by most of the national laws that have incorporated the UNCITRAL Model Law of Arbitration. The material method, allows arbitrators to choose directly the applicable substantive law they consider more appropriate to decide the dispute, instead of having to choose a conflicts-of-law rule before deciding the substantive applicable law. The material method is now formally established in the Arbitral Rules of the International Chamber of Commerce as per their reform in 2012.\(^\text{183}\) It has saved arbitrators one step to choose the substantive law, and has contributed to further detaching arbitration from a specific forum and allowing more freedom to arbitrators.

In arbitral practice, although it is not explicitly codified as such in their mandate, it is considered that arbitrators have a responsibility of issuing an enforceable award. This task requires arbitrators to consider the possible challenges related to public policy that an award

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could face at potential enforcement jurisdictions. This is not a minor task, since the arbitrators must consider effects that go beyond the decision they render in the award. However, in practice they need to consider the possibility that a party might refuse to voluntarily comply with the award, leading the other party to request its enforcement to national courts. If that were the case, the arbitrators would need to be aware that this award may face public policy challenges in the potential enforcement jurisdictions. In this type of scenarios, arbitrators, and eventually national courts, would need to differentiate the aforementioned ‘levels’ of public policy – national, international, and transnational public policy. A country’s national rules of private international law will not suffice to give answers to these cases; they would also intersect with the international agreements that a country has signed and would require its courts to expand the legal framework they use for solving cases involving the recognition and enforcement of foreign arbitral awards.

It was mentioned above that arbitrators would need to sort out the differences among the levels of public policy, however, this is taking for granted that these concepts have been incorporated by all (or the majority of) national legal systems, which is not the case. There are just a few countries, like France, who have actually recognized the existence of France’s international public policy in its legal framework. The reality is that the majority of legal systems, and furthermore their national courts, only operate within the idea of a national concept of public policy. There is a gap between the few countries who take the lead in affirming the existence of international and transnational public policy and their continuous evolution, and the larger number of countries who are not on board with the conversation but still they encounter some level of pressure to get on board with it. In the case of Mexico, for example, the courts are not discussing what should be considered part of Mexico’s ‘international public policy,’ in the French sense of the concept. They have only addressed, in some decisions, what should be considered matters of public policy for the public policy exception, without even settling a definitive interpretive criterion. Therefore, cases like France who has officially incorporated the concept of ‘international public policy’ are more an exception – and a leading example for many jurisdictions, maybe – rather than a general occurrence.

184 Regarding France’s concept of international public policy see infra section 3.5.1 Definitions of public policy in the context of enforcement of awards. For Swiss legislation see infra section 3.8 Transnational public policy, in particular infra note 313.
The conversation has become more elaborated with the incorporation of these levels of public policy. This leaves some jurisdictions with an unsolved or not clearly defined approach on how they understand public policy for the public policy exception, while still facing the challenges of dealing with two additional levels of public policy. Because of this situation, it is necessary for local approaches to go back to delineating their national concept of public policy for these scenarios before moving further on the incorporation (or not) of the notions of ‘international’ and/or ‘transnational’ public policy.

The legal context in which public policy is studied as outlined in this section has provided theoretical and practical perspectives involved in understanding public policy within private international law. The relative character of public policy, as a concept that keeps evolving with the society it emerges from, reveals the difficulty of its implementation. The rules of private international law (or conflict-of-laws rules) of a jurisdiction are the basis for applying the public policy exception; they show the jurisdiction’s approach to public policy and to the application of foreign law. These rules are not isolated within a legal system but rather have a relationship with other areas of law and with other jurisdictions. Cases involving the public policy exception bring closer, or blur, the usually strict divide between public and private matters in law, thus inviting us to consider other perspectives and to go beyond the dichotomy. The specific context of private international law helps us to understand the basis from which these challenges emerge and to examine the approach that a country has towards the enforcement of foreign arbitral awards.

2.7.4 Legal culture

The fourth factor suggested for understanding the local approach to public policy is legal culture. This is probably the most complex of these factors since it is also an aspect of a society that has been hard to study, yet, it is commonly resorted to for providing explanations about differences from one legal system to another. The intention of bringing this factor into the study is its usefulness to bring further awareness of differences among legal systems. It also emphasizes the importance of a pluralistic approach for understanding the public policy exception in the recognition and enforcement of foreign arbitral awards.
Essentially contested concepts, like public policy, have two significant elements, their relative nature and that they are culture dependent.\textsuperscript{185} Both elements reflect the dynamism implied in this type of concepts and convey part of the complexities involved in studying them.

It is not an objective of this study to set a definitive conceptualization of legal culture, in general, neither to define specifically what the Mexican legal culture is. This section reviews how the concept has been used and addressed by sociolegal scholars, the challenges that its study has posed, how it is an important element, and presents S.E. Merry’s proposal on how to approach it and give more clarity to the concept for specific studies.

As it has been mentioned beforehand, arbitration, as a dispute settlement mechanism, has been very successful for solving problems between parties that come from different legal traditions and legal cultures. Scholars and practitioners, like William K. Slate II, former president and CEO of the American Arbitration Association, highlight the importance of acknowledging differences in legal culture for a better practice of arbitration since “‗‗legal cultures‘‘ do not exist in an intellectual vacuum; [r]ather they are the products of the fundamental values of the society, based on history, language, and the perceptions of justice and social norms.”\textsuperscript{186} Slate II affirms that the understanding of legal culture has a significant qualitative consequence for arbitration, and arbitrators are not being sensible enough to cultural differences and their impact on the arbitral process even though it would be beneficial. He recognizes that little has been done in the international arbitration community in this regard and it is necessary to make specific efforts so that arbitrators consider cultural differences. To increase the confidence of parties in arbitration, Slate II suggests they need to feel heard and understood in their cultural context. One way to do this is if the arbitration field connects with other intellectual disciplines that have had more expertise in taking cultural elements into account. Even when legal culture remains an element that is very complex to study, the sociolegal scholarship has been very valuable in offering paths to address it in a variety of studies.

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\textsuperscript{185} See supra section 2.1 Public policy as an essentially contested concept.
2.7.4.1 Sociolegal scholarship on legal culture

One of the first names that stands out when addressing legal culture is Lawrence Friedman, his influential studies on legal culture date back to the 1960’s. For him legal culture refers to the “cluster of attitudes, ideas, expectations, and values that people hold with regard to their legal system, legal institutions, and legal rules.” Friedman affirms that to explain what the legal culture consists of in a certain country is an empirical question and there is little literature available on such a topic. However, he asserts that it is an extremely important variable because “it is, in a way, the fuel that makes the law machine move and work; [i]t determines the pattern of demand on the legal system; without the legal culture, “law” is dead, inert, a skeleton – words on paper.” He has continually emphasized the importance of looking at this variable. From his socio-legal perspective, legal culture is a source of law. He sees culture as the carrier of legal norms and reaffirms that law changes over time in response to social developments; law is an instrument and a consequence of group conflict. Hence the importance of acknowledging and purposely studying legal culture in different national contexts.

In his studies on legal culture, Friedman distinguishes between two ‘types’ of legal culture within a society, the internal and external legal culture. The external legal culture refers to the legal culture of the general population, their perceptions about the law and the legal system. The internal legal culture is the one experienced by the legal practitioners, all those who perform some kind of legal task within the system. This study concentrates on internal legal culture since the legal practitioners are the principal actors involved in the recognition and enforcement of foreign arbitral awards, which is a topic concentrated in a specific legal procedure. Additionally, what is suggested here is that the legal culture within the local practice influences how the local actors understand public policy.

Friedman has also suggested the emergence of a ‘modern legal culture’ in developed countries, one that is focused on ideas of individualism and rights. He considers this as an effect

188 Ibid.
of individualism in generating an unprecedented consciousness of rights, which has had a significant effect on developed nations’ legal cultures and their law. Regarding legal transplants, Friedman suggests that we stop talking about transplants and rather invites us to think about how to study the processes of diffusion, borrowing, and imposition of law.\textsuperscript{192}

David Nelken addresses the way that “adaptation” and “legal culture” are conceptualized and investigated. In the discussion about the outcomes, the real potential, and the perceived “successes” of legal transfers, he saw legal culture at the core.\textsuperscript{193} Therefore, instead of finding ways to make legal transplants work, it is necessary to give more attention to what makes each system different, and to look at those differentiating characteristics that are usually referred to as the “legal culture” of the adopting or receiving legal system. Nelken suggests that legal culture is one way of referring to stable patterns of legally oriented social behaviour and attitudes; and, like culture itself, it is about who we are and not just what we do.\textsuperscript{194} He warned about differentiating between its use and its usefulness and recognized that it is theoretically difficult and incoherent as a mode of explanation.

Nelken argues there are two contrasting uses of the term. In the first one, legal culture refers to patterns of law-related behaviour in given places or contexts, as contrasted with others; with the purpose of making comparisons more meaningful and with the further objective of explaining and understanding other legal cultures. In the second approach, legal culture is part of an ongoing process of meaning-making; these studies aim at understanding what is meant by legal culture in order to develop sociology and social theory of law, more generally.\textsuperscript{195} For him, the two enquiries are necessarily intertwined because “only in this way can research into legal culture help alert us the way aspects of law are themselves embedded in larger frameworks of social structure and culture that constitute and reveal the place of law in society.”\textsuperscript{196}

The analysis of the Law and Development (L&D) discourse presented in earlier sections of this chapter\textsuperscript{197} brought attention to this factor and revealed the importance of addressing it in

\textsuperscript{191} Lawrence Friedman, “Is there a Modern Legal Culture?” (1994) 7 Ratio Juris 117
\textsuperscript{192} Friedman, \textit{Comments on Cotterrell, supra} note 189.
\textsuperscript{193} Nelken, \textit{Towards a Sociology, supra} note 90.
\textsuperscript{194} Nelken, \textit{Using Legal Culture, supra} note 94.
\textsuperscript{196} \textit{Ibid} at 13.
\textsuperscript{197} \textit{Supra} section 2.3 Foundations for convergence: development and transplants.
This study. It was explained there that L&D has been considered a failure, mainly because those interested in offering the solution of ‘law’ to advance development neglected to see the social aspect of law most of the time. They expected that law and its institutions could be transplanted or imported into ‘non-developed’ legal systems and produce ‘development’ in the way that had happened in ‘developed’ countries. However, as it has also been mentioned before, there have been scholars, like Pierre Legrand, who refuse completely to accept the feasibility of legal transplants.198

Previously, scholars like Alan Watson were referred to for bringing attention to the importance of context to understanding the extent of transformation that a legal transplant could have; he affirms that a legal transplant cannot be expected to engineer determined solutions but will take on a life of its own in the new host.199 He recognizes the effect that the local legal culture has on the reception and transformation of the transplant.

Scholars point toward legal culture as part of the explanation for the impossibility of absolute transplants and to offer the explanation that, at best, the interpretive local communities will interpret and adapt the imported rules to fit the local legal system. Legal culture is then an important filter through which local actors look at and implement new legal institutions. This is important to acknowledge when we look at a culturally dependent concept like public policy. Awareness of the relevance of legal culture facilitates having a pluralistic approach to public policy. It opens us to see that it is not possible to expect legal institutions to work in the same way when they are brought from one country to another. Additionally, by bringing attention to it at the local level, it opens local actors to self-examination of the lenses through which they examine and incorporate global standards.

Some of the challenges faced by the scholars have been to decide whether legal culture could be an explanation or if it is something to be explained. Legal culture has been used as an explanation in comparative studies. There have been many challenges to those attempts because of the conceptual and methodological problems that the concept brings up. However, the continuous referral to and the use of legal culture in sociolegal scholarship demonstrates the need

to continue the quest for better ways to approach it as scholars in one way or another agree on the usefulness, or at least convenience, of the concept.

Nelken agrees that “although the potential of the concept to bring together the ‘legal’ and ‘social’ has been recognized at the theoretical level by specialists in comparative studies, its practical use in empirical research remains very poor.” Critics to the use of legal culture, like Franz and Keebet von Benda-Beckmann, have accepted that it might be a solution to a set of problems that are not clearly defined and for which the existing set of terms and concepts offer insufficient explanation. To this, Nelken argues that the meaning of concepts depends in large part on the way they are used and that the efforts to examine how scholars are using ‘legal culture’ in their research are valuable to bring more light to a concept that, despite its challenges, is useful and important.

Another significant voice in the study of legal culture is US-American anthropologist Sally E. Merry, who has offered a four-dimensional approach to legal culture for those interested in using it for their research. Merry—led by the interpretive anthropological studies of Geertz and Rosen—advocates for grounding legal culture in the anthropological understanding of how culture works by dividing it into four interconnected dimensions: a) practices and ideologies within the legal system, which is how practitioners see rules, the legal system and the people who use it, b) public’s attitude towards the law, which vary depending on their own experiences with the system c) legal mobilization, the instances when individuals turn to the law for help, and d) legal consciousness, the extent to which individuals see themselves as defined by the law and entitled to its protections and which changes according to their experiences with the law. Merry explains that this separation of legal culture into dimensions helps to clarify the concept and offers a better framework for empirical research. She affirms that each dimension requires different methods for its study but she emphasizes that they are not distinct forms of social behaviour but dimensions of social life that continuously reshape each other. She mainly argues that considering the dimensions separately provides “far better insight into the law/society

\[200\] Nelken, Purposes and Problems, supra note 195 at 3.
\[201\] Ibid.
relationship, greater scope for agency, and a more nuance analysis of processes of legal transfer, translation and hybridity.”\textsuperscript{203}

By disaggregating legal culture into these four dimensions, Merry suggests “it makes legal culture a more usable concept and less vulnerable to ambiguity in definition and inconsistency in its uses.”\textsuperscript{204} She recognizes it must have a certain level of importance for scholarship as it continues being used, despite the many challenges that different scholars have raised about it. For her, the relevance of finding approaches that can help to clarify it and contribute with better methods for studying it in scholarly research is evident. In the end, according to Merry, this will make the concept more valuable and viable.

Despite the challenges and criticisms that legal culture as a concept has encountered, its continued relevance is evident. It is useful, convenient, and necessary as an element for understanding local approaches to public policy. In this study, legal culture is approached as the practices and ideologies within the legal system and is done through interviews with local legal actors in Mexico that are presented ahead in Chapter 4. This study engages with their perspective about rules, the legal system, and local practices that reveal more about the tension between global standards and their local implementation.

The approaches that serve as background for this study have been presented to evidence the importance of engaging with the plurality of legal systems in ways that are more meaningful and connected with local contexts. The theoretical frameworks and the four factors advanced in this chapter are applied in the following chapters to, first, examine in detail the public policy exception in the New York Convention, and then, to examine Mexico as an example of a local context to test the tension between the expectations of globalized standards and their implementation in local contexts.

\textsuperscript{203} Ibid at 44.  
\textsuperscript{204} Ibid at 58.
Chapter 3: The Public Policy Exception in the New York Convention

This dissertation turns now to examine in detail the public policy exception as established in the New York Convention. This chapter starts by setting the context for arbitration, its legal framework, and reviews the origins of the New York Convention. It then moves to examine the role of national courts in arbitration, their crucial role in the recognition and enforcement of arbitral awards, and the exceptions incorporated within this important framework that the New York Convention created. To understand the purpose for which the public policy exception was included in the Convention, this chapter goes into the details of its discussion in the UN Conference using the travaux préparatoires. Then, the discussion moves to analyze the challenges found in the implementation of the exception in international practice. It uses the work done at the ILA conferences and its resolutions to analyze and challenge the trend advancing for a harmonized interpretation of the public policy exception. The analysis of this chapter finalizes arguing for the feasibility of a pluralistic approach to the public policy exception to advance the effectiveness of its implementation and of the arbitral system in ways that are more inclusive of the diversity of legal systems.

Transnational commerce requires cross-border movements; commercial contracts, their performance, and enforcement involve international elements, including mechanisms, rules, and institutions to solve disputes. Arbitration is a binding, alternative dispute resolution mechanism agreed upon by the parties involved in a contract. The most common form of arbitration, commercial arbitration, originates from a contract in which the parties agree –either in a clause or in a separate agreement– to submit to arbitration any dispute that may arise in relation to such contract. According to the statistics from the main arbitral institutions, international commercial arbitration has seen an exponential growth in the last thirty years. This expansion helps to understand why some scholars and practitioners consider it has evolved into a system of global governance. Some of the advantages for which arbitration is the preferred mechanism to solve disputes include the freedom it gives the parties to choose arbitrators, the applicable substantial and procedural laws, the confidentiality of procedures, and reduced times versus a procedure


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before national courts. Arbitration gives the parties a binding decision—arbitral award—for which there is an international framework supporting its recognition and enforcement.

The growth of international commercial arbitration has been driven in great part through the expansion of trade. In response to that expansion, there have been multiple efforts at the international level to create rules—conventions, agreements, and treaties—in a wide variety of topics to provide common grounds to facilitate understanding among parties from different countries, cultures, and legal systems. In a commercial transaction, the uncertainty of dealing with a foreign legal system poses an added risk for the parties. Thus, in addition to the reasons mentioned above, commercial parties also choose arbitration to avoid proceedings at the national courts of the other party. Arbitration is considered a more neutral forum to settle a dispute. This is important for business parties since they generally have the further objective of continuing doing business. Thus, they prefer to solve disputes in a more peaceful, problem-solving oriented context that arbitration can offer.

3.1 Arbitral legal framework

The practice of arbitration has developed national and international legal frameworks to support it. Margaret Moses uses a depiction of arbitration’s legal framework as an inverted pyramid with the point facing down to the arbitration agreement as the underpinning document governing arbitration. Moses justifies the inverted pyramid because the framework expands in scope and applicability as we move upward.

In the second level, following the arbitration agreement, are the arbitration rules selected by the parties to rule the arbitral procedure. These could be the rules of an arbitral institution or the ones agreed ad hoc by the parties. The third level is assigned to national laws governing the arbitration. In this category are the arbitration laws of the seat of arbitration and the substantive

209 Karl-Heiz Böckstiegel, “The role of arbitration within today’s challenges to the world community and to international law” (2006) 22(2) Arbitration Int. 165.
laws chosen by the parties to be applied to their disputes. The arbitration laws in many countries are based on the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law).\textsuperscript{211} Up to now, it has been adopted by 67 countries,\textsuperscript{212} which has contributed to a more homogenous arbitral practice.

Finally, at the top level of the inverted pyramid of the arbitration legal framework, E. Moses sets the international instruments applicable to arbitration. Among them stands out the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention or NYC, hereinafter).\textsuperscript{213} The New York Convention provides the rules for two basic actions: the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.\textsuperscript{214} In the first action, the Convention establishes the general obligation of a Contracting State to recognize an award rendered in another Contracting State as binding and to enforce it according to the rules established in the Convention. In the second action, the Convention requests that a court of a Contracting State, when seized of a matter for which the parties have agreed to arbitration, must, at the request of one of the parties, refer them to arbitration.

The New York Convention has been characterized as one of the most important successes in private international law with 157 contracting states up to 2017.\textsuperscript{215} In the words of the United Nations Commission on International Trade Law (UNCITRAL), “the wide adoption of the [New York] Convention has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade.”\textsuperscript{216} The New York Convention has been an important tool that provides the parties an effective mechanism to enforce an arbitral award. It has provided common rules for signatory countries and has enhanced arbitration to become the

\textsuperscript{211} UNCITRAL Model Law, supra note 16.
\textsuperscript{212} For a detailed list of the countries and its territories, states and/or provinces that have enacted legislation based on it visit: Status. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, online: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.
\textsuperscript{213} Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 38, (entered into force 7 June 1959).
most widely-used mechanism for settling commercial disputes among parties from different jurisdictions.  

At the international level, there have been multiple efforts to provide common rules to create a shared language that can go beyond differences in legal systems and traditions. The expansion of trade has put pressure on national and international systems to provide a legal framework that adapts to the constantly evolving demands of the business community. Arbitration itself had been a response to these needs when it was created as a private forum for business people to solve their disputes, and the legal framework created around it has so far demonstrated to support them.

3.1.1 The origins of the New York Convention

The International Chamber of Commerce (ICC) presented a draft convention on the enforcement of international arbitral awards to the United Nations Economic and Social Council (ECOSOC) in 1953 that prompted the Council to establish the Ad Hoc Committee on the Enforcement of International Arbitral Awards (Committee on Enforcement, hereinafter). The Enforcement Committee was composed of representatives of eight countries, with the purpose of studying the matter, report its conclusions, and submit proposals, including a draft convention if the Committee considered it suitable. In its submission, the ICC explained that the system established by the Geneva Convention of 1927 was no longer meeting the requirements of international trade, hence their proposal for a new convention. The Committee on Enforcement 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, would at the same time maintain generally recognized principles of justice and respect the sovereign rights of States.”

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218 The countries designated by the president of the Council were: Australia, Belgium, Ecuador, Egypt, India, Sweden, Union of Soviet Socialist Republics and the United Kingdom.
220 Ibid at 5.
The draft convention submitted by the ICC was circulated as per the recommendations of the Committee on Enforcement, to governments of member and non-member states, to the ICC and other non-governmental organizations, and to the International Institute for the Unification of Private Law, for their consideration and comments. With the information submitted, the UN Secretary General issued a Consolidated Report according to which nearly all submissions considered as major impediments to the progress of arbitration factors such as, “differences in municipal legislation governing arbitration procedures and the validity of arbitration agreements; difficulties in enforcing foreign arbitral awards; lack of uniformity in the rules of arbitral tribunals and in the use of sufficiently precise standard arbitration clauses, and the insufficiency of existing arbitration facilities.” Most of these factors were related to creating uniform rules to facilitate arbitration, which at that time were addressed by different organizations in diverse forums. In 1958, the UN called for the “Conference on International Commercial Arbitration” which resulted in the New York Convention. The call for this conference focused on the enforcement of international arbitral awards and the rest of the factors were highlighted as part of the context to be considered.

For the new convention, the countries suggested considering several topics, such as: defining its scope of application; how reciprocity could be assured; that a simplified and expeditious procedure be established; to define the conditions to refuse to grant the recognition and enforcement, in particular how judicial control would be addressed; and that attention should be put on how the relationship between any new multilateral convention and other international instruments related to the topic would work.

Pieter Sanders, delegate for the Netherlands at the 1958 Conference, presented a first draft of the Convention, which became known as the “Deutch Proposal.” This was the ground for what we know today as the New York Convention. According to Sanders, there were two main elements of the proposal. The first was to eliminate the double *exequatur* and the second to

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221 *Ibid* at 19.
222 According to the Consolidated Report, the following organizations were working on creating uniform arbitration laws: The Council of Europe, the Organization of American States, the Inter-American Council of Jurists, the International Law Association, the International Association of Legal Sciences, the Society of Comparative Legislation and the Union Internationale des Avocats. Report of the Committee, * supra* note 219 at 16-17.
223 UN ECOSOC, “Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Note by the Secretary-General” [hereinafter, Note by the Secretary General] E/CONF.26/2, March 6, 1958.
224 The double *exequatur* system implied that both, the court of the seat of arbitration and the court where the arbitral award was presented for recognition and enforcement had to issue a leave for enforcement before the arbitral award
restrict the grounds for refusal of recognition and enforcement as much as possible and to switch
the burden of proof of the existence of these grounds on the party opposing the recognition and
enforcement of the award.

The scheme set forth by the NYC for the enforcement of arbitral awards reflects a “pro-
enforcement bias”, which is the spirit of the convention. Generally, this is the approach taken
by national courts when interpreting the NYC and they are expected to construe its provisions
narrowly.

3.2 The role of national courts in arbitration

While international commercial partners often submit to arbitration in order to avoid
litigation, the involvement by national courts is still necessary in many cases. As Jan Paulsson
has noted, “the great paradox of arbitration is that it seeks the co-operation of the very public
authorities from which it wants to free itself.”

The role of national courts in arbitration is framed by the content of the Model Law,
which prescribes in Article 5:

“In matters governed by this Law, no court shall intervene except where so provided in
this Law”

The Model Law requires in Article 6 that states establish national courts or authorities to
performs various functions:

- To determine the appointment of arbitrators when the parties cannot agree on the
  procedure to appoint the arbitrators (Article 11(3)) or having agreed upon a procedure
  for appointment, the parties fail to comply with it or to reach an agreement within the
  accepted appointment procedure (Article 11(4)).

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Convention in Practice* (UK: Cameron May Ltd, 2008) at 56.
227 UNCITRAL Model Law, *supra* note 16.
• To decide on the challenge against an arbitrator, after the challenge has been rejected by the arbitral tribunal (Article 13(3)).

• To decide, upon request, on the termination of an arbitrator’s mandate, if a controversy remains on the grounds for challenging this arbitrator (Article 14).

• To decide on a plea that the arbitral tribunal does not have jurisdiction when the arbitral tribunal has ruled, as a preliminary question, that it has jurisdiction (Article 16 (3)).

• To decide on the recognition and enforcement of interim measures, to decide on their refusal based on specific grounds or to order them to support an arbitration (Article 17 H-J).

• To set aside an arbitral award upon request of one of the parties on certain grounds or if the courts find the subject matter is not arbitrable or the award goes against that state’s public policy (Article 34 (2)).

• To decide on the recognition and enforcement of an arbitral award or on its denial based on specific and limited grounds (Articles 35 and 36).

It is important to notice that a supportive rather than an interventionist or supervisory role is expected from national courts in arbitration. “Until late in the twentieth century the Courts in many common law countries were empowered by statute and decisional law to exercise a general supervisory jurisdiction over arbitration. One component of this jurisdiction allowed the losing party to challenge an arbitrator’s decision by judicial review of arbitral awards for error of law on the face of the award.” The Model Law has contributed to delimit and clarify the situations in which the cooperation of the courts is expected. D. Williams explained its promulgation has been an important factor for the development of a supportive modern approach to the role of courts in arbitration because Article 5 limits the courts’ intervention in arbitral matters. However, Williams also notes that the adoption of the Model Law does not guarantee the modern approach from the local judiciary. It is necessary to observe the practice of each country to recognize if the modern approach is supported in the courts’ decisions rather than only in the


229 Ibid at 5.
enacted legislation. Case law shows how local courts have interpreted this expectation to cooperate with arbitration and gives practitioners and the business community more tools to understand other jurisdictions’ approach to arbitration.

Lord Mustill emphasized the importance of a harmonious relation between the courts and the arbitral procedure, which involves a delicate balance. He agreed it has been recognized that the courts must be partners, rather than superiors or antagonists. Practitioners recognize they need to rely on the courts of a state to ensure that the arbitral agreement is given its proper degree of effect and feel certain the courts will uphold arbitration. To maintain that balance, it is equally important that courts recognize that arbitration serves the interests of the parties, respect their choices, and have a supportive attitude.

The recognition and enforcement of arbitral awards is one of the most significant moments when the courts’ participation is crucial. Arbitration is a conventionally agreed-upon jurisdiction and the parties agree to comply with its final decision. However, the parties need to use recognition and enforcement proceedings when one of them does not comply voluntarily with the award issued by the arbitral tribunal. The party favored by the arbitral award would need to resort to national courts for its execution since arbitral tribunals do not have execution powers. Therefore, the winning party would have to choose a national jurisdiction to request the recognition and enforcement of the arbitral award. This decision is usually based on the place where the reluctant party has assets against which the award can be enforced.

At this point, national courts gain a prominent role in arbitration and serve as a fundamental support –or important barrier– as they have execution powers and can use the force invested on them by their state to coerce a party to comply with the arbitral award. The New York Convention serves as the primary legal framework to support this action, along with the national laws in place for it. In this stage, the differences between legal systems and legal traditions become more evident. The interpretation and treatment that local courts give to

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arbitral awards vary according to the approach that each country has towards arbitration and the approach from the judiciary. Therefore, some jurisdictions are considered more supportive of arbitration than others.

The 2008 report of the International Arbitration Survey \(^{233}\) explained that most of the statements favoring arbitration were based on anecdotal evidence and this study wanted to provide more research-based information on those statements. Particularly related to the use of enforcement procedures, the report showed the majority of arbitral awards are voluntarily honored by the losing parties, about 75%, and it is only a small percentage of cases, 11%, that resort to enforcement proceedings. The rest of the cases were settled after an award was rendered, in order to avoid the use enforcement procedures.

A more uniform approach to the interpretation of the New York Convention is an important goal for the arbitration system as it contributes to the greater principles of certainty and predictability. The 157 signatory countries of the New York Convention show the willingness of the countries to adopt this legal framework to support arbitration. However, the diversity brings challenges in the interpretation of the Convention by the local judiciaries. For practitioners, it is necessary to know more about the approach or treatment that the local courts have given to the Convention in order to advise their clients and prepare their cases. The UNCITRAL commissioned a research team to create a Guide on the New York Convention, released in 2016, “to promote the uniform and effective interpretation and application of the New York Convention with a view to limit the risk that State practice might diverge from its spirit.” \(^{234}\) This initiative also brought an online platform - www.newyorkconvention1958.org - to make available case-law from a large number of jurisdictions around the world to disseminate

\(^{233}\) Pricewaterhouse Coopers and School of International Arbitration of Queen Mary University of London, International Arbitration: Corporate attitudes and practices (2008), report available online at: Pricewaterhouse Coopers <http://www.pwc.com/gx/en/arbitration-dispute-resolution/index.jhtml>. The School of International Arbitration of Queen Mary University of London has been doing this survey since 2006 to obtain more formal data on the practice of arbitration. This survey is one of the few empirical studies that provide data on the experience that corporations have had using arbitration. The topics that have been addressed in the surveys are: Corporate Attitudes and Practices (2006), Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards (2008), Choices in International Arbitration (2010), Current and Preferred Practices in the Arbitral Process (2012), Corporate Choices in International Arbitration: Industry Perspectives (2013), Improvement and Innovations in International Arbitration (2015), An insight into resolving Technology, Media and Telecoms Disputes (2016). For further details on each survey see: <www.arbitrationonline.org/research>.

information, limit legal disharmony and assist stakeholders with resources relating to the New York Convention.

A key feature of the New York Convention is Article V as it prescribes the grounds upon which national courts may deny recognition and enforcement of foreign arbitral awards. The grounds offered in this article are divided into two parts. In Section 1, the respondent must prove to the competent authority that: a) there is incapacity of the parties or the arbitral agreement is not valid; b) there were violations in the process for giving proper notice on the nomination of arbitrators or the arbitral proceeding; c) the award goes beyond the terms of the arbitral agreement; d) the composition of the arbitral tribunal or the procedures goes beyond the arbitral agreement; and e) when the award is not yet binding, has been set aside or suspended in the seat of arbitration. In Section 2, the national court, on its own motion (ex officio), might deny recognition and enforcement if it finds that, a) the matter is not arbitrable under its law, or b) if the recognition and enforcement would be contrary to its public policy.

A series of studies by Albert Jan van den Berg supports the idea that from the number of cases in which recognition and enforcement of an arbitral award is requested, only a small percentage of them are denied. Using the cases reported in the Yearbook of Commercial Arbitration, van den Berg made a review of these cases he labeled as the “unfortunate few,” to highlight the fact that it is a small percentage in which recognition and enforcement is denied by national courts – ten percent, in 1999. Five years later, in 2004, he made an update of these statistics and affirmed the percentage was stable around that ten percent he had reported before, with an apparently slight increase. In 2007, on the occasion of the 50th anniversary of the New York Convention, he updated this study once more. Van den Berg pointed out there were three key features that characterize the grounds for refusing enforcement that have been generally followed by the courts, with some notable exceptions where enforcement has been denied.

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235 See Appendix 1 for the full text of Article V of the New York Convention.
239 Ibid at 2.
• The grounds are exhaustive;
• A court may not re-examine the merits of the arbitral award; and
• The burden of proof lies on the respondent.

Van den Berg concluded the numbers of refusals for enforcement seem to be within an acceptable range and could be considered a successful achievement for an international convention. He found that from 1,400 court decisions that have been reported on the interpretation and application of the New York Convention in the 32 volumes of the Yearbook Commercial Arbitration, approximately half of these decisions concern the enforcement of arbitral awards. Thus, from around 700 enforcement decisions, in about 70 cases enforcement of the award was denied. After reviewing this ten percent, he concluded that “a fair number of decisions resulted from a mistake of one kind or another – parties drafting inadequate arbitration clauses, arbitral tribunals or arbitral institutions not paying sufficient attention to the conduct of the proceedings, or courts misunderstanding the meaning of the Convention.”

Regardless of how small is the percentage of cases where enforcement is denied, these cases provide an area of study and research since they challenge arbitration practice and provide an opportunity for its continued enhancement. Sometimes the challenging cases, the negative or hard-case stories, are the ones that reach the media and make no good service to show arbitration as a valuable and effective mean to solve commercial disputes or to a particular jurisdiction. The successful cases are hardly noticed outside the arbitration community and do not receive as much attention.

3.3 The origins of the public policy exception

Provision b) of Section 2 of Article V of the NYC is known as the public policy exception. According to it, national courts may deny enforcement of an award if it would be contrary to their public policy. In the following paragraphs are presented some of the most important comments, concerns, and amendments that were raised in submissions and during the debates that led to the adoption of the NYC. They provide a larger perspective of how the

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240 Ibid.
exception was defined and how the countries differed in their understanding of the concept of public policy based on their own legal cultures and legal systems.

From the reports presented by the Secretary General it is evident that to define the grounds for refusal was one of the central problems raised by the governments in their comments to the draft convention approved by the Committee on Enforcement.\textsuperscript{241} As well, they intended to make this an exhaustive list, without the possibility of adding grounds for refusal at the will of the countries. The Secretary General emphasized that “the extent of judicial control over the recognition and enforcement of arbitral awards must be defined with precision, so as to avoid the possibility that a losing party could invoke without adequate justification a multiplicity of possible grounds for objections in order to frustrate the enforcement of awards rendered against it.”\textsuperscript{242} Basically, this is the reason that guided the definition of the grounds for refusal, along with making the provisions clear and simple.

The first version of the public policy exception as established in the draft approved by the Committee on Enforcement read as follows:

“Article IV: Without prejudice to the provisions of Article III [requirements to obtain the recognition and enforcement], recognition and enforcement of the award may only be refused if the competent authority in the country where recognition of enforcement is sought, is satisfied:

(h) that the recognition or enforcement of the award, or the subject matter thereof, would be clearly incompatible with public policy or with fundamental principles of the law (“ordre public”) of the country in which the award is sought to be relied upon.”\textsuperscript{243}

The Committee on Enforcement construed this clause as a modified version of the provisions contained in the Geneva Convention and of the ICC Draft. The latter omitted the reference to the principles of the law, however, the Committee on Enforcement decided to include it but they added the words ‘clearly’ and ‘fundamental’ with the purpose of limiting the application of this clause. Their intention was to convey the idea that the arbitral award should be distinctly contrary to the basic principles of the legal system where the award is invoked. This wording found opposition from the representatives of Australia, India, and the United Kingdom who argued that the word ‘fundamental’ does not have a clear meaning under their laws. There

\textsuperscript{241}See supra section 3.1.1 The origins of the New York Convention.
\textsuperscript{242}UN ECOSOC, Note by the Secretary-General, supra note 223, at 5.
\textsuperscript{243}UN ECOSOC, Report of the Committee, supra note 219, at Annex page 2. Emphasis in the original.
was a discussion on whether some of the grounds could be raised by the parties, while others *ex officio* by the competent authority, but no distinction was made in the draft approved.\textsuperscript{244}

In his observations submitted in preparation for the Conference, the Secretary General explained that according to the comments received, the wording of Article IV (h) needed clarification. Some countries considered that using ‘public policy’ was broad enough to convey the idea, but including ‘fundamental principles of law’ could cause problems of interpretation. This could open possibilities for revision of the substance of the award at the enforcement stage and this is something that the drafters of the Convention wanted to prevent.\textsuperscript{245}

In his Consolidated Report,\textsuperscript{246} the Secretary General detailed comments and concerns raised by certain governments and non-government institutions on each of the articles of the draft convention approved by the Committee on Enforcement. About Article IV, the Netherlands Arbitration Institute was of the opinion that the incompatibility with public policy should be the only ground for refusing enforcement. About sub-paragraph (h), which contained the public policy exception, the Federation of Indian Chambers of Commerce and Industry indicated that the words “fundamental” principles of law (*ordre public*) had no clear legal meaning under the laws of many countries and suggested to delete it because “its inclusion would make the clause ambiguous and may lead to different interpretations in different countries.”\textsuperscript{247}

During the Conference, the following are the amendments suggested by the governments’ representatives regarding the public policy exception as it was framed in the draft Convention by the Committee on Enforcement:

a) Sweden\textsuperscript{248} and Japan\textsuperscript{249} suggested to eliminate “or the subject matter thereof.”

b) Pakistan suggested omitting “only” in the opening sentence.\textsuperscript{250}

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\textsuperscript{244} *Ibid* at 13.
\textsuperscript{245} UN ECOSOC, Note by the Secretary General, *supra* note 223, at 7.
\textsuperscript{246} UN ECOSOC, “Activities of Inter-Governmental and Non-Governmental Organizations in the Field of International Commercial Arbitration: Consolidated Report by the Secretary-General” [hereinafter, Consolidated Report] E/CONF.26/4, April 24, 1958.
\textsuperscript{247} *Ibid* at 29.
\end{flushleft}
c) The Netherlands proposed amendments for all the grounds of refusal; for the public policy exception, they suggested: “(e) the award would have the effect of compelling the parties to act in a manner contrary to public policy in the country of enforcement.”

d) Israel suggested to redraft the Netherlands proposal: “(e) the enforcement of or compliance with the award would involve the violation of any law of the State where the enforcement is sought or be contrary to its public policy.”

e) Yugoslavia suggested deleting “or with fundamental principles of the law” from the draft Convention.

f) The Federal Republic of Germany suggested reorganizing article IV and separating it into several articles. About the public policy exception, it suggested that the enforcement should be refused if “the recognition or enforcement of the award would be incompatible with the public policy (ordre public) of the State in which the award is sought to be relied upon.” It also suggested adding, “When an award has been declared operative by the competent authority of one of the Contracting States, measures of enforcement may be taken in any of the said States. Enforcement shall nevertheless be refused if the award is contrary to the public policy of the State in which the enforcement is requested or if under the law of that State the subject matter of the award is not capable of settlement by arbitration.”

g) In the second round of amendments, France, Federal Republic of Germany and Netherlands presented a new suggestion, “Recognition and enforcement of an arbitral award may only be refused if: (e) the recognition or enforcement of the award would be incompatible with the

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255 Ibid at 2-3.
public policy of the country in which the award is relied upon." In this amendment they argued that even if a party fails to claim the existence of any of the grounds, the local courts might refuse recognition or enforcement if they establish, by their own motion, the existence of any of the grounds. At this point the reference to “ordre public” was eliminated, leaving only the expression “public policy.”

After these submissions, the Working Party III, commissioned to prepare the recommended text for Articles III, IV and V, presented a new draft that, among other issues, advanced a new structure of Article IV. The grounds for refusal were divided into two sections, the first for the grounds that the party opposing enforcement should invoke and prove, and the second for the grounds that the enforcement authorities may apply of their own motion. As a result, the public policy exception was assigned to the second section of the article and its wording according to the proposal by France, Germany, and Netherlands, which omitted the reference to “ordre public.” The Working Party III, explained that the public policy ground should not be given a broad scope of application. Hence, the recommendation to delete any references to the subject matter of the award and to fundamental principles of the law.

In the first provisional full text of the Convention the grounds for refusal moved from article IV to article V, which is the article that contains the grounds for refusal in the final version of the Convention.

From the chronological reading of the discussions and proposals on the public policy exception presented above, the public policy exception has been pointed out, since the beginning, as a complex exception that could lead to challenges in its application due to difference of interpretation. The inclusion of “fundamental principles of law” was highly contested and

eventually withdrawn from the Convention. However, as it will be addressed ahead,\textsuperscript{260} public policy is often explained as the fundamental principles of morals and justice of a country, almost as if this should be considered implicit in the definition of public policy. The final drafting of the public policy exception received the consensus needed to achieve three main goals, a) to prevent giving space for debtors who would like to use resources or grey areas available to avoid the execution of an award; b) to offer the country in which the enforcement is requested, a tool to protect its fundamental principles; and c) to establish a restrictive approach to public policy when used as a ground to challenge the recognition and enforcement of arbitral awards. And still, the final wording might had left too wide a space for interpretation, which eventually has led to challenges in its application.

There was participation of 45 States representatives, 3 States represented by observers, 3 inter-governmental organizations (the Hague Conference on Private International Law, International Institute for Unification of Private Law, and the Organization of American States), and 10 non-governmental organizations: International Chamber of Commerce, American Foreign Insurance Association, Chamber of Commerce of the US, Consejo Inter-Americano de Comercio y Producción (Inter-American Council of Commerce and Production), International Association of Legal Science, International Bar Association, International Federation of Women Lawyers, International Law Association, Junior Chamber International, and Société de Législation Comparée (Society of Comparative Law). This distribution also shows the diversity of legal traditions that were represented in the process.

Aside from the challenges that will be addressed in sections below, it is fundamental to acknowledge the wide participation of government representatives, inter-governmental, and non-governmental organizations in the drafting of the Convention. This indicates the caution and attention given to all the possible details since participants and observers had great interest in the Convention to enhance the effectiveness of arbitration as a mechanism to solve commercial disputes.

\textsuperscript{260} See \textit{infra} section 3.5.2 The content of public policy.
3.4 Challenges in the implementation of the public policy exception

The application of the public policy exception has brought the challenges that their drafters were anticipating, and trying to avoid, in its interpretation at the local level. According to the way the exception was drafted, it is left to national courts to give content for its concrete application, and it is from here that the challenges have emerged. The exception has been described as an “escape valve” given to national courts to keep certain control over arbitration.

One of its most famous depictions has been the one made by English Judge Burrough in *Richardson v. Mellish* in 1824, as an “unruly horse” that once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.” This metaphor is still used in the common law tradition as a way to show that the public policy exception can carry the courts to unpredictable destinations. At the same time, this explanation represents very accurately how the exception is used because most of the times, it is not until other points have failed that it is resorted to.

In the civil law tradition, where the analogous notion would be ‘l’ordre public’, the public policy exception has been depicted as an “inveterate chameleon,” that represents a threat to legal certainty and predictability; two important goals for which the New York Convention was created.

Therefore, some of the reasons this exception has been so problematic is related to the very nature of public policy. Its dynamic nature conflicts with the general objectives of legal certainty and predictability that international instruments aim for. To look at public policy as an essentially contested concept helps to understand that openness and dynamism are part of its nature and that this nature serves a specific purpose. It is suitably explained by González de Cossio that public policy is “a norm of open texture that is nurtured by the local peculiarities, it allows each country to be part of the global infrastructure without compromising its own

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262 *Richardson v Mellish*, 2 Bing 229 (1824) at 303 [Emphasis added].
264 See *supra* section 2.1 Public policy as an essentially contested concept.
sensitivities… It is an ingenious solution from the Law to the problem of diversity as an obstacle to construct schemes at the international level.”

Cases like Saw Pipes in India, COMMISA in Mexico, and others that have happened in the last two decades have raised concerns in the arbitration community about this exception. Private parties from developed countries have seen their interests at risk for decisions from courts from developing countries that many times are considered less ‘legally developed’. On the other hand, national courts from countries like China and Russia have interpreted the exception in unexpected ways, which has promoted a perception there is a broad interpretation of public policy and a protectionist approach.

From another perspective, these decisions from national courts could be read as a reaction to how the most influential countries –those at the center– have imposed the interpretation that should be given to the public policy exception. This has led countries in the periphery to use the tools available to them to protect certain national interests through the application of this exception. It could be said that in the public policy exception, they have found the space to bring forward the particularities of their own system and national values.

One of the delicate lines in using the exception lies in the risk of states going too far on protectionism. However, one should consider that, to a certain degree, this is the purpose for which it was created, to provide countries with a space to safeguard their highest local values or principles when they get into a new international commitment. With the consolidation and increased active participation of certain jurisdictions in the international arena, the concept of

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266 Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd., AIR 2003 SC 2629. The problematic situation is that in Saw Pipes the Indian Supreme Court expanded the scope of public policy compared to the established precedent in Renusagar in which the Indian Supreme Court established a narrow interpretation of it. See Renusagar Power Co. Ltd. v. General Electric Co., 1994 SCC Suppl. (1) at 654 et seq; Yearbook of Commercial Arbitration, Vol. XX (1995), at 681 et seq.
267 Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, No. 10 Civ. 206 (AKH), 2013 WL 4517225 (S.D.N.Y. Aug. 23, 2013) [COMMISA]. In this case, the arbitral award has been nullified in Mexican courts and enforced in U.S. court, both on public policy grounds.
268 See the analysis made by Maurer, supra note 10 at 335 et seq. Maurer explained that the Supreme People’s Court has phrased ‘public policy’ in China as the ‘social and public interest’ and has been interpreted as that which is insensitive to the feeling of Chinese people, the breach of mandatory provisions of the People’s Republic of China Laws, mere unfairness or injustice, and the violation of China’s judicial sovereignty.
269 See Maurer, supra note 10, at 205 et seq. Maurer explained the public policy exception has been frequently used to deny the enforcement of foreign arbitral awards but there is no uniform application of the concept in Russian case law. It is a highly unpredictable environment.
public policy has been applied in unexpected ways. The public policy exception has been playing an increasingly important (and unexpected) role in these jurisdictions and in the international arbitration arena.270

Very few national laws specify what public policy is in a general way; even less explain how it should be interpreted for in arbitration cases. Consequently, national courts have had to define its scope and interpretation within their legal system. They have become the primary source to understand the local approach to this notion. In the United States, for example, in 1974, the Court of Appeal of the Second Circuit in Parsons & Whittemore Overseas Company, Inc. v. Societe Generale de l’Industrie du Papier271 (Parsons, hereinafter) defined public policy as “the most basic notions of morality and justice” of the forum state. In 2007, the U.S. Court of Appeals for the District of Columbia Circuit in Termorio S.A. E.S.P. and LeaseCo Group, LLC v. Electranta S.P., et al (Termorio, hereinafter) explained:

A judgment is unenforceable as against public policy to the extent that it is “repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.”... The standard is high, and infrequently met. As one court wrote “[o]nly in clear-cut cases ought it to avail defendant... In the classic formulation, a judgment that “tends clearly” to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property is against public policy.272

In Termorio, the US Court of Appeal specifically addressed the public policy exception, reasoning that “[t]he public policy defense is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice.”273

In France, the Code of Civil Procedure establishes that an appeal against a decision granting the recognition and enforcement of an award may be brought only in certain cases, being the fifth one, if the recognition or enforcement is contrary to France’s ‘international public policy.’274 This is a jurisdiction that has gone further to differentiate between local and international public policy, adding another layer of complexity to local interpretations of this

273 Ibid.
concept. The two key cases on the French approach to public policy are Renosol\textsuperscript{275} and Cargill,\textsuperscript{276} both solved by the Paris Court of Appeal in 1996 and 2001 respectively. These decisions have been the guiding criteria for French courts. In these cases, the Court explained that the recognition and enforcement should be denied if the award goes against the French conception of international public policy, which should be understood as the set of rules and values of the French legal system that cannot be ignored, even in situations with an international character. The court, when reviewing the award can only decide on the solution given to the dispute but not on the merits of the case, or on the arbitrators’ assessment of the rights of the parties against the public order provision invoked. The annulment of the award would be justified if its execution affects the French conception of international public policy.

Unfortunately, there are not many statistics available to give a detailed dimension of the size of this challenge, in terms of the amount of cases that have reached national courts and against which the public policy exception has been applied. This is due, in part, to the private nature of arbitration, which makes it difficult to have records of all the arbitration cases that happen and the multiple institutions that provide it. The dissemination of cases depends on national rapporteurs who report cases from their national jurisdictions. Hence the importance of initiatives like the New York Convention Guide\textsuperscript{277} and the work by the Yearbook Commercial Arbitration to document and compile these cases. The latter has made important contributions by monitoring the application of the NYC and reporting court decisions in which it is interpreted and applied, as well as commentaries where decisions are analyzed and compared.

Going back to the “unfortunate few” that van den Berg found in his studies\textsuperscript{278}—about 10\% of cases in which national courts have denied enforcement—, he reported in the last update from 2007, 10 cases in which the public policy exception had been applied.\textsuperscript{279} Van den Berg explained that the clear majority of arbitral awards are internationally enforced; most voluntarily and some through the courts. For him, this small percentage is an indication of the effectiveness of international arbitration.

\textsuperscript{275} SA Renosol France et autre v. Société Coverall North America, Cour d’appel de Paris (1re Ch. C), 15 February 1996. [Renosol case]
\textsuperscript{276} Société Cargill France v. SA Tradigrain France, Cour d’appel de Paris (1re Ch. C), 14 June 2001. [Cargill case]
\textsuperscript{277} New York Convention Guide, supra note 234.
\textsuperscript{278} See supra section 3.2 The role of national courts in arbitration and references included in supra notes 236, 237, & 238.
\textsuperscript{279} Van den Berg, Refusals of Enforcement, supra note 238 at 18-21.
On the public policy exception, van den Berg explained that while it has been the subject of several scholarly debates, there are few cases in which it had been applied. He concluded that these cases resulted from outdated arbitration laws or facts that truly warranted a refusal of enforcement. In the last update, he explained that the cases regarding the public policy exception were related to a) the distinction between domestic and international public policy, b) arbitrability, c) lack of impartiality and d) “other cases” (specific cases related to public policy that did not fit in the other categories). His own classification shows that these cases involved local distinctions in the interpretation and application of public policy.

Even though examples are minimal, it is important to recognize that the approach of national courts to the public policy exception can have great impact on the standing of a country as a pro arbitration jurisdiction, which would affect the risk qualification of a country as a safe country for conducting international business. This reason, as it will be shown later in the COMMISA case in Mexico, is important enough to bring attention to this exception. The public policy exception is an example of the tension between convergence and diversity. It is necessary to consider the challenges that national courts face when applying it, the constant international efforts to promote a more clear and uniform interpretation, and the importance of acknowledging and maintaining diversity in the conversation.

3.5 Development of the public policy exception as reported by the International Law Association

The Committee on International Commercial Arbitration from the International Law Association (ILA) organized one of the most significant efforts to compile international experience and provide guidance on how local courts should interpret and apply the public policy exception. In 2000, the Committee delivered an Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (ILA Interim Report, hereinafter), which built on a paper presented to the Committee by the Rapporteur Sheppard at the ILA conference in Taiwan in 1998. For ILA Interim Report (2000), the Rapporteur made a review of the development in the application of the concept of public policy by enforcement courts over fifteen years; he used as sources the aforementioned paper, the comments made at the conference, and

280 See infra section 5.5 COMMISA Case.
281 ILA Interim Report, supra note 7.
the submissions from members and non-members. These submissions provided the Committee with information on local practices, including local legislation and comments on decisions from local courts, along with decisions in which enforcement had been denied on public policy grounds.

The ILA Interim Report offered a detailed overview of the status of the topic around the globe. Particularly useful are the experiences and approaches reported and consolidated in categories to better understand how the exception has been studied and applied in different jurisdictions. The ILA Interim Report compiles the most important elements to be considered for understanding the public policy exception, which are summarized in Figure 3-1 and will be addressed in the following subsections.

Figure 3-1 Elements to understand the public policy exception according to the ILA Interim Report

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3.5.1 Definitions of public policy in the context of enforcement of awards

The ILA Interim Report recognized the difficulty to provide a precise definition of public policy in the context of the enforcement of arbitral awards, however it also acknowledged that the definitions had not had changed significantly over the years.\textsuperscript{282} The Report included three definitions to public policy that have been advanced for the recognition and enforcement of arbitral awards under the New York Convention:

\textsuperscript{282} Ibid at 343.
• The basic notions of morality and justice

The understanding of public policy as a “nation’s basic notion of morality and justice” derives from the United States case Parsons & Whittemore,283 is known as the “Parsons Standard” and has served as reference for scholars in other jurisdictions. Other jurisdictions that have showed this approach are the English courts based on the decision in the D.S.T v Rakoil case:

“Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution… It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.”284

According to the ILA Interim Report, German courts and Muslim Law are other jurisdictions that have used this approach to define public policy for the of enforcement of an arbitral award.

• International public policy

The concept of international public policy was introduced by French courts and it is legislated in their Code of Civil Procedure.285 According to this Code, to decide on the enforcement of an arbitral award, the judge should consider if there is a violation of French ‘international public policy’. The ILA Interim Report informed that Portugal has also incorporated this approach in its national legislation286 and the Court of Appeal in Milan had held that the public policy in Article V.2(b) of the NYC is international public policy.287

The purpose to differentiate domestic from international public policy, explained the Report, was to make clear that the international is narrower than the domestic. Thus, not all the

283 Parsons, supra note 271.
286 Portugal Arbitration Law enacted by Law No. 63/2011 on December 14, 2011 (entered into force 14 March 2012). Article 56, b), ii, states: “recognition and enforcement of an arbitral award made in an arbitration taking place in a foreign country may only be refused, if the courts finds that, the recognition and enforcement of the award would lead to a result clearly incompatible with the international public policy of the Portuguese State.” (Emphasis added)
287 However, the Interim Report suggested that given the Milan Court’s use of the concept, it seemed that it was referring more likely to ‘transnational public policy’ because it described international public policy as a “body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions” Interim Report, supra note 7 at 345.
norms that are considered domestic public policy are part of the international public policy of say country. However, it should be kept in mind that this approach still refers to a country’s differentiation between national and international public policy, i.e. it refers to the international public policy of that state. Citing Professor Sanders, “international public policy, according to a generally accepted doctrine is confined to violations of really fundamental conceptions of legal order in the country concerned.”

The Rapporteur explained in the ILA Interim Report that the international conventions related to the enforcement of arbitral awards or the UNCITRAL Model Law do not make any express reference to international public policy or transnational public policy; they only use public policy. Some national laws and national courts are advancing this distinction between national and international public policy, like in the cases of France and Portugal. It is also affirmed in the ILA Interim Report that there are no intentions to harmonize the public policy defense, but they found that many courts have adopted a restrictive approach to the interpretation of public policy. The only known effort to harmonize a shared concept of international public policy is in the OHADA (Organization for the Harmonization of Business Law in Africa) Uniform Act. Although most national laws only use public policy, according to the ILA Interim Report various courts’ decisions show an approach consistent with the view that public policy should be interpreted as the international public policy of the country where enforcement is requested.

- **Transnational public policy**

  This level is presented in the ILA Interim Report as a higher or more restricted approach to public policy, but one that has universal application that comprises: “fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as “civilized nations.”” The ILA Interim Report explains that although there are no examples where the courts have used this terminology, from some decisions it could be observed that national courts are referring to the aforementioned elements of what is considered ‘transnational public policy’ or, as its proponent

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289 ILA Interim Report, *supra* note 7 at 346.
290 *Ibid* at 345-6.
Pierre Lalive calls it, ‘truly international public policy’. This concept will be addressed in more detail in subsection 3.8 ahead in this chapter.

3.5.2 The content of public policy

To address these rules and norms that are contained in the concept of public policy, the Interim Report brought attention to the substantive and procedural categories of public policy and the issue of finality. On the procedural category, some authors have cautioned that procedural defenses should be grounded in Section 1(b) of Article V of the New York Convention and not on the public policy exception; however, this would depend on how the country construes the concept of public policy. The ILA Interim Report acknowledged that national courts had recognized the importance of finality through a general policy to narrowly construe the public policy exception to show a ‘pro-enforcement bias’.

Within the concept of public policy, there are four sub-categories of rules and norms that can be identified as part of the substantive content of public policy: mandatory laws / lois de police, fundamental principles of law, public order / good morals, and national interests / foreign relations.

- Mandatory laws / lois de police.

  Following Professor Mayer, “a mandatory rule (loi de police in French) is an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship. To put it another way: mandatory rules of law are a matter of public policy (ordre public), and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.”

  Examples of rules that would fit in this category according to professor Mayer are: competition laws, currency controls, environmental protection laws, measures of embargo, blockade or boycott, or laws falling in the rather different category of legislation designed to protect parties presumed to be in an inferior bargaining position, such as wage-earners or commercial agents. The ILA Interim Report explained that courts from many countries share the

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view that not all their mandatory rules are relevant when deciding on the recognition and enforcement of an arbitral award; but these mandatory rules, by their nature, must be applicable regardless if it is an international arbitration. It is summarized in the formula: “every public policy rule is mandatory, but not every mandatory rule forms part of public policy.”

- **Fundamental principles of law.**

  These are distinguished from the mandatory rules in the ILA Interim Report because courts use this term to refer to more general principles, rather than legislation. The iconic example for this category is a decision from Swiss courts that recognize as fundamental principles of law those of *pacta sunt servanda*, the prohibition of the misuse of the law, the principle of good faith, the prohibition of uncompensated expropriation, the prohibition of discrimination, and the protection of those incapable to act.

  It is generally assumed that most countries share these principles. However, since the ILA Interim Report also included the Muslim Shari’a perspective, it should be noticed that their approach to the fundamental principles of law differs in significant ways from the Western-oriented perspective. This element of public policy allows to make more evident the diversity of understandings of these concepts due to differences in legal traditions and legal cultures, and challenges harmonization.

- **Contrary to good morals/public order**

  The consensus found in the Interim Report shows that activities considered as *contra bonos mores* by a significant majority of countries include piracy, terrorism, genocide, slavery, smuggling, drug trafficking, pedophilia, corruption and bribery.

- **National interests / foreign relations**

  The ILA Interim Report explained this substantive category using the *Parsons & Whittemore* case in which the United States Court of Appeals sustained that “public policy did not equate with “national policy” (in the diplomatic or foreign policy sense)… The court indicated that enforcement would be refused only where the conflicting national policy would

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292 ILA Interim Report, *supra* note 7 at 357.

293 *Ibid* at 359.
The court explained that US courts could not deny the enforcement of an arbitral award for reasons related to the status of the diplomatic relationship between countries, in this case between the United States and Egypt. English and French courts have also sustained this approach.

According to the ILA Interim Report, the following are examples of cases where a violation of public policy would exist if any of these procedural situations were opposed as exceptions for the recognition and enforcement of a foreign arbitral award:

1) Fraud / corrupt arbitrator
2) Breach of natural justice / due process
3) Lack of impartiality
4) Lack of reasons
5) Manifest disregard of the law
6) Manifest disregard of the facts
7) Res judicata
8) Annulment at place of arbitration
9) Other cases of French international procedural public policy

As was noted above, many scholars have argued that these types of violations should be grounded in Article V Section 1 (b), which refers to procedural violations. However, for Civil Law countries these violations are considered part of public policy, which is not the same for Common Law countries. These examples offer a more specific guide of situations in which certain local courts would deny the enforcement of a foreign arbitral award on public policy grounds. Some countries have even added these cases to their legislation when adopting the UNCITRAL Model Law to make clearer their approach to the public policy exception.

In the case of breach of ‘natural justice or due process’, it is recognized this is a vague category of public policy that could include almost any complaint. Regarding how to understand ‘general principles of international due process’, the ILA Interim Report used Schwebel and Lahne to explain that these principles include:

“equal treatment of the parties; fair notice (to both appointment of the tribunal and conduct of the proceedings); and a fair opportunity to present one’s case in the sense of

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294 Ibid at 362. Parsons, supra note 271.
ensuring that there has been a fair and even handed approach to the elucidation of
evidence from both parties; and, should the tribunal elect to pay heed to ex parte extrinsic
material, it gives fair notices and presents the parties with the opportunity to address it on
that extrinsic material.”

The ILA Interim Report explained that lack of impartiality is usually raised before the
award gets to the enforcement stage and there had been some cases when the failure to give
reasons did not fulfill the grounds to deny enforcement. These examples of procedural categories
of public policy reflect the views from some legal systems. However, they can hardly be
generalized given the specific cases and jurisdictions in which they have been used.

3.5.3 Local public policy and extent of review

The ILA Interim Report reinforced that, under the New York Convention, the local
public policy must be applied in cases when the public policy exception is opposed to the
recognition and enforcement of a foreign arbitral award. The only case that the Interim Report
highlighted as an exception to this interpretation is the European Union (EU). The European
Court of Justice elevated the EU’s Competition Law (Article 81 EC) to the level of international
public policy and should be considered as such by all members of the EU. However, due to the
composition of the European Union, whatever is considered as the Union’s public policy is, in
fact, part of the forum’s public policy. Therefore, this reasoning does not deviate from the
mandate of the New York Convention, which refers to the public policy of the enforcement
country.

An approach aligned with a ‘pro-arbitration bias’ recognizes the enforcement courts shall
only examine whether the recognition and enforcement of the arbitral award would violate their
public policy and would not review the reasoning of the court to reach the decision. The ILA
Interim Report made a differentiation on the depth of review based on whether the cases were
about substantive or procedural public policy. In the first one, the courts would only need to
review the award while in the second the courts would need to do a deeper review. However, this

295 Schwebel and Lahne, “Public Policy and Arbitral Procedure” in ICCA Congress Series no. 3, Comparative
at 365.
296 For details on these examples, refer to Interim Report, supra note 7 at 363-369.
297 Ibid at 369.
is a controversial issue as well because the whole purpose of the system established by the New York Convention aimed at facilitating the enforcement of awards, thus limiting the depth of review from enforcing courts.

The ILA Interim Report concluded that although certain concerns had been expressed about the public policy exception, in practice it has not been highly problematic, similar to the conclusions from van den Berg.298 Nevertheless, the report recognized that “uncertainty and inconsistencies concerning the interpretation and application of public policy by State courts encourage the losing party to rely on public policy to resist, or at least delay enforcement.”299 The concluding suggestion to support predictability was to reach a broad consensus on the “exceptional circumstances” that justify the denial of enforcement by national courts and for them to follow accordingly.

3.6 Recommendations from the ILA Resolution to promote a uniform interpretation

The ILA Committee on International Commercial Arbitration met for the 2002 Conference in New Delhi, where they discussed and approved the ILA Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards300 [ILA Final Report, hereinafter]. The ILA Final Report culminated six years of study on public policy and provided specific recommendations on how local courts should address the public policy exception.

The Committee found that although there has not been an attempt at harmonization, the practice from most State courts show that they “favor a restrictive interpretation and application of public policy, which has resulted in a notable consistency of decisions amongst courts of different countries and legal traditions.”301 It is recognized that public policy remains the most significant aspect of the New York Convention where discrepancies among laws from different countries might still exist. The ILA Final Report explained that the perceived uncertainty and inconsistency regarding the interpretation and application of the public policy exception by local courts had encouraged losing parties to use it to resist or delay the enforcement of awards. Therefore, it was the hope of the Committee that state courts will consider these

298 See supra section 3.2 The role of national courts in arbitration.
299 ILA Interim Report, supra note 7 at 374.
300 ILA Final Report, supra note 6.
301 Ibid at 358.
recommendations in their local practice and will strive for consistency in the interpretation and application of the public policy exception.

The recommendations started by upholding the pro-enforcement bias that the New York Convention conveys and affirmed that the finality of international arbitral awards “should be respected save in exceptional circumstances.” The Committee asserted that those exceptional circumstances exist if the enforcement of the award would violate international public policy. This is the fundamental recommendation of the ILA Final Report, and is built on the idea of separating the public policy of a state into two levels, the domestic and the international. According to this approach, the international is narrower or stricter than the domestic public policy. It was specified in the ILA Final Report that this term refers to the international public policy of the state where enforcement is requested, and is different from transnational public policy, a term that aims to have a more universal reach.302

The Committee advised that domestic courts should apply the test of ‘international public policy’ when deciding on the enforcement of an international arbitral award. For this purpose, Recommendation 1(c) affirmed that international public policy is used to designate: “the body of principles and rules recognized by a [s]tate, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy).”303 According to this proposal, the international public policy of a state includes three elements:304

a) Fundamental principles, pertaining to justice or morality, that the state wishes to protect even when it is not directly concerned; they could be either substantive or procedural principles;
b) Rules designed to serve the essential political, social or economic interests of the state, these being known as “lois de police” or “public policy rules”; and
c) The duty of the State to respect its obligations towards other states or international organizations.

302 See infra section 3.8 Transnational public policy.
303 ILA Final Report, supra note 6 at 357.
304 Ibid at 359.
Some other general recommendations included, a) the seat of arbitration should not be taken into account by the enforcing courts when applying the international public policy test, b) the courts should detail their reasoning and the grounds they were using to deny enforcement of an award due to violations of their international public policy, c) the courts should take into account the experience of other courts applying the international public policy test and to apply it consistently, and d) the courts, when possible, would separate the enforceable from the non-enforceable parts of an award, i.e. to not enforce the part of the award that violates the state’s international public policy and allow the enforcement of the parts that do not violate international public policy. The ILA Committee hoped that all these recommendations would promote a more coherent practice and the development of a consensus on principles and rules that are considered of public policy.

3.6.1 Fundamental principles

The ILA Committee recommended that the courts should make the review in conformity to the fundamental principles of its own legal system. It also suggested that to determine if a principle of a state is sufficiently fundamental to justify the denial of enforcement, the court should consider: the international nature of the case and its connection with the legal system of the forum, and the existence of a consensus within the international community on the principle under consideration. The Committee argued that international conventions could be used as a guide to determine if there is a consensus on a principle, if so, this principle should be considered as being part of transnational public policy, which is of universal application with a very restricted scope. Finally, it should be deemed that a party waived the right to raise a fundamental principle as a ground for refusing recognition and enforcement if it could have relied on it before the arbitral tribunal but failed to do so.\(^{305}\)

\(^{305}\) ILA Final Report, *supra* note 6 at 364.
3.6.2 Public policy rules or lois de police

There were four recommendations on this element.\textsuperscript{306} First, a violation of a ‘mere’ mandatory rule should not bar the enforcement of an award, because not all mandatory rules are part of a state’s international public policy. To fit into this category and justify the refusal of enforcement, it must be a mandatory rule and a lois the police at the same time.\textsuperscript{307} Second, the court should only refuse recognition and enforcement for violation of a rule of public policy when: (i) the scope of said rule is intended to encompass the situation under consideration; and (ii) recognition or enforcement of the award would manifestly disrupt the essential political, social or economic interests protected by the rule. Third, the courts should be allowed to make a reassessment of the facts when the violation to public policy cannot be established from the review of the award. This was a controversial recommendation and in the end, it suggested that the court “should” be allowed to decide to do a further review of the facts but only when there is a strong argument of violation of international public policy and it should be reserved to very exceptional cases. Fourth, when new legislation is enacted after an award was issued, the new law should not affect the award unless it was clear that the legislator intended for this rule to affect awards issued previously to the law’s enactment.

3.6.3 International obligations

A state court can deny recognition and enforcement when, because of the award, the state would violate an obligation it has toward other states (due to a treaty or convention) or toward international organizations (like the resolutions from the United Nations Security Council).

3.7 Challenges to the implementation of the ILA Resolution

The recommendations are oriented to promote a more homogenous practice among local courts. However, there are some issues that are problematic in this approach. First, the separation between domestic and international public policy, is a divide that only few legislations and courts have officially adopted. It should be considered that the local organization of the courts might not make it feasible for a state to permeate this approach to all its courts and most countries do not have courts that specialize in arbitration, which implies that arbitration is only

\textsuperscript{306} Ibid at 365–367.
\textsuperscript{307} See supra section 3.5.2 The content of public policy.
one of the many topics they decide on. It is also necessary to ponder how many concurring experiences are needed to suggest that this approach is a practice adopted by a ‘majority’.

The application of the ‘international public policy test’ that the ILA Final Report suggested would need a shift in perspective from local judges and in the training of new judges on how to understand public policy. Thus, it would require a general effort from both, state courts and legislatures, to clarify for their own legal system how the three elements – fundamental principles, mandatory rules, and international obligations – suggested in the ILA Final Report translate for their own systems. There are more elements related to local perspectives that need to be addressed by states before they can apply the test of international public policy like defining the scope of public policy within their legal system according to their legal culture and legal tradition; defining their fundamental principles; and identifying their mandatory rules that would fit in this test. The ILA Final Report, as well reasoned as it is, it assumes the judiciaries have clearly thought or considered the three categories that comprise international public policy, which is difficult to generalize.

The recommendation to local courts to look at the practice of courts from other countries applying the public policy test and to apply it consistently is also problematic because it is requesting local courts to extend their deciding framework to decisions that are not part of their own legal system. First, this would require local courts and legislatures to have addressed the idea of international public policy, have given meaning to it, and incorporated the approach into their own legal system. Then, it is another step further to allow the courts to use decisions from a foreign court as guiding criteria to make decisions that pertain to their local legal system. The request to provide their detailed method of reasoning and the grounds for refusing the enforcement of an award could be the element that would help each state to compile their local perspective to keep track of the local practice and assess if they are applying it consistently.

Probably the first part of the recommendations could have suggested that states define public policy for their own legal systems, taking into account this approach of international public policy. The positive perspective acquired from the reports, study, and debates in the ILA Committee generated assumptions that overlooked fundamental issues in which the differences between legal systems and local practices are grounded.

Harmonization of the approach to public policy is important to provide consistency and predictability in the arbitration system, however, this does not entail that public policy will have
a uniform meaning for all states. It would serve better the arbitration system if each country provides certainty and consistency regarding its own legal system. Both objectives can be attainable if it is left to the local actors to give meaning to public policy within these international guidelines and the arbitration system operates under the premise that public policy will look different from one legal system to the other. It is here that we can observe that the enthusiasm for convergence tends to disregard the needs of the diversity.

The terminology used in the recommendations gives space for the courts to decide how deep they can go in their review of the award and the facts. However, the recommendations highlight this should only be in very exceptional circumstances. The next question is who decides what can be considered exceptional circumstances? Is it going to be accepted or well received the reasoning that local courts use to justify, from their own legal system’s point of view, the exceptional circumstances of the case at hand? There is a balancing act that happens at the courts between trying to comply with international commitments and being truthful to their own legal systems that needs to be acknowledged and reinforced at the local level because the conversations that happen at this type of international committees take long time to reach the local practice and to do so they need a close follow up from interested local actors.

3.8 Transnational public policy

Pierre Lalive’s article “Transnational (or Truly International) Public Policy and International Arbitration”308 was the first one to distinctly address and endorse the concept of “transnational public policy” and to explain its content. For Lalive, transnational public policy is comprised of the “values and fundamental interests of the international community”309 which can hardly coincide fully with those of a state. He contrasts international public policy of a state and transnational (truly) international public policy. Lalive analyzed the role that public policy was playing in the field of international arbitration, affirmed that the existence of transnational public policy could be attested for in practice, and used the literature on public policy in private international law, the practice of judges and arbitrators to argue for it. He makes an important distinction between the practice in national courts and in arbitration proceedings and explains

309 Ibid at 313.
that arbitrators had used the concept of transnational public policy in their decisions. From his review of arbitral awards, he suggests that only those principles that are “really essential and are supported by a widespread, if not universal, consensus, or as possessing, owing to their importance, a particular force and a particular imperative nature, will deserve to be considered as included in the concept of transnational public policy.”  

At the time when Lalive wrote this article in the late eighties, the debate on the interpretation of public policy in different aspects of arbitration was a common topic. He took the difficult task of putting together ideas that had been commented and debated in many discussions, but no one had taken the challenging, or probably the risky, endeavor of putting them in a concrete proposal. Lalive acknowledges three levels of public policy—domestic, international and transnational public policy. He explains in detail the ‘reality’ he had seen in practice that made him affirm that transnational public policy existed. Lalive recognizes that it “is indeed a “transfrontier” topic in various senses of the term, since it overlaps both private international law and involves, in particular, the difficult and challenging questions of the relationship between the law of nations and municipal law in the sphere of international economic relations.”

Even if it had been denied or questioned, he affirms the existence of the notion of transnational or truly international public policy and suggests to follow the development of the French courts’ practice and of the Swiss Federal Tribunal. He advances that the observation of

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310 Ibid at 288. One key area where Lalive argued there is recognition of fundamental principles that belong to a transnational public policy is the field of contracts. In an ICC award regarding bribery, Mr. Lagergren stated “contracts which seriously violated bonos mores or international public policy are invalid...” the arbitrator referred to a general principle of law (prohibition of bribery) and stated “such corruption is an international evil, it is contrary to good morals and to an international public policy common to the community of nations” in ICC Award no. 1110 of 1963, cited and partly published by J. LEW, Applicable Law in International Commercial Arbitration (New York, 1978). Another example offered by Lalive is in an ICC award stating “this solution is not only in keeping with internal French public policy, it is also dictated by the concept of international public policy as is recognized by the majority of States” in ICC Award no. 3913 of 1981, unpublished – extracts were published in a note by Y. Derains published with the award ICC no. 2730 in Clunet 1984, p. 920-921.

311 An example is the publication where his article was included which was an ICCA Congress Series dedicated to exploring different aspects of public policy in arbitration, i.e., its application in the decision of the arbitrability of disputes, in the arbitral procedure, in defining the applicable law, and his proposal on the existence of a transnational public policy. Also in the United States there was an important development when the arbitrability of antitrust cases was allowed with the decision in Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).

312 Lalive, supra note 308 at 308.

313 For the Swiss use of the concept and the application of a “higher threshold” for the public policy exception see: Pierre A. Karrer, “Public Policy in Swiss International Arbitration Law: For Once, Adjectives Make a Difference” in
practice shows it is impossible to deny its existence, the variety of its applications, or to question its interest. Lalive argues the arbitrator contributes to the creation of the positive law of international trade and the notion of public policy “is a necessary component, as a corrective or equitable superior element, of the whole body of rules applied by the international arbitrator and which make up the (composite) “legal system” which he is called upon both to apply and to produce.”

According to Lalive, transnational public policy has a dual function, negative and positive, just like international public policy. It has a negative function when it is used as an exception for the application of foreign rules in the traditional sense in private international law, but it may also lead to denying the intervention of the international public policy of a state. Its positive and main function, is to influence the decision of arbitrators, whenever fundamental and universal notions of contractual morality or the fundamental interest of international trade are involved. Transnational public policy governs the actions of both the parties and the arbitrators. There is certain level of identification between international and transnational public policy, according to Lalive, because they feed each other. However, it is not a complete assimilation due to the particular, or even ‘selfish character’, that international public policy retains for each state. Regarding the role of international arbitrators, Lalive suggests that, like state judges, they must consider a state’s international public policy, positive and negative. But contrary to state judges, international arbitrators should first consider the public policy of the international community of merchants –comprised also by many states or public entities.

Lalive emphasizes that states also provide merchants the space and power to self-regulate as a means to support the states’ own interest in promoting international trade. States save for themselves a supervisory role through national courts and other means like national legislation.


314 An example of a judicial decision which could be interpreted as recognizing transnational public policy was Messageries maritimes decided by the Court of Cassation of France on 21 June 1950 “the parties to such a contract were entitled to agree, even against the mandatory rules of a municipal law governing their contract, a gold value clause valid under a French law of 25 June 1928 in keeping with the French concept of international public policy” R. 1950. 609, note by H. Batifol. “The case is based upon a public policy which does not underlie the particularism of French domestic life and, quite to the contrary, is based on the desire that private transfrontier relations be governed by an international legal order... the exception of public policy leads here to the creation within French domestic law of a kind of ius gentium parallel to the domestic common law.” Citing Dean Laresours-Pigeonnière in Lalive, supra note 308 at 273

315 Lalive, supra note 308 at 311.

316 Ibid at 312.
and participation in the creation of international instruments to regulate international commerce. Thus, transnational public policy could be considered a limitation to this conceded tolerance and a guarantee that it will be allowed to remain. Lalive concludes that “thanks to its evolutive and dynamic character… transnational public policy allows today, and will allow in the future, the incorporation in arbitration of the new needs and ideas of the international community… [it] appears to be an indispensable and important *dynamic* factor in the development, through arbitration, of a law of international trade.” Nonetheless, he also warns not to over-estimate its importance, the frequency of its application, or its possibilities for intervention. Judges and arbitrators should be cautious before applying transnational public policy, either in its positive or negative function, just as much as they should with the traditional conception of public policy.

### 3.8.1 ILA’s reports perspective on transnational public policy

Fifteen years after Pierre Lalive presented this extensive report on transnational public policy at the ICCA Congress, in the 2000 ILA Interim Report, Professor Mayer (to the suggestion that further distinction should be made between national policies of the forum and those which were ‘truly’ international) cautioned that although “the concept of transnational rules was practical, national courts had consistently applied public policy as part of their domestic law and had not embraced the possibility of such rules belonging to a different legal order.” The study made by the ILA Committee found that there is still little support from state courts to the application of this notion of transnational public policy.

Swiss courts are consistently cited as an example of national courts that have officially embraced the existence and applied the concept of transnational public policy, although not using this specific terminology. One relevant case that illustrates the approach from the Swiss Federal Tribunal is *W. v. F. and V.* where the Tribunal supported the idea of using a “universal conception of public policy, under which an award will be incompatible with public policy if it is contrary to the fundamental moral o legal principle recognized in all civilized countries.”

Both the Interim and Final ILA Reports were cautious when addressing transnational public policy. The emphasis was more on explaining and justifying the value of the distinction

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317 *Ibid* at 315.
318 ILA Interim Report, *supra* note 7 at 379.
between domestic and international public policy of a state, and the content of the later. However, to identify if a principle is part of transnational public policy, the Final Report recommended that courts should consider whether there is a consensus within the international community about said principle. In order to determine this, the courts should look at the practice of other courts, the writings of commentators, and other sources. It was generally admitted that international conventions should be considered as proof of the existence of said consensus.\textsuperscript{320}

3.8.2 Other perspectives on transnational public policy

Professor Mayer, defined transnational public policy as:

“the set of legal principles, not belonging to the law of a particular State, which may be relied upon by an arbitrator either as a bar to the enforcement of an international commercial contract, or, in a less direct manner, as an obstacle to the application of the State law normally applicable to such contract.”\textsuperscript{321}

Mayer considers it a necessary device in international arbitration, so that arbitrators can have a public policy to rely on. Nevertheless, he does not share the idea that transnational public policy is part of the transnational legal system of \textit{Lex Mercatoria}, which emerges from the international society of merchants. Mayer does not consider the \textit{Lex Mercatoria} a legal system but rather a set of legal rules because it lacks judges and organs that exercise a power of coercion. Transnational public policy is, for him, a convenient notion when the principle is universally recognized and there is no doubt it has been violated. However, if these principles were not clearly delineated, arbitrators would need to resort to other mechanisms to decide on values that the parties in the dispute are obliged to respect. Therefore, transnational public policy is just one among other devices available to the arbitrator to compel the parties to respect those values.\textsuperscript{322}

Even though Mayer was the Chairman of the ILA Committee when the Interim and Final ILA Reports were issued, in his article published four years after, he explains the difference between truly international and transnational public policy. Mayer considered truly international public policy a part of international law, which would be different from transnational public

\textsuperscript{320} Recommendation 2(b) in ILA Final Report, \textit{supra} note 6.
\textsuperscript{322} \textit{Ibid} at 69.
policy. These two concepts were already addressed as equivalent in the Final Report, following Lalive’s approach. This shows the ongoing struggles to differentiate between international, truly international, and transnational public policy. Nonetheless, Mayer offers some specific examples of activities that in consensus are considered a violation of transnational public policy: corruption, racial or religious discrimination, drug trafficking, terrorism, trade in stolen art objects, and traffic in human organs.

In 2009, James Fry took a turn to address the confusing state of the public policy exception even to the point of suggesting a fading ‘truly international public policy’; he sees a general disorder in the discourse around it.\textsuperscript{323} He brings attention to the fact that the effectiveness of arbitration relies on the coercive powers of national courts, even though international commercial actors want to avoid them by resorting to arbitration. When classifying the types of public policy, he differentiates between national and supranational types of public policy. Contrary to Lalive’s concept that included both, transnational and truly international public policy, Fry separates these concepts into two different ones and explains, transnational public policy:

“is the body of customary legal rules that are not part of a State that can be used by an international arbitrator to avoid enforcement of an arbitration agreement or the application of the law designated as the applicable law in the underlying contract... does not belong to international law or to national law per se, but includes such bodies of law as lex mercatoria (sic).”\textsuperscript{324}

Truly international public policy “generally is the type of public policy consideration that is quasi-universal in nature.”\textsuperscript{325} Considering the different views on truly international public policy, he observes theyconcurred that it derives from an international source that is above the state, and the state only has an enforcement role of these pre-existing considerations. In his attempt to clarify the levels of public policy, he adds a new layer of complexity when separating the two concepts that had been considered equivalent.

Fry argues there is not a clear source from where to derive the obligation of a state to apply truly international public policy. On the contrary, the states were given a ratio of discretion on the topic, as it is clear from the New York Convention and the UNCITRAL Model Law.

\textsuperscript{323} Fry, \textit{supra} note 9. His study focused on the enforcement of international arbitral awards under the NYC.
\textsuperscript{324} Fry, \textit{supra} note 9 at 87.
\textsuperscript{325} \textit{Ibid} at 88.
These instruments clearly establish it is the public policy of the enforcement state that must be applied for the public policy exception, regardless if the scholars consider it is part of universal, transnational or truly international public policy.

Within the discretion given to the states, Fry explains they could consider the application of truly international public policy. However, he observes the weight goes for not applying it, hence his suggestion that it should fade off from the enforcement discourse because there is not a specific source that obliges to apply it. Fry recognizes truly international public policy plays a key role in international arbitration, but does not govern all aspects of arbitration and it should not have a role in the enforcement stage. He recognizes that truly international public policy helps arbitrators to fulfill their duty to protect the public policy recognized as inviolable by most states, and has a significant practical effect of making awards more transportable. 326 However, Fry challenges that truly international public policy should not be applied for the enforcement of an international arbitral award, contrary to what many commentators suggest. Even though state courts have the option to apply it voluntarily, they are outweighed by the reasons not to do so.

3.8.3 2014 ICC Meeting: a transnational legal order

In 2014, a group of scholars and arbitration practitioners (most of them from Latin American countries and France) met in Beaune, France for the ICC Meeting “The New World Order of Economic Relations in the Light of Arbitral Jurisprudence” to reflect and discuss the existence of a transnational legal order, whose existence could be accounted for in arbitration practice. The premises that brought them together were:327

1. The center of gravity of the legitimacy of the decisions taken by arbitrators has changed;  
2. Said center is not anymore, the law of the seat of arbitration, or the law of the enforcement state, sometimes it is not even the law chosen by the parties, but it is in other intellectual places and responds to other values;  
3. The old state-centered theories from traditional private international law (the conflict of laws method) learned in university are not useful to explain the new reality they observed;  
4. For the benefit of the legitimacy of arbitration, it is desirable to reduce the distance between what is said in public with what is done in private at the time of deciding, especially when it comes to the methodology to decide the law applicable to the proceedings or the substance of the dispute.

326 Ibid at 114–115.  
In the position paper and arbitral jurisprudence presented by Alfredo De Jesus O and Jose Ricardo Feris, they suggest that:

1. In the era of economic globalization markets have established a new world order of economic relations. This new world order is governed by a plurality of transnational legal orders and networks of transnational rules of law and arbitration is often one of their organs of governance and preferred method of dispute resolution;
2. Modern arbitral decision making provides evidence of the existence of this new world order as is reflected in arbitral decisions;
3. Such arbitral decisions are legitimate insofar as they are rendered within an appropriate theoretical legal model recognized and accepted as such by the economic operators at the receiving end of such arbitral decisions.

Based on these proposals, during the meeting they assessed arbitral case-law to identify elements of this new economic order. They reflected on a new paradigm or theoretical model to explain the reality of the arbitral practice they observed, which would further support the legitimacy of modern arbitral awards.

De Jesus O and Feris consider that the role of the nation-state has declined and it is not anymore the center of the economic order. In this new economic order, the authors see the world markets and their methods of transnational regulation and governance, at the center. They suggest that, considering the law of contracts and arbitration as the two major instruments of globalization, in the new global model now we find transnational contracts and transnational arbitration. Trends like the delocalization of the law of contracts and the evolution of party autonomy have paved the way, from their point of view, to the existence of a transnational law model. In this transnational legal order, they see contracts that are not directly connected to a specific legal system (Contrat sans loi Model) or are more and more connected to transnational rules, being the Lex Mercatoria the fundamental example. At the same time, transnational arbitration is for them the arena where these transnational rules are applied and thus accounts for the existence of the system. The Transnational Law Model -also known as the Lex Mercatoria Model- that De Jesus O and Feris advocate for is based on the existence of a plurality of

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329 Ibid at 5.
transnational legal orders and networks of transnational rules; which for them is a convenient theoretical model to govern and regulate global markets.\(^{330}\)

Their model is based on the school of legal pluralism advanced by Santi Romano, Francois Ost, and Michel van Kerchove who advanced that “transnational communities or societies constitute “institutions” or social bodies which are forms of organization governed by rules of law and therefore considered as transnational legal orders.”\(^{331}\) For De Jesus O and Feris, the transnational communities they speak about largely meet the conditions of autonomy requested by the school of legal pluralism, i.e. social, organic, and organizational autonomy. In consequence, “transnational legal orders are autonomous and independent from national and international legal orders and each is free to decide in autonomous and unilateral manner to what extent they will recognize and interact with national, international, and other transnational legal orders. [They] are transnational precisely because they transcend the concept of the Nation-State.”\(^{332}\) The legitimacy of transnational rules relies on the acceptance and recognition of the members of the transnational community they serve and is enhanced by the arbitral practice.

The authors use arbitral case-law\(^{333}\) as evidence to support the idea that the international community (understood as a community where the state is just one of many actors involved) recognizes the existence of a transnational order with its own organs, structures, and rules to regulate the participating actors. The awards show that the members of this transnational legal order have an expectation of legitimacy, certainty of the rules of law, and predictability; all of which are supported by the decisions of the arbitral tribunals. The authors suggest this order is governed by transnational rules that emerge from a diversity of sources basically led by the *Lex Mercatoria*, commercial usages, the UNIDROIT Principles of International Commercial Contracts, and industry-specific rules (like the rules of the hydrocarbons industry, satellite industry, construction industry, or oil and gas industry). In different awards, it was interpreted by the arbitral tribunals that international law should be interpreted as referring to *Lex Mercatoria*

\(^{330}\) *Ibid* at 6.
\(^{331}\) *Ibid* at 7.
\(^{332}\) *Ibid* at 8.
\(^{333}\) Alfredo De Jesús O & José Ricardo Feris, “... In the Light of Arbitral Jurisprudence - Arbitral Awards” (submitted at the Beaune Meeting 2014 of the ICC International Court of Arbitration and the Groupe de Beaune, France, 27 September 2014), online: Trans-lex.org https://www.trans-lex.org/uploads/news/BeauneMeeting-ArbitralAwards.pdf [Arbitral Awards]. For this review, they used 47 arbitral awards from tribunals created under the rules of the ICSID, the ICC, the UNCITRAL and other general arbitral tribunals. They recognized it is a small sample but they considered it useful to provide evidence of the modern practice of arbitration.
and general principles of contractual obligations in international commercial contracts, which are reflected mainly in the UNIDROIT Principles.

For the authors, arbitral practice, through the awards analyzed, show that international arbitration recognizes the existence of a principle of ‘transnational public policy’. The awards that referred to the existence of this principle were also used in Pierre Lalivé’s article as a source. For De Jesús O & Ferris the awards affirm that this principle is essential for the international society and that public policy is a means for the international arbitrator to provide substantive solutions and is therefore a normative creative process. Transnational public policy protects certain fundamental values and interests of the international society. The principles of transnational public policy involve a broader level of convergence among different legal systems; they are contained in conventions, and are followed by the international commercial operators.

The work of these authors and the attendees at the ICC Meeting offered practical evidence of how the ‘transnational model’ had permeated and how its language is embedded in arbitration practice. There are more and more scholars and practitioners that adhere to this idea of a transnational legal order. Nevertheless, the recognition of this system for which the authors advocate still raises questions as to how this model would fit with the ‘traditional’ conception of the state and within the international community where the state-based structure is still a fundamental element for the recognition and enforcement of international arbitral awards.

334 Lalivé, supra note 308. In the Final Award in Case 13515 in De Jesús O & Feris, Arbitral Awards, supra note 333 at 5, the arbitral tribunal explained “Attendu que l’ordre public transnational ou véritablement international est “consisté de l’ensemble de principes ou de normes supérieurs et fondamentaux pour le commerce international qui visent en toutes hypothèses à protéger certaines valeurs essentielles ainsi que les intérêts de la société internationale” (Commerçants et États) [citing P. Lalivé’s article]. Que l’arbitre international reconnait l’existence de principes d’ordre public transnational, dès lors qu’il constate qu’ils font l’objet d’une large convergence entre les différents systèmes juridiques des États…”

335 De Jesús O & Feris, Arbitral Awards, supra note 333 at 22 in Final Award in Case 13515.


337 In Final Award in ICC Case 7XXX in De Jesús O & Feris, Arbitral Awards, supra note 333 at 20, the tribunal explained: “The tribunal will apply those general principles and rules of law applicable to international contractual obligations which qualify as rules of law and which have earned wide acceptance and international consensus in the international business community…” In Award ICSID Case no. ARB/06/18 in De Jesús O & Feris, Arbitral Awards, supra note 333 at 21, the tribunal affirmed: “The UNIDROIT Principles are neither treaty, nor compilation of usages, nor standard terms of contract. They are in fact a manifestation of transnational law.”

It might be that international commercial actors create and recognize these transnational rules within the transnational legal order and they act upon them, but it is also of fundamental importance to reflect on how they engage with the local structures. While it can be true that the evidence suggests recognizing the existence of transnational normative structures, it is also important to consider the issues that are left out in this conversation. Quite often, local actors that do great efforts to stay up to date with these developments are the ones left out.

If the transnational legal order idea is recognized, then the local actors need to have guidance to make sense of these transnational actors, rules, and systems within their own internal structure. It might be that the legal pluralism perspective that the authors support is only looking at a level that is above the ‘traditional’ state-centered structure but eventually it would need a way to communicate with the internal structures of a state and its society.

3.9 A pluralistic approach to advance the conversation between the local, international, and transnational levels

This chapter presented the arbitral legal framework, the historical origins of the New York Convention and of the public policy exception since the debates for the creation of the New York Convention started. History shows that the merchant or business community is continuously acting ahead by proposing ways to facilitate international transactions and advocating before state-led forums for the creation of rules that contribute to this goal. As it was expressed by the Committee and noted above, there is a foundational intention to maintain generally recognized principles of justice and respect the sovereign rights of states when convergence is advanced through the creation of a new convention that will bring the states under the same set of rules. It can be affirmed that the creation process of the Convention attests for this intention. At the same time, this intention needs to be kept in mind for those efforts to have a more homogeneous framework for arbitration. Uniform approaches and homogeneity can only go so far within the international community before risking stepping over and threatening its diversity.

For this study it was of fundamental importance to go back to the origins and primary discussions as a way to ponder the efforts made to have a wide reach of consultations that brought the voices of the states, international trade actors, and organizations to one forum. At the same time, they are a way to re-consider the motivations and intentions behind the final text of
the New York Convention and of the public policy exception. It should be remembered there was an original common interest in having uniform laws and in limiting the grounds for refusal of enforcement by generating an exhaustive list that would provide a well delimited framework for local courts.

Even though the wording of the public policy exception caused a lot of concerns and was the object of much discussion, there was a consensus that the exception should be included. In the end, the final text can be considered a result reached thorough debates and mutual considerations. Fry reminded us “the language of the New York Convention is the way it is for a reason –the product of hard-fought compromises at the conclusion of states having spent vast amounts of resources and time in negotiating.”\textsuperscript{339} All these should be taken into consideration for the analysis on what is the purpose of the exception and when convergence wants to be advanced. In the New York Convention, this specific space was left for the states to fill in, it is the space for diversity. If it is a wider or narrower window within the general framework, it is also for the enforcing state to decide. It serves a specific purpose for every state to keep the control on what it considers its most fundamental values.

The ILA Recommendations, although they suggest a restrictive interpretation, they also suggest new terminology that does not reflect the original intentions of the NYC. They offer a new way of interpreting the public policy exception when it suggests using the ‘international public policy’ of the state. Additionally, the proposal for a ‘transnational or truly international public policy’ became another layer, making it more complex. All these concepts are suggestions to advance uniformity in the interpretation of the public policy exception but at the same time divert from the original purpose it was created for. From analysis like Fry’s, it can be noted that those original intentions are still the drivers of how the exception ought to be interpreted and applied so it can continue to offer arbitration the support it was intended to provide.

The question remains if more uniform laws would be the answer to support the goals of certainty and predictability. It seems that more than uniform laws, it is the assurance of a more uniform practice within a legal system that would advance these goals. Since the conception of the NYC, the factors identified as roadblocks for the progress of arbitration were mostly related to the lack of uniform laws. As it can be observed, there have been abundant efforts to create

\textsuperscript{339} Fry, supra note 9 at 134.
more uniform laws for arbitration practice, as well as efforts to assure their effectiveness. At the same time, the differences in legal systems are constantly brought up asking to be acknowledged, including the importance of working with these differences and to look after the sovereign rights of a state in these conversations. It seems as if diversity could be an obstacle for certainty and predictability in this topic. However, if we start by acknowledging diversity as a positive factor according to which each state is recognized the ability and the right to define public policy in their own terms and for national courts to decide accordingly. It should then follow that, through a consistent approach from the courts, the certainty and predictability that the actors expect would be offered, while respecting the interest and values of each state. Fry suggested “flexibility in choosing applicable public policy considerations are an important component of enforcement that ought to be protected.”\textsuperscript{340} Therefore diversity or plurality, reflected in the public policy exception, does not need to mean a risk for the arbitration system.

It is relevant to consider carefully which were the countries that participated more in the debates for creating the New York Convention, the ILA Reports and even the cases that are analyzed in forums like the ICC Meeting. Most of the experiences that are considered are from European countries or the United States, which have been the hegemonic, dominating views. This raises questions as to how much participation there was from countries considered of the ‘Global South’ or in the ‘periphery’. It is not that they were completely excluded, but certainly there was not a strong participation from them. The suggested pluralist approach differs from the pluralist approach advocated for in the ICC Meeting because the ICC Meeting suggests a supra national lens which only considers the diverse actors who interact at that level. On the contrary, the pluralist perspective suggested in this dissertation, considers the variety of actors who interact at different layers. It brings attention to the actors in the international arena but considers the many levels that also interact underneath. This pluralist approach aims at giving strength and value to all the actors, not only to those that have been more influential at the international forums.

Those advocating for a transnational legal system put at the center of it the commercial actors. However, as it has been raised above, this is debatable because the international arena is still mostly organized around states, even though it recognizes the participation of more diverse

\textsuperscript{340} Fry, \textit{supra} note 9 at 132.
actors like the merchants and many non-governmental organizations who everyday play a more active role in the international arena. Therefore, the paradigm of a transnational system that gives autonomy to the arbitration system needs to be taken with caution if we keep in mind that the enforcement of an arbitral awards still depends on state courts. In the end, national courts are the only entities that have enforcement authority.

There is space for a pluralistic approach. Efforts have focused on homogenizing rules and approaches and while these drive actors into common directions, it can also limit or cloud the ability of a state and its local actors to stay true to their basic principles. A pluralistic approach reminds the importance of diversity and difference, and offers the possibility to look at all states at an equal level, granting them the capacity to look at international experiences on the topic but assured that it is their own conception of public policy that will be uphold. The rhythm and dynamism of commercial transaction keeps all actors involved trying to come up with new instruments or approaches that continue to facilitate trade. However, sometimes a pause to review original purposes is needed to remember that international trade transactions can also flourish within, and based on, the plurality of legal systems.

Standards that are discussed and proposed at international forums, more often than not, do not permeate local contexts in the expected ways. To secure that international recommendations are better transferred into national systems, the suggestions for the courts to incorporate a restrictive approach and to consider the fundamental values recognized by the international community could be more fruitful avenues. Instead of giving directives on what should be the content of an exception that, per its origin, is meant to provide a space for states to protect their own fundamental values and principles. If there is no national legislation, it will continue to be the role of local courts to decide the content of this notion and to prove their system can offer the certainty and predictability that international actors expect. The approach that each country will have to public policy for arbitration needs to permeate to the whole judiciary so it can be properly presented in the international arena through consistent decisions. An important element to create and support a system that works under a premise of plurality is to recognize that “what is needed is for [s]tates to be allowed to apply a public policy defense in
good faith, since enforcement [s]tates are in the best position to determine what is the public policy that is worth defending"341 within their jurisdiction.

341 Fry, supra note 9 at 125.
Chapter 4: Mexico as an Example of Local Legal Arrangements

This dissertation approaches public policy as an essentially contested concept which has a relative nature and is culture dependent. According to that perspective, the understanding of these concepts is enriched through the process of discussing them and this dissertation has been set as a voice contributing to the conversation about public policy. The detailed examination of the public policy exception in Chapter 3 provided the context under which the exception was created, the challenges that it has represented in arbitral practice, how the conversation is changing at the global level, and suggested an approach that would be more connected with the local contexts in which it is applied. Thus, to continue building layers of understanding of this concept it needs to be examined in a specific context. The analysis of the public policy exception revealed that global expectations are in tension with local implementations and the discussion now turns to test the tension in Mexico in the following two chapters.

This chapter introduces Mexico as an example of a local context. It is the legal field that will be examined in detail to understand how the public policy exception is interpreted and applied. This chapter begins by explaining two important characteristics of Mexico’s legal system, its court precedents systems and amparo. It then examines the development of trade in Mexico and how this has provoked changes in its legal system. Mexico is then examined as a recipient and, more recently, as a provider of aid within the development agenda. This reflects the influences Mexico has received from development projects guided by the Law and Development discourse. Following, this chapter presents the general context of arbitration in Mexico and the local process for the recognition and enforcement of foreign arbitral awards. Finally, the four factors suggested in Chapter 2 – language, legal tradition, legal context and legal culture – are applied to Mexico for understanding local approaches to public policy.

Mexico needs to be understood on its own terms, rather than in comparison to other legal systems. Before moving on to examining Mexico’s context, the reader is invited to consider the words from Nobel Laurate Gabriel García Márquez in his acceptance speech referring to the reality of Latin America, as cited by Karin Mickelson:

“García Márquez acknowledges that if those that are part of this reality face such difficulties, it may not be difficult to understand that “the rational talents of this side of the world… should have found themselves without a valid means to interpret us. It is only natural that they insist on measuring us with the yardstick that they use for
themselves…” Understandable, and natural, but fundamentally damaging: “The interpretation of our reality through patterns not our own serves only to make us ever more unknown, ever less free, ever more solitary.”342

Mexico constituted itself “as a representative, democratic, laic, and federal Republic integrated by free and sovereign States in regard to their internal regimes, and by Mexico City, all united in a Federation established according to the principles of this fundamental law.”343 Mexico is composed of 32 federal states.344 Mexico City, one of the federal entities, is the seat of the Powers of the Union and the country’s capital.345 Its legal system is based on the civil law tradition with significant influences in its origins from Spain, France, and Germany.

Mexico’s federal government is exercised by three Powers of the Union: Executive, Legislative and Judiciary. The Legislative power lies in the Congress, which is divided into two chambers, Deputies and Senators.346 The Chamber of Deputies represents the citizens and is composed of 500 deputies elected for a three-year term with the possibility of one re-election; 300 deputies are elected according to the principle of relative majority in a system of uninominal electoral districts, and the other 200 deputies are elected according to the principle of proportional representation, using a system of regional lists voted in plurinominal circumscriptions. The Senate represents the states and is composed of 128 senators elected for a six-year term, with no option for re-election. There are two senators per state and for Mexico City that are elected according to the principle of relative majority, one is assigned to the first minority in each state, and the other 32 are elected according to the principle of proportional representation, using the system of lists voted in one national plurinominal circumscription.

342 Mickelson, supra note 106 at 418-19, citing Gabriel García Márquez speech The Solitude of Latin America.
343 Political Constitution of the United Mexican States [Mexico’s or Mexican Constitution, hereinafter], published in the Official Gazette on 5 February 1917 (entered into force on 1 May 1917), Article 40.
344 Mexican legislation uses as synonyms ‘states’, ‘federal states’ and ‘federal entities’. In this Chapter ‘state(s)’ refer to the federal entities that integrate Mexico, as a country, and which are considered the (internal) local level.
345 On January 26, 2016 was published a constitutional amendment by which the Federal District is granted autonomous status as a federal entity of the Mexican Republic like the rest of the states and changed its name to Mexico City. “Decree by which various provisions of the Political Constitution of the United Mexican States are reformed and repealed, in the matter of the political reform of Mexico City”, published in the Federal Official Gazette 21 January 2016.

The Council of the Federal Judiciary (Consejo de la Judicatura Federal) issued an agreement on February 5th, 2016 according to which any reference to the Federal District in Mexican legislation should be understood as made to Mexico City, pursuant to the political reform of Mexico City. “General Agreement of the Plenary of the Council of the Federal Judiciary that changes the denomination of Federal District for Mexico City in its entire normative body”, published in the Federal Official Gazette 5 February 2016.
346 The composition of the Legislative Branch is legislated in Articles 50 to 70 of the Mexican Constitution.
The Executive branch is invested on the President of the Mexican United States who is elected by direct vote for a six-year period without re-election. The President directly appoints the members of the cabinet.

The Federal Judiciary power is exercised by the Supreme Court of Justice, the Electoral Tribunal, Plenary Circuit Courts, Unitary or Collegiate Circuit Courts, District Courts, and the Federal Judiciary Council. Federal courts decide cases involving federal matters as specified in Mexican laws; what is not reserved to federal courts is delegated to the states’ judiciaries. The Supreme Court of Justice is integrated by eleven ministers and it can session in plenary or in two chambers; the President of the Supreme Court does not participate in chambers’ sessions. At the state level, every state and Mexico City have their own Superior Tribunal of Justice (STJ), which is the highest local court, and is considered the appeal local court. Below the STJs are the courts of first instance, the organization and number of which vary from state to state. Typically, every state will have civil courts, family courts, criminal courts, special courts for adolescents, mixed courts and peace courts, in addition to the numerous administrative entities that are also part of the state’s judicial branch. Each state has the autonomy to decide the structure of its judicial branch and therefore can have specialized courts for certain matters, for example Mexico City has courts specialized on matters of property leasing.

4.1 Court precedents system and amparo

Two characteristics of the Mexican judicial system are important to explain in further detail to understand the local context: its binding court precedents system (jurisprudencia) and

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347 The structure of the Executive Branch is legislated in Articles 80 to 93 of the Mexican Constitution.
349 The difference between the two chambers of the Supreme Court are the subject matters they decide on. The First Chamber decides on criminal and civil matters and the Second Chamber decides on administrative and labor matters.
350 When I use ‘state courts,’ I refer to the courts of the 31 states and of Mexico City. In Mexican legislation and scholarship, they are also referred to as ‘local courts’ or of the ‘common order’ (del orden común).
351 Special courts for adolescents hear criminal cases in which the offender is between 12 and 18 years old.
352 Mixed courts hear cases that do not fit in any of the other specific courts but that are matters of state competence.
353 Peace courts hear cases that are considered of lower severity pursuant to Mexican laws. For the civil matters, the severity is established according to the monetary amount in dispute and for the criminal ones, the severity is established depending on the type of offence in question.
Court precedents are interpretive criteria issued by specific courts following particular processes as mandated by law. When deciding a case, authorized courts can decide to set a new criterion to interpret the law, this new criterion is established in a ‘court precedent’ that inferior courts have to follow for future cases. The compilation of these criteria conforms Mexico’s system of court precedents. Authorized courts can issue mandatory interpretive criteria, referred to as ‘binding court precedents’, which are created through specific methods established in the law. The methods to create new binding court precedents (BCP) are by reiteration, by contradiction, or by substitution. They can only be issued by the Supreme Court of Justice – in plenary or in chambers—, the Collegiate Circuit Courts and the Plenary of Circuit Courts. 

   a) BCPs by reiteration are established by the Supreme Court of Justice (either by the plenary or one of the chambers) and by the Collegiate Circuit Courts when five cases are decided in the same sense, not interrupted by any decision to the contrary. Then the interpretive criterion is considered mandatory. Each decision in this series of five is called a ‘non-binding court precedent’ (NBCP – tesis aislada) until it becomes mandatory. They do not have mandatory character but can be used to guide the reasoning of the courts on certain issues. Nonetheless, Circuit Courts, for example, generally follow these non-binding precedents or used them as guiding criteria. 

   b) BCPs by contradiction are established when a court decides over BCPs with divergent criteria to establish a new binding precedent, which can result in upholding one of the precedents in the contradiction, can create a new one, or declare it non-existent or without matter. The courts that can create BCP by contradiction are the

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354 For the preliminary details about the Mexican court precedents system, refer to supra section 1.3.1 Mexican court precedents.
355 The binding court precedents system is legislated in Amparo Law Articles 215 to 235. For details on the three types of binding court precedents see, Miguel de Jesús Alvarado Esquivel, “La jurisprudencia en la nueva Ley de Amparo” (Binding court precedents in the new Amparo Law) (2013) 35 Rev del Inst la Judicatura Fed 189. The country has had an Amparo Law since 1861 but it went through a major amendment after the human rights constitutional amendment of 2011; while there were significant changes, the name remained the same. In the literature most authors refer to it as the “new” Amparo Law.
356 Amparo Law, Articles 216, 222-224.
357 Amparo Law, Articles 216, 225-227.
plenary or the chambers of the Supreme Court of Justice and the Plenary of Circuit Courts.  

c) BCP by substitution\textsuperscript{359} are established when a court with the faculty to do so – Collegiate Circuit Courts, Plenary of Circuit Courts, one chamber of the Supreme Court – requests a superior court to issue a new precedent to substitute a BCP created by reiteration or by contradiction.

BCPs are binding for the court that issued them and those below it. Only the BCPs from the Supreme Court are binding for all federal and state courts. The BCPs from the Plenary of Circuit Courts are binding for all courts in the same circuit. The BCPs from Circuit Courts are binding for all courts in the same circuit, except for the Plenary of Circuit Courts and the other Collegiate Circuit Courts.

The use of BCPs and NBCPs by lawyers and judges to support their cases or decisions has increased as the access to them has been facilitated by technology. The study of BCPs allows to track chronological changes in the courts’ approach to all types of legal matters. This is also the mechanism that Mexican courts have to promote changes in the Mexican legal system by determining new ways to interpret the law that adapt to changes in society.

Amparo is a fundamental and iconic feature of the Mexican legal system. It is a constitutional remedy that can be, and is frequently used, to challenge the judicial decision that grants or denies the recognition and enforcement of a foreign arbitral award in Mexican courts.\textsuperscript{360} The amparo is a legal institution created in Mexico to protect the citizens from acts of authorities that violate their constitutional guarantees. According to Carlos Arellano García:

“\textbf{The Mexican Amparo is the legal institution by which a physical or moral person, named ‘complainant,’ }exercises his right to action before a local or federal court, to claim from a State organ –federal, local, or municipal– named ‘responsible authority,’ an act or law [‘contested act/law’] that the complainant considers has violated his individual guarantees or the regime of distribution of competence between the Federation, the States

\textsuperscript{358} Plenary of Circuit Courts were introduced in the constitutional reform of 2011 and legislated in detail in the new Amparo Law. See: Víctor Manuel Islas Domínguez, “Los Plenos de Circuito en la Ley de Amparo” (Plenary Circuit Courts in the Amparo Law) (2013) 122 Foro Jurídico 34.

\textsuperscript{359} Amparo Law, Article 217.

\textsuperscript{360} This will be addressed in more detail in \textit{infra} Chapter 5 section 5.1.3 Grounds for nullifying an arbitral award or denying its recognition and enforcement.
and the Federal District, respectively, to recover or keep the enjoyment of the alleged rights, after having exhausted all the ordinary remedies available.”

One hundred and seventy-five years after its creation, amparo went through an important reform in 2011 (Human Rights Amendment) that included amendments to the Mexican Constitution and the promulgation of the new Amparo Law in 2013. The Human Rights Amendment involved important changes in Article 1 of the Mexican Constitution. Before the amendment, Article 1 was framed around individual guarantees that everyone was entitled to in Mexico. A significant outcome of this reform was the expansion of the concept of individual guarantees into human rights including those protected by international treaties ratified by Mexico.

Article 1: in the United Mexican States all the individuals will enjoy the human rights recognized in this Constitution and in the international treaties that the Mexican State is part, as well as the guarantees for their protection; their exercise cannot be restricted or suspended, except in the cases and under the conditions that this Constitution dictates. The norms regarding human rights shall be construed in accordance with this Constitution and with all the international treaties in this matter, giving people the most ample protection at all times.

This purposeful incorporation of international treaties in the text of Article 1 significantly changed the way in which the courts must analyze amparo cases and it could impact other areas of law. This amendment requires the judges to explicitly incorporate international treaties in their analyses. This is addressed by some of the local actors interviewed for this study and is presented below in section 5.4.

There are two types of amparo, direct and indirect. Indirect amparo challenges a law, acts or omissions of authorities that are not part of a trial, and acts or omissions derived from a trial but that are not the final decision of a case. Direct amparo is opposed against the final judgment of a trial, which decides the main issue on trial. The requirement to file a direct amparo is that the complainant must have exhausted any other remedies available (like an

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362 For the specific cases in which an indirect amparo can be used, refer to Amparo Law, Article 107.
363 For the requirements to file a direct amparo, refer to Article 170 of the Amparo Law.
364 According to Article 5 section I of the Amparo Law, the complainant is the person who claims to be the owner of a subjective right or a legitimate individual or collective interest, provided that he alleges that the claimed norm, act,
appeal before a superior court). Amparo proceedings are filed before federal courts. District Courts decide on indirect amparos and Circuit Courts decide on direct amparos and applications for review of indirect amparos.

It is frequently specified in Mexican scholarship and in the legal discourse within courts that amparo is not a third instance in a trial, but a separate trial in itself. As mandated by the Constitution, a trial cannot have more than two instances, the court of origin and an appeal to a superior court. The amparo is a separate procedure by which the complainant argues that his/her fundamental rights are being violated by an act of authority and this is what is judged in its proceedings. It is explained later how the amparo fits in the recognition and enforcement of foreign arbitral awards and in understanding the interpretation of public order within the binding court precedents system.

4.2 The development of trade in Mexico365

In colonial times, Mexico was restricted to trade only with Spain and silver was essentially its only high scale export. During the first fifty years following its independence in 1810, Mexico suspended many of its trade relationships with Europe, due to the many political conflicts it went through to establish itself as an independent country. By the end of the nineteenth century it resumed trading relations with several European countries including Great Britain, France, and Germany. During these times, silver continued to be the most important export, representing two thirds of its total exports.

Despite Mexico’s geographical proximity to the United States, it was not until the last decade of the nineteenth century and beginning of the twentieth century that trade started between the two countries as a result of the construction of train routes that linked the center of the country with its northern borders. From that time onwards, the United States became Mexico’s main trading partner. From the 1870s to 1930s, Mexico diversified its exports to include produce and other metals such as copper, lead, zinc, and gold. During the Second World

or omission violates the rights provided for in Article 1 of the Amparo Law and thereby makes a real and actual impact on his legal sphere, either directly or by virtue of his special situation vis-à-vis the legal order.

War, Mexico increased its exports and became an important supplier of textiles, uniforms, food, beverages, and commodities like iron. The construction of roads also diversified the modes of transportation to a point that by the end of the twentieth century, land routes surpassed train routes in trade volume.

In the 1950s, and for twenty-five years, Mexico established a model of industrialization based on import substitution grounded in high state intervention to promote growth and development, which isolated Mexico from international trade. Some of the trade protection measures included the request of ‘anticipated import permits’ and undisputable import prohibition of a wide number of products. Foreign direct investment was highly regulated, restricted in non-strategic manufacturing industries and forbidden in any other sector. The government established sector-specific programs to develop a manufacturing sector that could produce capital goods and complex intermediate investments. For the advancement of these programs the government implemented tax cuts and trade restrictions with strict requirements, including the degree of local content and the development of the exports network. The most successful sector programs were the car industry, information technology and pharmaceutical industry.

In the 1970s, the discovery of large oil reserves in the Gulf of Mexico made a turn in Mexico’s economy, which started to rely primarily on oil exports that represented eighty percent of total exports. The government started an ambitious development program financed by oil income and foreign debt. It lasted shortly, until the collapse of the international oil market and the rise of interest rates in the United States in 1981 that provoked a fiscal and exchange crisis in Mexico. The import substitution model came to an end and the government turned to open market and investment liberalization policies. These new policies led to a series of economic law reforms, the focus of which were trade, financial liberalization, de-regulation and privatization of foreign direct investment. They also brought a radical change in the industrial policy; eliminated sector-specific policies, which highly affected the manufacturing sector because it eliminated most of the subsidies and fiscal stimuli that had been offered. In 1985, Mexico unilaterally eliminated the anticipated import permit for most of the products, drastically opening its internal market, mainly to capital goods and intermediate goods.

A significant moment in the process of opening its economy was Mexico’s accession to the GATT (General Agreement on Trade and Tariffs), now World Trade Organization (WTO), in
1986. After its accession, Mexico started to ease the regulations on foreign direct investment, mainly on intensive capital industries or technology. By the end of 1988 the trade liberalization of the internal manufacturing market was almost complete, the only sectors that kept their development programs for a little longer where electronics, computers, and automobiles. The administration in the period from 1988 to 1994 accelerated reforms by creating new legislation for foreign direct investment and lifting restrictions in almost 75% of the branches of economic activity. By 1994, before the North America Free Trade Agreement (NAFTA) came into effect, Mexico had opened 91% of its branches of economic activity to majority participation by foreign investors. NAFTA represented the big step for its market liberalization policy; it triggered the growth of Mexico’s imports and exports. NAFTA ratified the United States as Mexico’s most important trade partner, representing 84% of its exports followed by Canada and Germany; and the number one origin of Mexico’s imports, followed by China, Japan, and South Korea. Following NAFTA, Mexico sought to extend its trade relationships and, up to 2016, has signed 12 free trade agreements with 46 countries, 32 bilateral agreements for the promotion and protection of investments with 33 countries, and 9 agreements of limited scope (economic complementary agreements and partial scope agreements, within the framework of the Latin America Integration Association, ALADI).366

Regarding its participation in international forums, in addition to its accession to the WTO, Mexico is a member of the Organization for Economic Co-operation and Development (OECD), the Asia-Pacific Economic Cooperation (APEC), and the ALADI. In October 2013, Mexico joined the negotiations for the Trans-Pacific Partnership (TPP). It is one of the two countries that has a free trade agreement with the two most important economic blocs, North America and the European Union; its participation in the TPP would give it access to a trade agreement with important Asian countries like China, its second source of imports. With its trade and investment agreements and its participation in these international organizations and cooperation groups, Mexico has sought to position itself as a relevant actor in the international economic arena.

366 A detailed list of Mexico’s trade-related agreements is available at, Acuerdos y tratados comerciales suscritos por México, online: gob.mx <http://www.gob.mx/cms/uploads/attachment/file/1883/Cuadro_de_Acuerdos_y_Tratados_Comerciales_de_Mexico.pdf>.
4.3 Mexico in the development agenda

The influences Mexico has received came first from Continental Europe because of its colonial ties with Spain and because its legal system is grounded in the Romano-Germanic civil law tradition. However, as the United States became more influential in the continent and the world, it became one of the strongest influences on Mexico. The legal education reform projects created under the Law & Development discourse in the development decade led to substantial efforts to attract Mexican elites, scholars, and lawyers to US universities to obtain additional training. These efforts encountered a local situation in which Mexican elites, looking up to the North, sent their young students to learn the ‘American way,’ under the assumption that they would bring ‘development’ ideas and implement them in the country; but it was also a strategy to extend their local power and position. Those graduates from US universities gained positions in the political elite and led to Mexico’s adoption of neoliberal objectives and standards, as well as the objectives of the Washington Consensus. It brought about a paradigm change on the economic front and a wide array of legal reforms to implement it. One of the arguments in the process was the legitimation that these elite groups drew on the academic degrees obtained in renowned US universities.

Mexico has been a constant recipient of development aid projects and continues receiving them with very specific agendas. Its geographical position, i.e. its direct border with the US, has made of it a key country that represents important interests for the US. Research has been done to study it as a recipient of development aid projects, and on the topics of legal transplants and legal culture. These studies have offered a view on how certain exports, like

367 Dezalay & Garth, Palace Wars, supra note 13.
368 Washington Consensus, online: Global Trade Negotiations <http://www.cid.harvard.edu/cidtrade/issues/washington.html>.
369 Some examples are the ‘Rule of Law Initiative’ from the American Bar Association in Mexico that supports projects for legal education reform, criminal law reform, and anti-human trafficking efforts. See Mexico, online: American Bar Association - Rule of Law Initiative, online: <http://www.americanbar.org/advocacy/rule_of_law/where_we_work/latin_america_caribbean/mexico.html>. The USAID projects on topics like democracy, human rights, and governance; economic competitiveness; gender and global climate change. See Mexico, online: USAID from the American People <http://www.usaid.gov/where-we-work/latin-american-and-caribbean/mexico>. The European Union aid projects, from 2002-2006 focused on social development and reducing inequality, economic growth/reform/competitiveness, science and technology, and strengthening the rule of law and institutions. From 2007-2013 the focus was on social cohesion and dialogue on which policies to implement, sustainable economy, and competitiveness, and education and culture. See Mexico, online: European Commission - Development and Cooperation – Europeaid <http://ec.europa.eu/europeaid/where/latin-america/country-cooperation/mexico/mexico_en.htm>.
370 Dezalay & Garth, Palace Wars, supra note 13.
the corporate law firm, had been adopted but they had to be adapted in a way that was
convenient, in this example, to the more family-based law firm model that predominates in the
country. Also, these studies have shown that some other models were not as welcomed as the
intended reform of legal education. Nevertheless, it can be said that generally Mexico has been
an avid importer and has been constantly looking abroad, especially at the north, for models to
import. Just like Dezalay and Garth argued in their study, it seems like every generation has felt
the responsibility of completing an unfinished transplant started by a previous generation or
provoking a new one.

One example is the amount of resources that flowed into Mexico to support transitioning
the criminal justice system from an inquisitorial to an accusatorial model that includes oral trials.
This change to the criminal system was introduced through a major reform in 2008. It attracted
resources for drafting the reforms, the physical renovations that were needed in the courts and for
training the judiciary. It also involved modifications in the curriculum of legal education to
prepare law students for these types of procedures.

One leading US institution in development projects has been the American Bar
Association through the Rule of Law Initiative (ABA ROLI), which declares as its mission to
promote justice, economic opportunity, and human dignity through the rule of law. It operates
under the premise that to meet the needs of their population, countries need to consolidate the
rule of law. In Mexico, ABA ROLI has been working closely with local actors to support them in
the transition. During this process, ABA ROLI has offered training to law professors and
students to improve teaching methods that align with this new approach. They have organized
mock trial competitions to prepare law students for the new accusatorial system and have also
promoted professional certifications, mandatory bar membership, and continuing education for

373 For example, Tecnológico de Monterrey –the largest private university in Mexico- built special rooms in all the
campi that offer a law degree for mock-trial exercises for their students to learn and practice the skills that are
required for oral proceedings.
The decision to advance these major changes in the criminal system have been celebrated and embraced at all levels, from the judiciary, to lawyers, and law schools. Applying a more critical view after reviewing the background on Law and Development discourse, legal transplants and the results from Dezalay and Garth’s research, the criminal law reform and all the support to adopt these changes evolved from ideas that have been ingrained in the Mexican legal context from the influence received from the US over the years. These include the idea that to attain development their legal system needs to adopt legal methods and legal forms as followed in the US.

Even though the US continues to be its most important trade partner, at this point Mexico is not only looking North. Mexico has been strengthening its ties with Europe through its trade relationships and through development aid programs that have been supported by Europeaid. Mexico has also diversified its partnerships considering other strong actors like China.

After looking at Mexico as an aid receiver, it is also important to recognize its newly identified role as an “emerging donor.” Mexico has been engaging in cooperative projects mainly with Latin American countries, with a strong focus in Central America and the Caribbean. It has also been a relevant actor in South to South cooperation. Its fast reaction and support for Haiti in 2010 after the earthquake highlighted the need to better organize its aid efforts as there were several aid projects already in place, but not a concentrated source of information and organization for them. Following on this, in 2011, there was a legal initiative to enact the Mexican Law for International Cooperation for Development, which established the first national system of international cooperation grounded in the principles of complementarity, auto-sustainability, and co-financing. The system materializes in the Mexican Agency for International Cooperation for Development (AMEXCID, for its acronym in Spanish) that coordinates all the efforts on this topic. AMEXCID’s responsibilities include, among others,

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creation of initiatives; establishment of the Mexican development program; evaluation and follow up the implementation of policies; conclusion of necessary agreements with different institutions and agencies for the implementation of projects; and management of a national registry and information system of Mexico’s international cooperation for development.  

A particular feature of Mexico’s cooperation for development is the horizontal-partnership and knowledge-exchange approach that it takes. It could be said that after being a recipient of several projects from a North-South, in a top-down approach, Mexico understands the importance of working from a perspective of cooperation and from an approach that is mindful of the recipient’s needs. More importantly, an approach that sees the recipient as a partner for the creation of an alliance, rather than a mere recipient. A challenge that Mexico faces is to balance its two roles as aid recipient and as aid donor, but certainly these roles position Mexico as a more relevant actor in the international arena.

4.4 Arbitration in Mexico

One of the underpinning tools for all the international treaties and agreements that Mexico has signed, and a way to offer security to its trade partners, has been to strengthen arbitration as the main mechanism to solve commercial and investment related disputes. Among the reforms that were done to prepare the terrain for NAFTA, in 1993, Mexico incorporated the UNCITRAL Model Law on International Commercial Arbitration (Model Law, herein). Except for certain procedural rules and rules regarding expenses and costs that were added, it can be said that Mexico fully incorporated the essence, spirit, and language of the Model Law.

The following are some of the reasons expressed by the Mexican President in turn to incorporate the Model Law:

“In the area of international trade it is very convenient to adopt a model law in commercial arbitration which is universally known and which has received wide acceptance internationally… [it] constitutes a solid and encouraging ground for the

379 Law of International Cooperation for Development, Article 10. The National Registry of the International Cooperation for Development (RECID, for its acronym in Spanish) keeps record of the cooperation that Mexico offers. In 2014, Mexico’s cooperation was of $288.6 million dollars and was offered through technical cooperation by experts exchange programs, scholarships for foreigners to study in Mexico, contributions to international organism, humanitarian help, operation of AMEXID and refundable and non-refundable financial cooperation. AMEXID, Cuantificación de la Cooperación Mexicana (Quantification of Mexican Cooperation), online: gob.mx <http://www.gob.mx/amexcid/acciones-y-programas/cuantificacion-de-la-cooperacion-mexicana>.
harmonization of national laws, in line with the more important developments of modern practice of international arbitration.”

Commerce is considered in Mexico a federal matter, which means that only the Federal Congress can legislate on trade-related topics and trade laws are applicable across the country; thus, the states cannot legislate on these topics. What can be called the Mexican Arbitration Law is contained in Title 4 Book V of the Commercial Code, which goes from Articles 1415 to 1480. This reform repealed the content of the Commercial Code that ruled arbitration and replaced it with the new articles that were drafted following the Model Law. Minor adjustments or changes were done when Mexico incorporated the Model Law, however, Treviño highlighted four important modifications:

(i) the new law applies both to domestic and international commercial arbitration that takes place in Mexico;
(ii) if the parties have not chosen the applicable substantive law, the arbitrators may do so, taking into consideration the characteristics and connections of the case (Title IV, Article 1445). The Model Law provides that the “law will be determined by the conflict-of-laws rules which the Tribunal considers applicable”;
(iii) the new law opts for a single arbitrator, instead of three as provided in the Model Law, when the parties cannot agree on the number of arbitrators; and
(iv) in the absence of an agreement of the parties about costs, the new law incorporates provisions from the UNCITRAL Arbitration Rules for the determination of costs.

Mexico was one of the first countries to apply the same rules for national and international arbitration. This is considered an advantage since it offers a unique set of national rules for any type of arbitration. It has been recognized by national and international scholars that Mexico’s Arbitration Law is modern legislation that offers a positive legal framework for arbitration practice.

Regarding recognition and enforcement of foreign arbitral awards, the chapter on arbitration in the Commercial Code also includes the rules for these procedures, which follow the New York Convention and the Inter-American Convention on International Commercial

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381 Dictamen, Cámara de Diputados, Diario de los Debates, Año II, No. 23, 24 June 1993, p. 1760 cited by Treviño, ibid, at 4-5.
382 Commercial Code, published in the Federal Official Gazette 7 October 1889 (entered into force, 1 January 1890)
383 Treviño, supra note 380 at 5-6.
Arbitration\textsuperscript{385} (Panama Convention). Mexico adopted the New York Convention in 1971 and ratified the Panama Convention in 1978, both without any reservations. This implies that Mexico would apply the same standard of review to all foreign awards, even if they originated from a non-signatory of the New York or Panama Conventions. It is important to mention that arbitration was legislated in Mexico before the aforementioned reform of the Commercial Code of 1993; however, arbitration was not used as frequently as it has been in the last two decades following the change in the economic model to an open market economy. With the changes in its trade and investment policies and the demands that NAFTA put on its legislation, Mexico has had to provide a legal framework for arbitration that would meet the needs of its international commitments.

On January 2011, Mexico took another step forward to improve its arbitration legal framework and reform the arbitration chapter in the Commercial Code. The arbitration community in Mexico generally welcomed and praised the reform. The comments were positive and highlighted how this reform clarified certain aspects that had been confusing or challenging in practice; additionally, scholars and practitioners considered that the reform strengthened Mexico’s arbitration legislation and practice.\textsuperscript{386} The main topics of the reform were:

- Enforcement of arbitral agreements: the reform clarified that the agreements should be summarily executed; the judges must refer the parts to arbitration immediately.
- Principle of \textit{compétence-compétence}: it was finally clarified that the arbitral tribunal has the faculty to decide on its own jurisdiction, including the exceptions related to the existence and validity of the arbitral agreement.\textsuperscript{387}
- Courts cooperation: it specified the role of the courts when their cooperation is requested for designation of arbitrators, assistance in the production of evidence, and

\textsuperscript{387} Before the reform, there was a debate on who should decide on the validity of the arbitral agreement, the courts or the arbitral tribunal. Contradictory criteria in the BCPs issued by Circuit Courts were brought before the Supreme Court of Justice and solved the contradiction establishing that it was for the judge to decide. This had been one of the most relevant debates about arbitration in Mexico that was finally settled with this reform. For a full comment on this debate in Mexico, see: Francisco González de Cossío, “De Necios y Convencidos: El debate sobre la postura mexicana sobre quién decide acerca de la validez del acuerdo arbitral” (Of Fools and Convinced: the debate over the Mexican posture on who decides the validity of the arbitral award) (2010) 40 Jurídica - Anuario del Dep Derecho la Univ Iberoamericana 137.
for deciding on arbitrators’ honorariums. The reform clarified the type of procedure and the procedural rules for these cases.

- New special procedure: the reform established a new summary special procedure for topics like contesting the decision on the challenge of an arbitrator or the decision on the competence of the arbitral tribunal, to obtain judicial interim measures to support an arbitration, to execute interim measures issued by an arbitral tribunal, nullity of commercial transactions, and nullity and enforcement of arbitral awards.\footnote{González de Cossío emphasized the reform clarified that arbitral awards are just enforced, they do not need a previous \textit{exequatur} procedure; and, finally, because it is now a special procedure, it is evident that the type of amparo to challenge the judicial decision on the enforcement of an arbitral award is a direct amparo. This aspect on the enforcement procedure is addressed in more detail in \textit{infra} section 4.4.1 Recognition and enforcement of arbitral awards in Mexico.}

- Interim measures: the big step taken by the reform is that now national judges can issue any type of interim measures they consider appropriate for arbitration,\footnote{Before they were restricted only to the options of interim measures provided in Mexican legislation for commercial procedures.} and the interim measures issued by an arbitral tribunal can be executed by national courts. The latter means that the Mexican judicial system is giving full recognition to the interim measures dictated by an arbitral tribunal.

The only criticism to the 2011 reform was the last-minute inclusion of the responsibility of the arbitral tribunal for the interim measures it issues, along with the party that requests them. Some practitioners like González de Cossío, suggested that this unfortunate, last minute decision should not distract us from the great progresses this reform did for arbitration in Mexico.\footnote{González de Cossío, \textit{Modification to Arbitration Law}. \textit{supra} note 386 at 6-7.} Other firms, like Santamarina & Steta, in its internal report on the reform, considered that this addition might affect Mexico’s standing as an arbitral forum, but that arbitral institutions might modify their rules to exempt arbitrators from this responsibility to overcome this new rule.\footnote{Santamarina & Steta, \textit{Reforma Legal en Apoyo al Arbitraje Comercial. Regulación de la Intervención Judicial} (Legal reform in support of commercial arbitration. Regulation of judicial intervention) (February, 2011), online: Santamarina & Steta <http://www.s-s.mx/pdf/ACTUALIDAD_LEGAL-Reforma_Legal_en_apoyo_al_Arbitraje_Comercial.pdf>.}

In terms of arbitrability, pursuant to Article 568 of the Federal Code of Civil Procedure\footnote{Federal Code of Civil Procedure (FCCP) published in the Federal Official Gazette 24 February 1943 (entered into force, 25 March 1943).} (FCCP) the controversies arising from the following matters shall be exclusively settled by
national courts: land and water resources located within national territory; resources of the
exclusive economic zone or resources related to any of the sovereign rights regarding such zone;
acts of authority or related to the internal regime of the State and of the federal entities; and the
internal regime of Mexican embassies and consulates abroad and their official proceedings.
“Additionally, all family and criminal matters correspond to the exclusive jurisdiction of national
courts and are therefore not arbitrable. Recently [in 2012], the Law of Public Works and Related
Services, as well as the Law of Acquisitions, Leases, Services of the Public Sector have
expressly excluded from arbitration any dispute regarding the validity of the administrative
rescission or the early termination of any contract entered into by public entities with private
parties which fall under the scope of these laws.”393

Some of the major international arbitral institutions as well as some local institutions
operate in Mexico and all of them support arbitration practice according to international
standards. The alliances that these institutions have established show the connections that local
institutions have put in place to maintain Mexican arbitration practice aligned to the best
practices of arbitration around the world. These efforts support the view of Mexico as a pro
arbitration jurisdiction and for that it earned the reference as the Switzerland of the Americas.394
A list of the main institutions that provide arbitration services in Mexico can be found in
Appendix B Arbitral Institutions in Mexico.

4.4.1 Recognition and enforcement of arbitral awards in Mexico

In Mexico, federal and local courts have “concurrent jurisdiction” for solving commercial
disputes, where arbitration cases fit. The Mexican Constitution in its Article 104 rules that the
federal tribunals can hear:

“II. of all the civil or commercial disputes related to the compliance and application of
federal law or of the international treaties celebrated by the Mexican State. According to
the plaintiff’s choice and only when private interests are affected, these disputes can be
heard by the judges and courts of the common order.”395

393 Marco Tulio Venegas, Mexico, online: Global Arbitration Review <http://globalarbitrationreview.com/know-
how/topics/61/jurisdictions/16/mexico/>.
394 This statement was endorsed and repeated by some of the Mexican practitioners interviewed for this project. This
is addressed in more detail in infra Chapter 5 section 5.4.1 Local actors’ perspective about arbitration in Mexico.
395 Mexican Constitution, Article 104 section II.
This means that the plaintiff can decide whether to file a commercial action before a state court or a federal court. If filed at the state court, the plaintiff must identify the court that hears commercial disputes, which generally would be a civil court of first instance, depending on the structure of that state’s judicial branch. If filed at federal courts, the action must be submitted to a District Court, which is considered the court of first instance for ordinary federal cases.\footnote{Organization Law of the Federal Judiciary, Article 53 (I).}

Regarding arbitration, the Commercial Code in Article 1422 provides that the actions in which judicial intervention is required for an arbitral case, shall be filed before the federal court of first instance (District Courts) or the state court of first instance of the place where the arbitration takes place. When the arbitration place is outside of Mexico, the recognition and enforcement of the award shall be filed before the federal court of first instance (District Courts) or the corresponding state court –the one of the address of the defendant or of the address of the goods over which the award will be executed.\footnote{Commercial Code, Article 1422.}

The recognition and enforcement of arbitral awards, before the 2011 reform, was done through an “incidental” procedure that was ruled by Article 1463 of the Commercial Code with direct reference to Article 360 of the Federal Code of Civil Procedure.\footnote{For all those procedural details in which the Commercial Code is not explicit, Article 1063 of Commercial Code establishes that the FCCP, or the local code of civil procedure, should be used as supplementary if the Federal Code does not provide on a specific procedural matter. Article 360 FCCP details the timeframe in which the stages of the incident should happen like number of days for setting the hearing, for offering evidence, and for deciding the incident.}

Generally, an incidental procedure is used to request the court to solve an issue that is related to the main matter of a case, which needs to be decided before the main matter. The use of the incidental procedure for the recognition and enforcement of arbitral awards was a controversial debate in Mexican scholarship and the judiciary. The legal reasoning for using an incidental procedure was to uphold the policy of giving celerity to all matters related to arbitration, and more so when it was the recognition and enforcement of an arbitral award. However, an important and related issue, was the possibility of challenging the incidental decisions. Some courts interpreted that the decisions made within the incident were disputable through an appeal for revocation\footnote{The appeal for revocation is a remedy available in commercial proceedings by which the claimant requests the revocation of a decree or a non-appealable order of the judge made within the proceeding. It is regulated in articles 1334 and 1335 of the Commercial Code.} (\textit{recurso de revocación}), others argued to the contrary. Finally, the Supreme Court of Justice clarified the
interpretation and issued a BCP by contradiction\(^{400}\) establishing that the use of the incidental procedure for deciding on the recognition and enforcement of an arbitral award was the most expedient way and one which was aligned with the principles of celerity, practicality, and expediency that should be applied to arbitration. In the BCP, the First Chamber of the Supreme Court also affirmed that the incidental decisions could not be further appealed.\(^{401}\)

The arbitral reform of 2011 put an end to the debate when it clarified in Article 1471 of the Commercial Code that the recognition and enforcement of an arbitral award should be requested via the “special procedure” for commercial transactions and arbitration pursuant to Articles 1472 to 1476. The new special procedure is also filed at the federal or local court following the options of concurrent jurisdiction aforementioned – most often it will be filed at a district court. This decision from a district court is a Mexican judicial decision, therefore, the non-conforming party may file a direct amparo against this decision, which is the last resource before Mexican courts. By including the action for recognition and enforcement of an arbitral award in the special procedure, this reform solved a very controversial issue and clearly defined the type of amparo available.

The importance of clarifying the type of amparo that can be filed lay in the time that it would take to execute an arbitral award. Some courts\(^{402}\) were of the view that because the decision was the result of an incidental process, then it could be challenged via an indirect amparo before district courts. The implication of this path was that the decision from the district

\(^{400}\) BCP by Contradiction: 40/2007-PS among the criteria issued by the 4\(^{th}\) and 7\(^{th}\) Collegiate Courts on Civil Matters of the First Circuit. The main question was to decide whether the intermediate decisions issued in an incidental procedure for recognition and enforcement of an arbitral award could be appealed.


\(^{402}\) LAUDO ARBITRAL. CONTRA LA INTERLOCUTORIA QUE DECLARA SU NULIDAD PROCEDE EL JUICIO DE AMPARO INDIRECTO. (Arbitral Award. An Indirect Amparo can be filed against the interlocutory that sets it aside) Localización: [J]; 9a. Época; 1a. Sala; S.J.F. y su Gaceta; Tomo XXVII, Enero de 2008; Pág. 2681a./J. 146/2007. This criterion was sustained in the BCP by Contradiction no. 78/2007-PS among the criteria from the 2\(^{nd}\) Collegiate Civil Court of the 6\(^{th}\) Circuit, the criteria from the 2\(^{nd}\) and 6\(^{th}\) Collegiate Civil Courts of the 1\(^{st}\) Circuit and the criteria from the 3\(^{rd}\) and 13\(^{th}\) Collegiate Civil Courts of the 1\(^{st}\) Circuit.

RECONOCIMIENTO, EJECUCIÓN Y NULIDAD DE LAUDO ARBITRAL. SON MATERIA DE INCIDENTE Y LA RESOLUCIÓN QUE LO RESUELVE ES RECLAMABLE EN AMPARO INDIRECTO. (Recognition, enforcement and nullity of an arbitral award. They are matter for an incidental procedure and the decision can be challenged via an Indirect Amparo) Localización: [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XXIX, Abril de 2009; Pág. 1953I.3o.C.730 C.
court could be challenged through a judicial review (recurso de revisión) before a circuit court, therefore adding one more procedure before the award could be executed. Other courts were of the view that because the decision is on a main matter – the recognition and enforcement of the arbitral award – the only remedy available was the direct amparo before circuit courts, which does not accept any further challenge. The debate on the type of amparo was one between the literal interpretation of the law when it characterized this procedure as ‘incidental’ and the nature of the decision, which is a ‘final’ decision of a procedure. Fortunately, the reform of 2011, established that the recognition and enforcement of an arbitral award shall be decided through the new “special procedure” giving clear answer to the type of amparo that can be opposed to this decision, i.e., a direct amparo.

Finally, it is important to add that the new special procedure also incorporated the option for accumulation. Article 1477 of the Commercial Code provides that the actions for setting aside and for recognition and enforcement of an arbitral award can be accumulated and decided at the same time instead of having to suspend one while the other was decided. This provision contributes to deterring delaying practices by deciding on two actions that are intrinsically related; thus, contributing to the principles of expediency, simplicity, and celerity that guide arbitration practice.

403 A ‘judicial review’ is a remedy that can be filed against the decisions made by district courts, unitary circuit courts, or circuit courts in direct or indirect amparo proceedings. Depending on the type of amparo is the court that decides the judicial review, either a circuit court or the Supreme Court of Justice. The judicial review is legislated in Mexican Constitution Article 107 sec. VIII and IX and Amparo Law, Articles 81-96.

404 NULIDAD DE LAUDO ARBITRAL. SU TRÁMITE ES INCIDENTAL PERO LA RESOLUCIÓN QUE DECIDE EL FONDO CONSTITUYE UNA SENTENCIA DEFINITIVA QUE NO ADMITE RECURSO ALGUNO POR LO QUE PROCEDE EN SU CONTRA AMPARO DIRECTO. (*Nullity of the Arbitral Award. It is decided in an incidental procedure but the decision on the main matter is a definitive sentence that cannot be appealed, therefore a Direct Amparo can be filed against it*). Localización: [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XXIV, Julio de 2006; Pág. 1247I.3o.C.557 C. On this topic Mexican practitioners and scholars have also supported the criteria that the direct amparo is the correct avenue to challenge the decision that grants or denies the nullity or the recognition and enforcement of arbitral awards, see: Carlos de Silva Nava, “Procedencia de amparo directo contra resoluciones sobre nulidad o reconocimiento de laudos arbitrales en material comercial” (*Direct amparo as the remedy against the decisions on the nullity or recognition and enforcement of commercial arbitral awards*) in Diagnóstico y Propuestas sobre los Sistemas de Impartición de Justicia en México (Diagnosis and Proposal for the Mexican Systems of Justice), Barra Mexicana, Colegio de Abogados, Colección Foro de la Barra Mexicana, Volume II (2004) page 1503.

4.5 The four factors for studying the concept of public policy applied in Mexico

After the general introduction to the Mexican context, the four factors suggested in Chapter 2 –language, legal tradition, legal context, and legal culture– will be examined as they apply in this specific legal field. These factors expand the perspective to understand where local actors are coming from in their approach to public policy.

4.5.1 Language

As it was explained in Chapter 2, language is used to create shared meaning and to establish common frameworks that lead to social organization. Wittgenstein suggests the meaning of a word is determined by its context and makes sense within a corresponding language-game. The challenges involved in drafting an international instrument were also addressed there, as well as the importance of considering practical differences when choosing their wording, and the relevant influence of diverse languages in creating meaning in international law. For examining language in Mexico for the public policy exception, this section points to the meaning of public policy in different languages. It introduces an important distinction made in this project that the concept ‘public policy’ in English encompasses more than ‘public order’ in Spanish. It was explained that the assumed equivalence between these terms could be the cause of ambiguities, thus, this section highlights the reasons for using ‘public order’ for the analysis of the Mexican context.

According to the pluralist approach that is endorsed here, it is not possible to talk about public policy starting from the assumption that it is equivalent to ‘orden público.’ Article V of the New York Convention in its official text in English uses the term ‘public policy’ and its official text in Spanish uses ‘orden público.’ Their equivalence has been a general assumption and it has been specified as such for official translations, but assuming their equivalence seems to imply that this would overcome any differences that lay underneath the wording. Therefore, it is necessary to analyze in more detail those differences behind each term, in each language.

It suits to present the meanings of ‘public policy’ and ‘orden público’ as they are defined in legal dictionaries in English and Spanish. In Spanish, the most recognized source for the

meaning and use of a word is the dictionary from the Real Academia Española, which defines ‘orden público’ as:

**orden público** 1.m. Situación de normal funcionamiento de las instituciones públicas y privadas, en la que las personas ejercen pacíficamente sus derechos y libertades. (A situation in which the public and private institutions function normally, and the individuals exercise peacefully their rights and liberties)

2.m. Der. Conjunto de principios informadores del orden social que constituyen un límite a la libertad de pactos. (Set of principles that inform the social order that constitute a limit to the freedom of contract)

3.m. Der. Conjunto de principios y valores que se estiman fundamentales en un orden jurídico nacional y que impiden la aplicación, en otro caso obligada, de la ley extranjera. (Set of principles and values considered fundamental in a national legal order that prevent the application, otherwise mandatory, of foreign law.)

On the English side, the Oxford English Dictionary defines public policy in the following terms:

**public policy** n. (a) policy, esp. of government, that relates to or affects the public as a whole; social policy; (b) Law the principle that prospective injury to the public good is a basis for refusing to enforce a contract which would otherwise be valid.

In the legal context, the Black’s Law Dictionary defines public policy as follows:

*public policy*. 1. Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society. Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is “contrary to public policy.” Also termed policy of the law.

2. More narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large.

From these definitions, it is important to notice that public policy in English generally encompasses more than the term in Spanish. In English it refers to both, the policies from the government and the fundamental principles of a society that are generally used to restrict the individual freedom of contract with the purpose of protecting the public at large. In Spanish, it

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refers only to the fundamental principles and values of a legal system. In both languages it is recognized that public policy would serve as a limit to the freedom of contract; it encompasses those guidelines that would imply the limit of individual freedoms for the protection of a higher interest, i.e. the societal order.

Sometimes English speaking authors try to make the distinction by using ‘public order’ when referring to the fundamental principles and values, and ‘public policy’ or ‘social policy’ for the government policies. In Spanish, the government policies are called “políticas públicas” which involve the policies established by the government to address specific social issues and it falls within policy studies and policy analysis in the terms that were referred to above in Chapter 2. In Mexico there is also a vast body of scholarship that is concerned with public policy or ‘políticas públicas’, including analyses that critically assess the use of foreign models of policy sciences in contexts that are culturally and politically different. Of particular interest on matters related with public policy in Mexico is a recent study that points to the actual participation of the Mexican Supreme Court in making ‘políticas públicas’ through its decisions on significant cases that, as a consequence, create policy or have an effect on a policy. Ana M. Ríos concluded that the Supreme Court makes public policies through its decisions but it makes policy because it is called to make it, the cases are brought before it to decide legal inconsistencies on specific executive or legislative solutions. The Supreme Court makes these decisions to maintain the constitutional order and regarding the matter of ‘judicial activism’ from the Supreme Court, Ríos suggests that the Court affects public policy because public policy affects the legal order, which is the function of the Court, therefore, it cannot be formally considered activism. Nevertheless, she points that we could observe some type of activism from the Supreme Court when it exercises its faculty to attract certain cases to decide on them and on the creativity of its legal interpretations.

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410 Legal system and society are used interchangeably in this paragraph under the assumption that the fundamental values of a society are reflected in its legal system and it is the means by which those values are protected.
411 See supra section 2.7.2.3 Policy Analysis.
Now, for example, when a Mexican court is presented with a case where the public policy exception is raised, its analysis would focus on the effect that the award could have in their fundamental values but would not bring into the analysis the government policies. In Mexico when the judges declare that an issue is a matter of public policy, it generally signifies that the matter has been characterized as an issue of highest importance for the system and part of its core values that it must be elevated to this status. It assigns a higher priority or importance to these matters that courts need to be cautious when a foreign award touches upon them.

The need to make the distinction is mainly due to the two meanings that converge when using the term public policy in English. The government policies are associated with the individual or political party that is in government office, or with a government agency and its priorities, and would reflect specific areas of interest or priorities for a specific group. On the other side, public order, as referring to the fundamental values of a society, is supposed to reflect the values and principles that hold a state together, beyond partisanship and individual ideologies. These are the principles that hold the highest priority, which would be grounds for rejecting the application of a foreign law or would prevent the recognition and enforcement of a foreign arbitral award. In the common law tradition, it is expected that the legislature or the courts would establish which are those fundamental values. While in a civil law country, the fundamental values are contained in the highest source of law, usually the constitution, and it is expected that they will be framed by the legislature in secondary laws, then applied and interpreted by the courts.

In this project, ‘public policy’ – as including the governmental policies – is separated from ‘public order’ to refer to the fundamental values of a legal system, regardless that the literature continues using ‘public policy’ interchangeably to refer to both. Using ‘public order’ allows the separation of the two great fields compounded in the term in English and reflects better what ‘orden público’ entails in Spanish. This also serves to clarify that this project does not touch upon the large and separate field that analyzes, studies, and proposes policies that the governments put in place for addressing the needs of the society; this is not about ‘políticas públicas.’ The approach to public policy in this study is based on the distinction used in Spanish, therefore using ‘public order’ to analyze Mexico’s context allows to talk in more equivalent terms.
4.5.2 Legal tradition

Mexico’s legal system follows the civil law tradition, which was inherited from Spain. The formation of its legal system followed influences from Continental Europe, including that its Civil Code is based on the French Napoleon Code. The understanding of the role of the judges, as framed before in Chapter 2, is also influenced in Mexico by the doctrine of separation of powers and their mandate to only apply the law as it is in the codes and to interpret the law following the intention of the legislators. The judges are instructed on specific methods for the interpretation of the law and its sources.

As part of following the civil law tradition, the sources of law in Mexico are strictly defined. Mexican scholarship identifies three types of sources of law: formal, real, and historical.\(^{414}\) Formal sources are the specific procedures to create norms; real sources are the social facts that lead to the creation of legislation; and historical sources are documents and texts that once contained legal norms that legislators can use as reference for the incorporation of new laws. The formal sources law in Mexico are legislation, court precedents system, customs, the general principles of law, and legal scholarship. As it was explained before, the hierarchical order of the sources of law are a fundamental element of civil law countries and this also applies to Mexico.

Mexico has also been receiving more influence from the United States and this has led to the combination of elements from both legal traditions. For example, the criminal reform of 2008 to incorporate an adversarial and oral-based criminal system. For this reform, the Federal Judiciary organized its actions around three important topics: changes in the organization of the courts, cultural changes to transform the mentality of all legal actors involved in the criminal system, and the coordination with other institutions involved in the development of the new criminal system.\(^{415}\) The implementation of this reform has taken several years and has also involved changes in legal education and training of judges and lawyers.

\(^{414}\) Eduardo García Maynez, *Introducción al Estudio del Derecho* (Introduction to the Study of Law), 53rd ed (México: Porrúa, 2002). García Maynez suggests this classification that is generally used for the study of law in Mexico.

\(^{415}\) Poder Judicial de la Federación, “Informe Anual de Labores del Ministro Presidente” (Annual Report of Activities from the President of the Supreme Court of Justice) (Mexico, Poder Judicial de la Federación, 2011)
Merryman and Pérez-Perdomo referred to the idea of state positivism and strict separation of powers as the main ‘dogmas’ on which the civil law tradition was grounded after the revolutionary movements.\footnote{Merryman & Pérez-Perdomo, supra note 148.} This characterization illustrates an issue that is still valid in present times because many principles on which these systems have been created are treated as dogmas and thus are considered fixed and unquestionable truths. This approach is problematic when addressing topics like public policy because, as one of the core institutions in a system, its meaning is easily assumed and, as well, hard to open for debate or question. One of the local actors interviewed for this study brought attention to the dogmatic approaches prevalent in the Mexican legal culture and how, according to his view, they pose a challenge for the evolution of the Mexican legal system.\footnote{Interview of Counsellor 3, 6 June 2012.}

Counsellor 3, who has also acted as arbitrator in various cases, explained that one of the challenges for the Mexican legal culture is to abandon deductivism and its strong focus on procedure (procesalismo), both distinctive features of the Mexican legal culture.\footnote{More details on how he saw these two features interact in the Mexican legal culture is also addressed in infra section 4.5.4.1 Self-reflection on Mexican legal culture.} He explained that legal education in Mexico is grounded in deductivism, a method inherited from the colonial times, which is guided by principles. Deductivism is a characteristic that has made the Mexican legal culture not prone, and even reluctant, to question those principles, which eventually has led to the reaffirmation of dogmas. Counsellor 3 explained that once a jurist or a school of thought have expressed a principle, it is followed and repeated and repeated, when it should be open for questioning or at least its interpretation should be open for discussion. This critical perspective is not encouraged in Mexican legal culture. Thus, these principles transform into dogmas that ought to be followed, making it harder to shift or adapt principles to situations that occur in current times.

Counsellor 3 offered an example related to an established principle that the judicial process is a matter of public policy. It is affirmed in the Mexican legal context that the procedure before a court is a matter of public policy; it comes from the principle of the adversarial judicial procedure. He explained it is a principle (a dogma) that is interpreted in a dogmatic way. The case was an ordinary commercial dispute in which he and his counter-party decided to request the deferral of an evidence hearing for a brief period (5 or 10 days, a short period) because the
parties where going through negotiations that could possibly settle the dispute. The counselor was aware that this is something not specifically contained in the law, however the parties considered it feasible to request it of the judge given that it could potentially end the legal proceedings. The answer from the judge to this request was an absolute rejection arguing that the judicial procedure is a matter of public policy, and that was the end of it. Counselor 3 agreed with the judge that the judicial procedure is a matter of public policy, and he truly believes in that, but in this case, it was being interpreted in a dogmatic way. The counselor explained that when something challenges the well-established structures of thought in the Mexican legal culture, it would imply the need to adjust or modify those structures. The local actors, as a rejection to the challenge, resort to known path of holding onto of the dogmas, to the principles, rather than modifying them. In this example, he suggested the judge could have seen this as a positive action towards the solution of the dispute rather than considering that public policy was under attack; for Counselor 3 this path of thought comes from the ingrained deductivism.

This example is an illustration of the application of a principle in a dogmatic way that prevents the parties in a dispute from resolving their dispute in a more favorable manner. At the same time, it exposes the awareness of some of the actors about these inherited ways of thinking that could be positively challenged within that legal system to support the development of legal institutions that can better adapt to the needs of current time, without disregarding the value they have added to take the system to where it is now.

4.5.3 Legal context: private international law or conflicts of law

Private international law in Mexico is approached in local scholarship as the set of legal norms that determine the applicable law to cases where norms from different jurisdictions have simultaneous validity over a specific situation.\textsuperscript{419} The study of private international law in Mexico generally involves the rules to solve conflicts of laws, rules of nationality and the legal status of foreigners.

The international norms to which Mexico subscribes, such as treaties and conventions, go through a process of incorporation into the national legal framework, which gives national legitimacy to international law. The incorporation requires that the international treaties

concluded by the President must be in accordance with the Mexican Constitution and ratified by the Senate.\textsuperscript{420} This is an important fact in understanding the Mexican context and how they solve conflicts of laws because it involves understanding the hierarchy of laws within the Mexican legal system. For Mexican legal actors (practitioners and judges) international laws have been incorporated to their national legal system, thus they only need to use Mexican law to argue and decide cases. This emerged in the interviews with local actors for this study, Counsellor 2 and Counsellor 4 recognized that judges are not very familiar with international conventions or other international instruments and practitioners do not use them to argue their cases because this could be perceived as if they do not have a solid case within Mexican law. On the other side, judges solve cases under the premise that the answers have to be found within Mexican legislation. For example, Judge 4 recognized that judges are trained to analyze all cases only through the national legal framework because any international norm would have been incorporated into the national legal system. Therefore, for them there is no need to review any international treaties or convention because if they have been incorporated, then all the answers to decide a case can be found within the national legal framework.

The challenge with this perspective in times of globalization has been brought up by scholars like Leonel Péreznieto who suggests that there needs to be a recognition of the national character of international treaties, without fixating on this process of incorporation, so that international treaties can be directly applied in deciding cases.\textsuperscript{421} The problem is that the Constitution only recognizes two levels of jurisdiction, federal and local (of the states), but also recognizes the superiority of international treaties over federal laws. Therefore, Pereznieto suggests there should be a ‘national’ level formally recognized for all international treaties subscribed by Mexico. Judges should be able to do directly reference to international treaties in deciding cases. This issue gained relevance with the Human Rights Reform of 2011 according to which all people in Mexico are entitled to the protection of human rights as established in the Constitution and in the international treaties that Mexico has signed. Currently, there is no formal recognition of this level of jurisdiction – national – which makes the direct use of international treaties for topics that are not related to human rights more difficult. Judges and practitioners

\textsuperscript{420} Mexican Constitution, Article 133.
\textsuperscript{421} Leonel Péreznieto Castro, “El derecho internacional privado y su normatividad en su incorporación en el Sistema jurídico mexicano” (Private International Law, its provisions and their incorporation into the Mexican legal system) (2015) XV Anuario Mexicano de Derecho Internacional 773-816.
recognized in the interviews that this reform is changing the way in which judges apply international treaties to decide human rights cases and should put international treaties for other matters, like commercial cases, at a different position in the mind of the judges when deciding cases. This was considered a positive development for the Mexican legal system by the interviewees.

The way in which international treaties are used and applied by practitioners and judges has an effect on private international law because there are several international treaties that impact relationships between individuals from different jurisdictions, which in the end involve the solution of conflicts of laws. Some of the topics are adoption, marriage, alimony, the domicile of natural persons, legalization of public documents, trade, trade instruments, contracts, arbitration, among others.

The theoretical approach to public policy in Mexico follows the approach of the exception to the operation of choice-of-law rules. Accordingly, as it was explained in Chapter 2, foreign law might be applicable to a specific case but because the results of its application affect the local public order, the foreign rule cannot be applied.\textsuperscript{422} Mexican legislation recognizes the application of foreign law according to specific rules established in Article 14 of the Federal Civil Code and public order restricts the application of foreign law for the protection of Mexican fundamental principles or institutions, pursuant to Article 15 of the Federal Civil Code. This is the basis for the application of public order in Mexico in the legal context of private international law. However, there are more elements involved in understanding the use of public order in the Mexican context that requires a detailed examination of its application, which is the objective of Chapter 5.

4.5.4 Legal culture

Legal culture is considered by Pitman Potter as a basis for understanding the relationship between imported and local norms because it constitutes the cognitive environment in which local and imported law norms intersect.\textsuperscript{423} He brought attention to the local context to which the imported norms arrive and how it will affect the way those norms take root in the local environment; mainly due to how the local interpretive communities interpret and apply such

\textsuperscript{422} See supra section 2.7.3.1 Theoretical approaches to public policy in private international law.
\textsuperscript{423} Potter, supra note 91.
concepts. Legal culture is considered here as an element that impacts the way local actors understand the concept of public policy and is related to the local context. Legal culture was included in the interviews to explore the local perspective on legal culture, and whether the local actors perceived a relationship between the Mexican legal culture and the way in which public policy has been constructed in cases related to the public policy exception.

From the examination of the sociolegal literature in Chapter 2, it can be affirmed that legal culture, despite its complexity, does provide some level of explanation as to why local actors have certain practices and ideologies and provides more context to their approaches to specific issues like the role of law in society and the attitude of the public toward law. From the studies reviewed before, it can be captured that legal culture has helped to explain and understand why legal transplants or imports, most of the time, take a different form from what was expected. It is that special reminder of the individuality of each legal system and ultimately, a society. Legal culture is about how people understand law, its role in society and the people’s relationships with law. Thus, it informs their behaviour and is passed down. If we acknowledge the perspectives from local legal actors, we are in better position to understand their thoughts, arguments, and dilemmas when confronting global standards.

The international standard of how to apply public policy for the public policy exception is set in the New York Convention, but when the different actors involved in the enforcement procedure apply it, the local legal culture plays a role in making sense of it. Legal culture shapes the actors’ construction of the term and thus affects the enforcement of the arbitral award in ways that might not be understandable by foreign actors who are not sensitive to certain particularities of the local legal culture. Addressing legal culture with the interviewees brought attention to some particularities of the local perspective and provided a space for their expression through the self-reflection of local actors.

Legal culture was addressed with the three types of participants: arbitrators (A), counselors of a party (C), and federal judges (FJ). The objectives for including legal culture as a topic in the interviews were; first, to have an account of their interpretation of the concept and understanding of the term, and second, to get their point of view about their own legal culture and whether they considered it impacted the construction of the concept of public policy. For these reasons, the interviewees did not receive a definition of legal culture to frame their
answers. They were asked about “cultura legal mexicana” (Mexican legal culture) and were given ample leeway to elaborate on it from their own point of view.

One set of questions focused on asking them to describe Mexico’s legal culture, its fundamental elements, and what they would consider as its distinctive features. These questions were intended to be a self-reflection of their legal culture and to bring the topic into the framework of the interview. The other set of questions focused on connecting legal culture with the concept of public policy. They were asked if they considered that the local legal culture affected the way public policy is understood in the Mexican legal context for the purpose of the public policy exception and if so, how they considered it had an impact. With the later set of questions, the goal was to explore whether the international standards from international commercial arbitration practice played a role in the local legal culture. The interviews illustrate how local actors compare their own legal culture versus others; what criticisms they have of their own legal culture; and which aspects of their legal culture they consider to be holding back Mexico’s legal development.

4.5.4.1 Self-reflection on Mexican legal culture

The interviewees offered some characteristics they identified as part of the Mexican legal culture, however it was interesting to find that many of the comments about the characteristics or the references to the legal culture were accompanied with strong criticisms about it as well. In the following paragraphs are presented both the characteristics and topics raised by the interviewees related to legal culture and their criticisms to the Mexican legal culture, within which they identified ways forward for the Mexican legal system.

Some of the characteristics that the interviewees identified as part of the Mexican legal culture are related to practices from legal actors. The comment of being a very “formalistic” legal culture, a characteristic that is associated with the civil law tradition, stands out. The civil system is considered too formal in the sense of demanding specific ways in which an act or a procedure should be done. The ‘civilistic’ – used as a synonym for ‘too formal’ – approach to the legal procedure is considered a major characteristic of the Mexican legal culture. Counsellor 1 explained that in Mexico they continue with all the formalisms that are characteristic of the civil law, which is associated with a paternalistic, more protected way of practicing law where the forms need to be cared for much more than in the North American legal systems, which are
considered more ‘liberal’. Counsellor 1 added that the Mexican legal culture is too ‘civilistic’ (formal) in the method of interpretation and suggested that the attitude could be more moderate. However, at the same time, he recognized that the clients themselves many times request more ‘formalism’ in procedures like arbitration. The perception is that if more formalisms are incorporated to the arbitral procedure, they could give the clients more confidence in the process. This is related to a general expectation that any legal procedure must have certain formalities – for many people, that is what makes it legal—thus it is sometimes assumed that clients would trust arbitration more if they see more ‘formalities’ in the process.

The ‘formalistic’ criticism was also associated with causing delays in the development of the legal system. Federal Judge 4 explained that in the process of doing amendments to the Constitution or other national laws, the legislators got stuck in legalist or formalist arguments. His example was the Human Rights Amendment passed in 2011 by which there were major changes in the Constitution related to the protection of human rights. However, the secondary law (Amparo Law) that needed amendments to fulfill the constitutional reform took two years to be ready. This delay generated uncertainty for the citizens since the judges were left without the laws they needed to implement the constitutional reform.

Regarding legal procedures before courts, the “formalistic” critique was aimed at the issue of the legal procedure focusing more on fulfilling the forms required by law to pursue a case rather than on solving the substantive matter of the case. This causes unnecessary procedural delays that eventually affect society’s perception about the legal system, undermining their confidence in the law to solve their disputes. In a connected manner, it was also mentioned it is very characteristic of the Mexican legal culture to pursue virtually every case up to the last instance, even though the first court might have solved the case correctly. There is a perception of being an over-litigious culture, in the sense that every possible resource—even if not completely viable—must be exhausted and brought to the courts. Counsellor 2 considered there is an abuse of nullity actions and criticized that legal practitioners seem to pursue further legal resources to maintain their clients and, sometimes, even inciting them to continue the legal battle.  

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424 Interview of Counsellor 1, 16 May 2012.  
425 Interview of Federal Judge 4, 5 June 2012.  
426 Interview of Counsellor 2, 31 May 2012.
Related to legal culture, the interviewees brought up the attitude of the people towards the law. Federal Judge 2 mentioned that on civil matters there seems to be a culture of ‘no-payment,’ of people avoiding fulfilling their payment obligations.\footnote{Interview of Federal Judge 2, 29 May 2012.} In connection with this observation, Federal Judge 4 talked about a ‘negative legal culture’ because the people do not trust the law, nor the judges and the legal system. There is a perception that the people look for ways to avoid, rather than comply with the law. Federal Judge 4 mentioned that this characteristic, combined with a culture within the courts of not solving the substantive matter of the cases but of finding ‘formalistic reasons’ to dismiss or delay them, have provoked cases taking too long to be solved at the courts and thus the population has lost confidence in the legal system for solving their disputes effectively. Paired with these comments, Counsellor 4 commented that this problem comes from the society, homes, and schools where education about respecting and complying with the law is missing.

Not all the interviewees expressed negative concern about their legal culture. There was recognition about progress seen in the legal culture opening itself to new topics and subjects, to include international standards in their laws, and even trying to harmonize the terminology with them. It was commended that, in alignment with the demands of globalization, the Mexican legal culture has opened itself to topics like international contracts, arbitration, investment arbitration, antitrust law and regulation of economic activities, incorporation of new financial instruments, or new types of business organizations created to align with the demands of commercial practices.

Counsellor 3 spoke deeply to the roots of what he considered the main obstacles that the Mexican legal culture needs to overcome.\footnote{Interview of Counsellor 3, 6 June 2012.} He identified ‘deductivism’ and ‘procesalism’ as two significantly distinctive aspects of the Mexican legal culture (as well as of other cultures, because he considers they also apply to most of Latin America), which are also its two biggest challenges. Deductivism, he explained, is related to how law is taught in the law schools, in a deductive manner, and hand in hand with principles. The Mexican legal culture is one in which neither the principles, nor their interpretations are questioned, which creates dogmas upon which legal actors conduct themselves. The problem, from his point of view, is that this dogmatic perspective does not allow for the evolution of concepts or legal institutions. Mexican legal actors choose rather to create legal fictions to go around a fixed principle, instead of criticizing
or questioning the principle itself. The second challenge, procesalism (related to ‘formalism’ addressed above) is related to the adjudication process before the courts that focuses more on the form that on the substance. For Counsellor 3, procesalism is a consequence of deductivism. He explained that when there is a situation that challenges local legal actors to change their pattern of thought, as a rejection, they tend to go back to reaffirming the dogmas and the principles, regardless if there is clear evidence that the principle cannot solve the new situation at hand. He saw, as a way forward, that the Mexican legal culture should be more open to questioning the principles that created the dogmas; thus, allowing for new principles to emerge that adapt or reflect the reality that the legal culture is experiencing.

In addition, other interviewees offered more comments on ways to improve the Mexican legal culture. Counsellor 4 suggested a more moderated attitude regarding the ‘formalistic’ ways of the courts. 429 Counsellor 1 considered that they would become a more mature society, legally and commercially, as the parties in a legal relationship become more responsible for their commitments and by exercising responsibly the principle of party autonomy.

The Human Rights Amendment of 2011 mentioned above, is recognized by some of the interviewees as an important development in their legal system that is shifting paradigms in the Mexican legal culture. There has been a move from constitutional-control to conventional-control in the legal system, in which human rights and the international conventions that Mexico has signed became the standard of review of courts’ decisions. This was highlighted as one of the most significant characteristics of the legal culture at that moment, which involved its openness to new topics and institutions, but, in particular, to conventionalism, i.e., the legal control guided by international conventions. For them, conventionalism would require a shift in their legal culture starting with the legal education at universities and that should permeate through all the judiciary and to legal practitioners.

4.5.4.2 Mexican legal culture, arbitration, and public policy

The interviewees offered their views on how the Mexican legal culture relates to arbitration and to the public policy exception. These comments illustrate that local legal actors

429 Interview of Counsellor 4, 8 June 2012.
consider legal culture as a factor that influences the understanding of the concept of public policy.

Some interviewees identified a level of negative predisposition to arbitration from the Mexican legal actors. Arbitrator 3 identified three factors that could be influencing this negative perspective and brought attention to one case that happened recently, which was surrounded by misinformation. The case *Infored vs. Radio Centro* involved a services contract by which Infored would produce informative and news radio programs to be transmitted by the radio stations owned by Radio Centro in Mexico. After a long and complicated history that involved arbitration, nullity procedures before national courts, and constitutional challenges at the Supreme Court of Justice the award was declared valid and executable. However, the general knowledge in the community is that the arbitral award was not enforced, which provoked negative perceptions and criticism of the effectiveness of arbitration. The media coverage of the case and the word of mouth highlighted the problems of arbitration and how it ended in an annulled award, which was contrary to what really happened. Those who are not sympathetic to arbitration, have extensively used this case to discredit arbitration as an effective mechanism to solve commercial disputes. Arbitrator 3 explained that this biased and misinformed coverage by the media combined with the lack of reliable information available to legal practitioners, had a negative effect on the acceptance of arbitration among some practitioners.

In addition to the *Infored* case, Arbitrator 3 offered three factors that could have contributed to a negative predisposition from the Mexican legal culture towards arbitration. One

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430 Interview of Arbitrator 3, 23 May 2012.
431 The services contract from 1998 contained an arbitral clause, designated the ICC Arbitration Rules to solve any disputes, and Mexico City as the place of arbitration. After certain conflicts Infored decided to terminate the contract and file for arbitration in 2002. In January 2004, the arbitral tribunal ruled that Radio Centro should pay Infored over 21 million dollars. The award was adopted by majority with a particular vote from the dissenting arbitrator and at requests from both parties, the tribunal issued an *addendum* to the award. Radio Centro challenged the award which started a series of discussions and judicial decisions on its validity. The award was nullified by a civil court, then was declared valid by a district court in an amparo. This last decision was reversed by a collegiate circuit court, annulling the award at that moment. After another series of constitutional challenges and amparo reviews before the Supreme Court of Justice, the final decision was that the arbitral award was valid and should be executed. For detailed accounts on the case and its effects on the perception of arbitration in Mexico, see: Elsa Ortega e Itziar Esparza, *El caso Monitor/Radio Centro y el arbitraje en México* (The case Monitor/Radio Centro and arbitration in Mexico), online (in Spanish): SAI [http://www.sai.com.mx/doc/20060101_caso_monitor.pdf] and Francisco González de Cossío, *El caso Infored vs Grupo Radio Centro: El Quijote Mexicano* (The case Infored vs Grupo Radio Centro: The Mexican Quixote), online (in Spanish): <http://www.gdca.com.mx/PDF/arbitraje/El%20Caso%20Infored%20v%20Grupo%20Radio%20Centro%20El%20Quijote%20Mexicano.pdf>. *[Mexican Quixote]*
is the historic factor, there have been three cases that have happened in the Mexican legal history that have left the country with a not so favorable idea about arbitration\textsuperscript{432} – El Chamizal,\textsuperscript{433} The Pious Fund of the Californias,\textsuperscript{434} and Clipperton Islands.\textsuperscript{435} The second factor is the reaction from practitioners and judges to new or different ways to solve disputes. When arbitration and other alternative dispute resolution methods are introduced, the reaction has been to look at them with suspicion, mainly because there is not enough knowledge about them. The third factor he suggested is the opposition showed by those legal practitioners for whom arbitration does not suit them because they are used to solving cases using illegal practices or tactical delays before the courts.

It was raised by some of the interviewees that the exception of public policy is used as the exception of choice when it comes to challenging the enforcement of a foreign arbitral award. The premise usually is, if there is no exception that supports a party’s claim, then the public policy exception should work. This is something that, according to Counsellor 2, needs to change and suggested that the Mexican legal culture about arbitration and the use of the public policy exception will evolve as there are more decisions from the judiciary. If there are more and

\begin{footnotes}
\item[432] For combined analysis of these cases see: Antonio Gómez Robledo, \textit{México y el Arbitraje Internacional: El Fondo Piadoso de las Californias, La Isla de la Pasión, El Chamizal} (Mexico and International Arbitration: The Pious Fund of the Californias, The Island of Passion, The Chamizal), 2nd ed, (Mexico: Porrúa, 1994).

\item[433] El Chamizal was an arbitration between Mexico and the United States over the sovereignty of a piece of territory, El Chamizal, located on the border between these two countries in the state of Chihuahua. In 1911, the arbitral tribunal decided in favor of Mexico. The dispute ended until 1963 when both countries ratified a treaty that incorporated the arbitral decision. For El Chamizal see: Ismael Reyes Retana Tello, “México frente al arbitraje internacional: el caso de El Chamizal” (Mexico before international arbitration: the case of El Chamizal) (1994) 43 Revista Mexicana de Política Exterior 98, online: Revista Digital <https://revistadigital.sre.gob.mx/images/stories/numeros/n43/reyesrt.pdf>.

\item[434] This was the first arbitration decided by the Permanent Court of Arbitration in The Hague in 1902. It was a case between Mexico and the United States over the ‘Pious Fund of the Californias’ which was established to sponsor the Catholic Jesuit and Franciscan missions in Baja and Alta California in 1769. After the Treaty of Guadalupe Hidalgo (1848), the archbishop and bishops from US California claimed they were entitled to receive for the benefit of their missions a proportion of the amount that the Mexican government had had to pay regarding the sale of properties that were part of the Pious Fund. Mexico paid the value of the funds as per ordered by the British umpire in an award, but disputed its obligation to pay interests. This last claim was decided by the arbitral tribunal in The Hague, which ordered Mexico to pay the interests accrued and ordered a perpetual annuity. The countries reached a settlement in 1967 terminating any future obligations regarding this fund. Aurora Cortina González, \textit{El Fondo Piadoso de las Californias}, online: Biblioteca Jurídica UNAM <http://biblio.juridicas.unam.mx/libros/2/721/18.pdf>.

\item[435] This was a dispute between Mexico and France over the sovereignty of the Clipperton Island located in the Pacific Ocean. Mexico and France signed a compromise to submit the dispute to binding arbitration by the King Victor Emanuel III of Italy who ruled for France in 1931. Laura Ortiz Valdez, \textit{La pasión en la Isla de Clipperton: Una herencia del Porfiriato} (The passion in the Clipperton Island, an inheritance from the Porfiriato), online: Juridicas UNAM <https://archivos.juridicas.unam.mx/www/bjv/libros/9/4121/24.pdf>.
\end{footnotes}
aligned criteria, this would help to avoid using the exception of public policy virtually in every case, which is what she has observed in practice. One problem, identified by Counsellor 2 related to the public policy exception, is that characteristic of the Mexican legal culture to try to exhaust every possible resource. She is of the view that if the public policy exception is there and it is not clearly delimited or without some fixed criteria, then there is a window that is taken by the lawyer who finds a way to fit –or force– his arguments within it.

Counsellor 1 suggested there is a connection between the concept of public policy with the ‘formalistic’ approach to the law (characteristic of the Mexican legal culture) and to the formal content the law. Therefore, she suggested that public policy serves as a break or control mechanism at the judicial level because the judges are the ones who interpret it. Along with another interviewee, she suggested that the wider the concept of public policy is in a legal culture, there is more intervention from the state. There is a greater need to request the protection of the state through the courts and there is more control over the commercial relationships and of the economic development. In as much as increased importance is given to party autonomy and the courts make the parties hold on to their agreements to arbitrate, this would make them comply with their responsibility in a commercial contract and therefore would support the mechanism they agreed to. Complementarily, Federal Judge 4 explained that in a ‘formalistic’ legal culture like Mexico, institutions like arbitration, which uses less formal and more flexible procedures, causes unrest in local actors. He suggested that a better standpoint would be to have a more restricted approach to public policy, which would eventually reduce resorting to this exception at any given opportunity.

Federal Judge 4 recognized that they are trained to raise or magnify any missing formality. However, he also admitted the courts are now more open to relaxing their procedures and embracing the more flexible forms characteristic of arbitration. He considered there is more openness from the courts to look at arbitral procedures differently, without abandoning what they consider fundamental formalities, but recognizing that arbitral procedures could prove to be more effective.

A sign of evolution in a society, suggested Counsellor 1, can be noticed when more importance is given to the principle of party autonomy, combined with the parties living up to their commercial agreements and the mechanisms for dispute resolution they agreed to. She also suggested that a society is more mature, legally and commercially speaking, when dispute
resolution mechanisms agreed to by the parties are upheld and effectively used. She advanced it would be less appealing to the courts to solve disputes and less resorting to the protection of the judiciary when the parties act upon the alternative dispute resolution mechanisms they agreed to in a contract. Additionally, Arbitrator 1 proposed that the more legal culture there is [sic], there will be more consciousness of what public policy really is as an exception and it should be interpreted restrictively. If the concept of public policy is constructed broadly, it is a sign of a more protectionist legal culture, which depends more on the intervention of the state. Therefore, if public policy is constructed narrowly, there will be fewer possibilities that an arbitral award would affect public policy.

Federal Judge 4 suggested that if the members of the Mexican legal culture do not understand their own legal system and what their fundamental values as a country and society are within an international scope, their legal system will continue using legalistic and formalistic procedures that will not focus on adequate solutions to a conflict. He suggested that if the actors in the Mexican legal culture continue giving more importance to the form, rather than the substance and, when deciding cases, they depart from the Mexican legal culture, the disputes would not be solved on the substance. Disputes would be solved according to the law, but would not necessarily reflect an effective justice. When the judges decide, they need to understand the context of the case and the broader legal culture, therefore, he suggested, the courts need to be less formalistic. He emphasized that to construct a more adequate concept of public policy and an adequate arbitral proceeding in which the judges understand it better and solve accordingly, it is important that the judges understand the national idiosyncrasy and inform their decisions within the new framework of human rights. Judges need to make the procedures work and make them effective for the citizens that approach the courts. There is no benefit, he added, in a perfect decision, drafted in accordance with the law, but completely inoperative for the rights at stake.

Another idea offered by the interviewees, regarding the elements of the legal culture that should be considered to understand the concept of public policy, suggested it is necessary to understand social factors. It is necessary to understand not only the rights established in the constitution and in the international conventions, but also how they are being applied in certain segments of the population and how they are attending to their specific characteristics.

Arbitrator 2 suggested that the local legal culture is determinant for the construction of the meaning of public policy because each group has its own characteristics, its principles of
identity, and its own interpretation of the international instruments according to which they solve their disputes.\textsuperscript{436} He affirmed that a shared legal cultural background influences how a problem is analyzed, as well as how an international convention or agreement is interpreted. He concluded that each party in an international agreement would look at the instrument from its own point of view, and according to its legal system because, in the end, the law is a cultural product.

The local legal actors expressed a level of concern about certain characteristics of their legal culture, however it was also evident the level of hope they acknowledged for certain changes. In their comments, it became evident they perceived that the ‘negative’ characteristics they saw in their legal culture had impacted the perception of arbitration in the community in general, and in the legal community in particular. At the same time, they saw that better informing the legal actors about arbitration can create a more positive environment for the practice of arbitration, which all of them endorse.

Their comments and points of view exemplify legal culture as a complex element but more importantly as an element that needs to be considered when exploring local interpretation of concepts contained in international instruments.

\section*{4.6 Summary}

This chapter has introduced Mexico as an example of local legal arrangements. It is a civil law country with influences from European legal systems and more recently from the United States. Mexico evolved from a closed economy to an open market economy in the late 1980s which was marked by its accession to the GATT/WTO in 1986. It has developed multiple commercial partnerships from which NAFTA stands out. In the 1990s Mexico experienced numerous legal reforms in the process of opening its economy.

Mexico has been recipient of multiple legal aid programs especially from the US. These programs have made significant impact on its legal framework and legal culture. Legal transplants were a tool used to integrate many legal forms from the US; from the model of the corporate law firm, to changes in legal education, and training of judges and practitioners. The

\footnote{436 Interview of Arbitrator 2, 21 May 2012.}
research has shown the problems with these programs and transplants but the idea of adopting US models and practices continues.

Two fundamental features about Mexico’s legal system are the court precedents system (jurisprudencia) and the amparo trial. In the context of arbitration, Mexico adopted the UNCITRAL Model Law in 1993, accessed the New York Convention in 1971 and its latest Arbitral Amendment in 2011 clarified several aspects in favor of an enhanced arbitration legal framework.

The four factors of language, legal tradition, legal context and legal culture were applied to Mexico to understand better the local legal arrangements that pertain to the public policy exception. These factors help to delineate the study of public policy. Regarding language, the study on the differences between ‘public policy’ and ‘orden público’ explained that public order is better suited to analyze the Mexican local context since it refers to the fundamental values and principles of a legal system that fit with what the public policy exception is about. Mexico follows the civil law tradition and the role of the judges is influenced by the ideas of separation of powers and that they should only apply the law and interpret it following the intentions of the legislators. Foundational dogmas and deductivism within the Mexican context, derived from a strict positivism, challenge the examination of principles because judges are reluctant to question them. Matters that are considered of public order fall within these principles, like the example of the legal process as a matter of public order. This needs to be considered for the analysis of the local discourse because some ideas are engrained in the legal system as dogmas and it is difficult to offer or incorporate a perspective that goes against them.

The third factor reviewed to understand local approaches to public policy is the legal context, understood here as the rules of private international law or conflict-of-laws. This factor helps to contain the topic within a specific legal subject matter. Mexico follows a system in which international treaties must be incorporated into national legal framework to be applied. This influences the way in which judges decide cases because they consider that the answers to any case must be found only within Mexican legislation. This has changed in recent times with the Human Rights Reform of 2011 and now international treaties and conventions have taken a more prominent role in the mind of judges. Fundamental to local rules of private international law is their approach to public policy. Mexico considers public order as an exception for the application of foreign law if the result of its application will affect fundamental principles of
public order. This is the basis for the application of the public policy exception but as it will be showed in the next chapter, there are more elements that need to be examined to have a complete picture of how public order is interpreted in Mexico for the purpose of the public policy exception.

Legal culture is a distinctive feature of a legal system and provides some level of explanation for local practices and approaches. The recognition and study of perspectives of local actors supports their understanding and can be used to create solutions that fit the local context. Mexican local actors while they offered strong self-evaluations of their legal culture – being ‘too formalistic’, avoiding obligations and the law –, they also acknowledged the positive changes that had been embraced to provide a context more in tune with international developments. Deductivism and procesalism were identified as important obstacles to overcome. Old experiences and predispositions toward arbitration affected its acceptance in Mexico, but the attitude from practitioners and judges is changing towards more acceptance and support for arbitration. The critiques, recognition, and explanation of local practices as explained by the interviewees reveal the importance of considering legal culture for better understanding the local context.

The introduction of Mexico as an example of local legal arrangements and the use of the four factors to understand more about the local context in which public policy is applied, prompt the detailed exploration of the interpretation and application of the public policy exception in Mexico that follows in Chapter 5.
Chapter 5: The Public Policy Exception in Mexico: The Discourse of Public Order

In the preceding chapters I have argued that the implementation of the public policy exception exemplifies the tension between the expectation of global standards and local legal contexts. The proponents of convergence are suggesting ways to harmonize the interpretation of this exception, however, as it was showed in the examination of its origins, this exception is meant protect the fundamental principles of legal systems. These fundamental principles vary from one legal system to the other, which is further supported in the examination of the relative character of public policy. Thus, I have argued that a pluralistic approach to the public policy exception would better serve the arbitration system as this would allow for each legal system to advance their interpretation of public policy, be it recognized as legitimate, and offer certainty in the implementation of the public policy exception.

To establish the local interpretation of the public policy exception, I have also argued that legal systems would benefit from doing an examination of their legal context from within, rather than trying to import models from other jurisdictions. This involves the analysis of four factors – language, legal tradition, legal context and legal culture– to understand more about the local approach to public policy in general and then the analysis of specific local elements that are involved the interpretation of the concept. To test the tension mentioned above, Chapter 4 introduced Mexico as an example of local legal context and applied to it the four factors. This chapter examines in detail elements of the Mexican legal context that would serve to understand how public policy is approached from the local perspective. Those elements are legislation, scholarship, court precedents, the perspective of local actors, and the COMMISA Case as one significant case that involved the public policy exception. Each element involves several aspects, categories, or topics that relate to public policy in the local context and are all inter-connected. By choosing the legal elements that are relevant for each legal system is the way in which an exploration from within can be done.

The study of language as a factor that influences the concept of public policy in different jurisdictions presented in Chapter 4 showed that public policy in the common law tradition and in English encompasses more than ‘orden público’ in the civil law tradition and in Spanish. Therefore, to study the local context in Mexico it is more appropriate to use public order as the
term that better reflects the part of public policy that is studied in this project; as such, this is the wording used throughout this chapter to present the Mexican perspective.437

This chapter starts with the current Mexican legal framework on public order contained in the main federal legislation. Then it presents the Mexican scholarship on public order, from the classic scholars, to scholars in the field of private international law and arbitration. It moves then to court precedents issued by federal courts for the interpretation of public order. Court precedents make evident how the main point of reference for understanding public order in Mexico derives from the amparo trial. The subsequent section, presents the informative interviews with local actors involved in the practice of arbitration in Mexico. The interviewees give a rounded review of the preceding elements and suggest ways to move forward on improving the local context on this topic. The last section presents the COMMISA Case, which is a case on the public policy exception that has attracted the interest of Mexican and international practitioners and scholars because the award was nullified on public policy grounds by Mexican courts and was recognized on public policy grounds by US-American courts.

5.1 Mexican legal framework on public order

Considering the characteristics of the civil law tradition that were presented in Chapter 4, the point of entry for the study of public order in Mexico is the local legislation. Mexican laws do not have specific provisions that establish the meaning of public order, it is a concept used throughout legislation with an assumed meaning. It is precisely this state of the situation that makes it necessary to look at some of the different ways in which public order is used within Mexican law to understand where the local actors come from when addressing it and to be able to clarify what it means in Mexico for the public policy exception.

In this section are identified four uses of public order within Mexican legislation: a) to characterize a law as being of public order; b) public order as a restriction for the application of foreign law; c) public order as grounds for nullifying an arbitral award or denying its recognition and enforcement; and d) to deny the suspension of an act of authority (contested act) in amparo trials. While these are not the only uses of public order within Mexican laws, they are the most

437 When referring to the exception, this chapter uses ‘public policy exception’ and when talking about the Mexican context it uses ‘public order’.

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relevant for this study since these have an impact on how local actors use and interpret the concept.

5.1.1 A law of public order: Article 1 and basic provisions

One characteristic of Mexican laws is that most of them state in their first article that such law is ‘of public order and social interest.’ This is one of the major ways in which public order appears in Mexican legislation. Because this statement is used all together, it has been hard to make the distinction between public order and social interest. They are separate concepts that work hand in hand but are used interchangeably within Mexican Laws.\(^{438}\) This provision conveys that the norms contained in such law protect the general interest and cannot be modified by the will of the citizens or the authorities; and thus, any act contrary to the law shall be null.\(^{439}\)

Two specific provisions that also exemplify the combined use of public order, public interest, and social interest are articles 6 and 8 of the Federal Civil Code.\(^{440}\) Article 6 provides that “the will of the individuals cannot exempt them from complying with the law or modifying it; individuals can only renounce the private rights that do not directly affect the public interest, provided that the renounce does not affect the right of third parties.” This provision illustrates a fundamental tenet in a civil law country, the distinction between private and public areas of law because it recognizes that parties can renounce to certain rights except when the public interest is affected. This article is part of the legal basis for individuals to access arbitration because the rights of the parties emanate from a contract which establishes their rights and responsibilities.

\(^{438}\) *Infra* section 5.2 further explores the doctrinal approach on public order within Mexican scholarship.
\(^{439}\) J. Fernando Ojesto Martínez Porcayo, “Estudio sobre el orden público, la interpretación normativa y los principios de constitucionalidad, legalidad y definitividad en materia electoral federal” (Study on public order, normative interpretation and the principles of constitutionality, legality and finality in federal electoral matters) (1997) Revista electoral 75, online: <https://tecnologias-educativas.te.gob.mx/RevistaElectoral/content/pdf/a-1997-02-009-072.pdf>. Martínez Porcayo explains how public order is used when incorporated into article 1 of a law.
\(^{440}\) Federal Civil Code (before: Civil Code for the Federal District and Territories on common matters and for all the Republic on federal matters) published in the Federal Official Gazette on May 26th, July 14th, August 3rd and 31st 1928 (entered into force October 1\(^{st}\), 1932).

In the year 2000, after constitutional reforms the regime of the Federal District changed and it was recognized as a more independent federal entity. The Legislative Assembly of the Federal District enacted its own civil code and code of civil procedure and thus the Civil Code from 1928 and the Code of Civil Procedure from 1943 came to be known as the Federal Civil Code and the Federal Code of Civil Procedure. Many references or precedents in this project refer to the codes of the Federal District but should be understood as the Federal Codes, which is the current structure of the Mexican legal framework.

Additionally, the Federal District went through another major reform in 2016. Accordingly, it was granted autonomous status as a federal entity and was officially renamed as Mexico City. For details see *supra* note 342.
Therefore, the renounces that the parties do within a contract must be in accordance with those rights that they are allowed to renounce, otherwise the contract provision is considered as not valid or not stated.

Article 8 provides, acts that are executed contrary to prohibitory laws or laws of public interest are null, except in cases when the law provides to the contrary. When this provision refers to \textit{laws of public interest}, it does so in connection with those laws that contain the provision in Article 1, mentioned above, that such law is a ‘law of public order and social interest.’

Finally, Article 1830 of the Federal Civil Code establishes that it is illegal the fact that is contrary to a \textit{law of public order} or good customs. Again, public order is used to give a specific character to some laws within the Mexican legal system, which entails a particular level of importance. Within the civil law tradition, the distinction between private and public matters serves as a guidance to determine rights that are renounceable, as well as laws whose compliance is not elective for individuals because they serve a higher social order.

By assigning a law or to certain provisions the character of ‘public order’ is the way in which Mexican legislators give higher importance to a body of law. For example, the Federal Civil Code establishes that the provisions related to family are \textit{of public order and social interest}. Once this character was given in the Federal Civil Code in 2000, the courts acknowledged that a superior status was given to such provisions. One effect of this is that family matters are considered non arbitrable for being a matter of public order. Section 5.3.1 Matters that are of public order (C1) ahead will further exemplify how the courts, by establishing that a law or provision is ‘of public order’, assign to it a superior status within the Mexican legal system.

\section*{5.1.2 Restrictions for the application of foreign law.}

The use of public order as a limit for the application of foreign law is applicable in the context of the Mexican conflict-of-laws rules established in articles 12 to 15 of the Federal Civil Code.\footnote{The Federal Civil Code, Article 12 provides that Mexican laws apply to all the persons that are in the Republic, to all the acts that happen within its jurisdiction or to those acts that submit to its laws; except when the laws provide for the application of foreign laws and according to the treaties and conventions that Mexico has subscribed.} Article 15 provides the two cases when foreign law will not be applicable within
Mexican jurisdiction. The first one is when a party cunningly avoids fundamental principles of Mexican law; and section II provides that foreign law will not be applied in Mexico when its provisions or the result of their application would be contrary to fundamental principles or institutions of the Mexican public order. This article is the main protection of Mexico’s fundamental principles and institutions, which are broadly contained in the term ‘public order.’

5.1.3 Grounds for nullifying an arbitral award or denying its recognition and enforcement

Mexico acceded to the New York Convention in 1971 and adopted and incorporated the UNCITRAL Model Law of Commercial Arbitration in its Commercial Code in 1993. Pursuant to these two international instruments, in the Commercial Code public order has two principal functions. The first one as a ground to nullify an arbitral award, contained in Article 1457, section II of the Commercial Code. The second, as a ground to deny the recognition and enforcement of an arbitral award pursuant to Article 1462 section II of the same regulation. These are the ways in which Mexican legislation incorporates the “public policy exception.”

5.1.4 Deny the suspension of a contested act in amparo trials

The amparo is a fundamental Mexican constitutional remedy that protects the human rights and the guarantees of citizens when they are violated by general norms, acts, or omissions of an authority according to what is established in the Amparo Law.442 When an amparo is requested, the court can order the suspension of the contested act as a precautionary measure while the court decides if the amparo is granted or not.444 One of the fundamental requirements

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442 Amparo Law, Article 1. For details about amparo see supra section 4.1 Court precedents system and amparo.
In 2013, after the human rights constitutional amendment from 2011, there were major amendments to the Amparo Law. While the name remained the same, the internal organization of the law changed, and thus, many authors refer to the ‘new’ Amparo Law. In following sections and citations when there is a reference to the Amparo Law, the number of article from the ‘old’ and ‘new’ Amparo Law are specified if necessary.

443 The contested act is the act of authority against which the protection of the amparo is requested.

444 The purpose of a suspension in an amparo trial is to prevent the contested act to take its full effects. It keeps the situation in its current state until the court decides on the amparo. The ‘provisional suspension’ preserves the act until the court decides if it grants or not the definitive suspension. The ‘definitive suspension’ preserves the contested act until the court renders its final decision on the amparo. In the final decision of an amparo trial, if the amparo is granted, the contested act is destroyed and things must go back to their original status. If the amparo is not granted, then the contested act would take its full effects.
to grant the suspension of the contested act is that it should not damage social interest nor infringe laws of public order. If the suspension has any of these two effects, the contested act cannot be suspended during the amparo trial and will continue its effects until the final decision is made. In this context, ‘social interest and public order’ are considered again as one encompassing concept. In this situation, public order is used as a specific characteristic of a law that gives it a higher status, as it was explained in the first use of public order mentioned above in section 5.1.1. However, the courts and scholars have constantly emphasized that if a law states in its article 1 that it is a law of public order, this does not imply that the suspension should be automatically denied. The court must make a further analysis to decide about the suspension of the contested act.

Article 129 of the Amparo Law is the only provision in a law that provides a more specific guidance on public order. It establishes concrete situations when it is considered that social interest would be affected or that laws of public order would be contravened if the suspension of the contested act is granted. There is no distinction in the law between which situations damage social interest and which infringe laws of public order, they are both considered part of one concept. Due to the significance of this article for the precedents that will be analyzed ahead in section 5.3, it is important to present here a summarized version of the situations that this article considers.

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445 Amparo Law, Article 128 - Except for the cases where the court shall decide by its own motion, the suspension shall be granted, in all substantive matters except for those specified in the last paragraph of this article, provided that:

I. It is requested by the complainant (quejoso), and
II. It does not affect the social interest, nor violates norms of public order.

The suspension must be filed as a separate incident and in duplicate form. The general norms, acts, or omissions of the Federal Institute of Telecommunications and the Federal Economic Competition Commission cannot be suspended. Except in the cases where the Federal Economic Commission imposes penalties or the disincorporation of assets, rights, social parts or shares, these shall be executed until the amparo is decided.

Article 128 is from the ‘new’ Amparo Law. In the ‘old’ Amparo Law the requirements to grant the suspension of the contested act of authority were in Article 124. In the ‘old’ Amparo Law, Article 124, section II, second paragraph provided the situations when social interest should be considered affected or laws of public order contravened. In the ‘new’ Amparo Law the list of cases was expanded and made more explicit in Article 129.

446 In the analysis of court precedents in infra section 5.3 Mexican court precedents some courts address these concepts and offer a distinction.

448 Most, if not all, of the precedents that will be analyzed in sections ahead, allude to Article 124, section II, second paragraph when referring to the situations when public interest and public order would be affected if the suspension was granted because they were issued within the framework of the ‘old’ Amparo Law. All references to Article 124, section II, second paragraph should be considered now made to Article 129. Hence:
Article 129: it is considered that the social interest is affected or laws of public order are contravened if granting the suspension allows for the:

I. Functioning of vice or pimping centers, or gaming centers,
II. Production or dealing of drugs,
III. Consummation or continuation of a crime or its effects,
IV. Increase in the price of basic goods,
V. Impede the execution of measures to combat severe epidemics or the invasion of exotic diseases,
VI. Impede the execution of campaigns against alcoholism and drugs addiction,
VII. Non-compliance of military orders directed to military personnel issued for the protection of the country,
VIII. Affect the interests of minors or disabled or that can cause emotional or psychic disorder,
IX. Prevent the payment of alimony,
X. Entrance of prohibited merchandise to the country or fail to comply with foreign trade related norms, Mexican official norms, or affect national production,
XI. Impede or suspend procedures involving the intervention, revocation, liquidation or bankruptcy of financial institutions and any acts that aim at safeguarding the payments system or its stability,
XII. Impede forfeiture procedures, except when the complainant in the amparo is a third party outside the procedure,
XIII. Impede or preclude the State from the use, development, and exploitation of direct ownership goods under Article 27 of the Constitution (natural resources, minerals, metals, precious stones, salt, oil, hydrocarbons, gas, sea water, and other water formations within the territory).

The court deciding on the amparo might grant the suspension, even if it goes against these provisions, when the dismissal of the suspension could cause further damage to the social interest.

For courts and scholars, this article is the one that gives actual content to public order within the Mexican legal system. However, it is not considered an exhaustive list and for the same reason it has been the object of multiple courts criteria which have tried to clarify how to interpret public order, in addition to the scholarly discussions that have accompanied it.

The use of different synonyms for public order within Mexican legislation is one of the challenges for understanding this institution in the arbitration context and for the purposes of the public policy exception. Some of the synonyms used in Mexican scholarship and legislation for public order are: public interest, social interest, general interest, interest of the Nation, public

Old Amparo Law Article 124 section I & II (requirements to grant the suspension) = New Amparo Law Article 128.
Old Amparo Law Article 124, section II, second paragraph (situations) = New Amparo Law Article 129.
utility, national utility, social utility, and social benefit. Despite recognizing that these cannot be considered synonyms in the strict sense of the words, they are used as such. In terms of language, the use of these synonyms extends the challenge of interpretation for local courts.

The four uses explained here are all together in the minds of local legal actors, specially judges when deciding cases. Mexican scholarship and court precedents have taken the task of making distinctions that can help to differentiate how public order should be used for different situations and, thus, are examined in the following sections.

5.2 Mexican scholarship on public order

The study and analysis of legal institutions in Mexican scholarship generally starts with specifying its origins in Roman Law, which is a common ground for civil law countries. The fundamental dichotomy in Roman Law is the distinction between public and private law (ius publicum and ius privatum), where public law refers to the norms that organize the populous within the Roman state and private law regulates relationships among individuals. However, scholars emphasize that it should always be considered that the norms established for the public interest also serve the individuals and that within a law, there can be no norms that are of interest for the individuals that are not useful for the collectivity at the same time. Even though Roman law made this public/private distinction, it also established that private agreements cannot overturn any laws promulgated by the state organs, they cannot repeal public law.

The ideals of Roman Law were captured in the Napoleonic Code of 1804, which included several norms establishing public order as a limit to private interests. Güitrón Fuentevilla explained that these norms were the basis for the classic theory of public order endorsed by Jean-Etienne Marie Portalis in the drafting of the Napoleonic Code. It enclosed the Roman principle that private agreements cannot revoke the laws of public order and good customs. This principle was later transferred to the Mexican Civil Code when Mexico adopted the Napoleonic Code. The


450 Ibid. Jean-Etienne Marie Portalis was Napoleon’s closest advisor for the drafting of the Code. See Jean-Luc Chartier, History Chronicles. Jean-Etienne Portalis (1746-1807), Author of the Civil Code, online: <http://www.napoleonsociety.com/english/Portalis.htm>.
Overall idea of the classic theory is to establish the superiority of the collective good over the private good.\textsuperscript{451}

Within the philosophical scholarly discussion on public order in Mexico, Andrés Serra Rojas explained that public order is the “indispensable order for coexistence, for maintaining social peace, and for the free and safe development of human groups.”\textsuperscript{452} Similarly, Miguel Acosta Romero affirmed that “public order is a mission possessed by the authority (an element of the State) to maintain tranquility and peace, striving for the public interest of the society. Said mission is accomplished through the government of men and the administration of things. The government is the one who makes it concrete and institutionalizes it in the law.”\textsuperscript{453} In the \textit{Omeba} Legal Encyclopedia, public order is, “in a general sense, the state of pacific coexistence among the members of a community. This idea is associated with the notion of public peace, which is a specific objective of the government and policing measures. In a technical sense, it is the set of legal institutions that identify or distinguish the law of a community; principles, norms, and institutions that cannot be altered by the will of the individuals nor by the application of foreign law.”\textsuperscript{454}

These accounts represent the traditional approach to studying public order in Mexico and it is the perspective according to which legal education is done in Mexican law schools. One can notice the emphasis on determining the divide between public and private law, on the role of the state to maintain the public order, and the role of public order as a limit to the will of the individuals. Public order is explained as the distinctive and important features and institutions of a society. These perspectives also inform the ways in which public order is analyzed and used by Mexican courts. One of the most significant uses is for purposes of an amparo trial because it is an important element for deciding on the suspension of the contested act, which is the central piece of this trial.


\textsuperscript{453} Miguel Acosta Romero, \textit{Segundo Curso de Derecho Administrativo} (Second Course on Administrative Law) (Mexico: Porrúa, 1989) at 894. Translation by the author.

\textsuperscript{454} \textit{Omeba Legal Encyclopedia, sub verbo} “orden público”. Translation by the author.
Even though these nationally oriented perspectives are the ones that inform the interpretation of public order in all legal matters, there is a group of scholars (most of them practitioners as well) that have brought international approaches to public order into the Mexican context. They are local actors that had connected with other scholars at international forums or their international practice had exposed them to these international perspectives. They are strongly influencing the way in which public order is being interpreted for arbitration cases by constantly bringing attention to comparative perspectives.

5.2.1 Local scholars with an international perspective

The challenges that the public policy exception poses have not gone unnoticed to Mexican scholars and practitioners. They have emphasized the lack of studies about public order within Mexican scholarship, as well as the lack of interpretive criteria from the Supreme Court of Justice on the matter for arbitration purposes. José Luis Siqueiros suggests that the ILA Resolution is a useful guide and if national courts would follow it, this would enhance consistency and predictability in the interpretation and application of such a complex concept. He supports the idea of a restricted approach to public order and suggests it should be understood as the fundamental principles of justice and morals, and the essential political, social, and economic interests of the enforcing state. Siqueiros recognizes that Mexican procedural legislation is at the forefront on matters of recognition and enforcement of foreign arbitral awards. However, and even though the non-binding court precedents from the courts had incorporated an approach that is more liberal and aligned to international cooperation, it was perplexing for him there was not enough binding court precedents that could serve as mandatory interpretive criteria on how to apply public order in this context. At that time, in 2002, Siqueiros argued that so far there had not been a case which applied public order on a substantive matter, the cases had been related mainly with procedural matters. He disagrees with the practice from Collegiate Circuit Courts of considering procedural violations as matters of public order or

455 José Luis Siqueiros, “El Orden Público como Motivo para Denegar el Reconocimiento y la Ejecución de Laudos Arbitrales Internacionales” (Public policy as grounds of refusal for the recognition and enforcement of international arbitral awards) presented at the “Seminario Nacional de Derecho Internacional Privado y Comparado Prof. Friedrich K. Juenger” in Tijuana, Baja California, Mexico, November 2002.
456 For details about the ILA Resolution, see supra section 3.6 Recommendations from the ILA to promote a uniform interpretation.
457 Siqueiros, supra note 455, at 11.
equivalent to it. In his opinion, this is not how public order should be understood but rather according to the recommendation from the ILA. 458

Arbitration is a growing field in Mexico and it is still considered not widely known and used. Local scholars and practitioners strongly advocate to promote it within the legal and business communities. The number of scholarly publications within the field continue to increase and are becoming more specialized, one which deserves specific mention is the ‘Diccionario Enciclopédico de Arbitraje Comercial’ (Encyclopedic Dictionary of Commercial Arbitration). The editor, Cecilia Flores Rueda,459 brought together diverse voices from the local arbitration field with the objective of unifying approaches on the use of the legal language within this field.

Regarding the public policy exception, the entry in this collection incorporates the most recent developments on this topic and aligns with the ILA Resolution from 2002.460 The public policy exception is acknowledged as a recognition to the right of the states and their courts to exercise control over the ‘last instance’ of the arbitral process. It also recognizes the conflicting interests between the right of states to preclude the enforcement of awards that are contrary to their national laws and values, and the interest in supporting the enforcement of foreign arbitral awards for the efficiency of arbitration, while limiting the denial of recognition and enforcement to exceptional circumstances. It endorses the use of a restricted approach to public order and suggests that this limited approach is to be called ‘international public order.’ Pursuant to the ILA Resolution, it explains that international public order is composed of the fundamental principles of morals and justice of a state, its rules of public order or *lois de police*, and the international obligations contracted by the state.461 One problem with this text is that it assumes the general acceptance of the concept of ‘international public order’ when there is no consensus about it at the international level, despite the strength of the proposition. It gives to public order

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459 She is an arbitrator practitioner and former Secretary General for the Arbitration and Mediation Centre of the National Chamber of Commerce (CANACO). CANACO is one of the leading local institutions that provides arbitration services in Mexico. See: *Centro de Mediación y Arbitraje CANACO* (CANACO Mediation and Arbitration Centre) online: <http://www.arbitrajecanaco.com.mx/home/Arbitraje/New/index.php>
461 For the recommendations from the ILA Resolution see *supra* section 3.6 Recommendations from the ILA Resolution to promote a uniform interpretation.
an international approach when it is a concept that, by definition and pursuant to the spirit of the New York Convention, is and should be nationally construed.

The Encyclopedic Dictionary exemplifies the awareness of international trends within the local interpretive community and an effort for their incorporation in the national context. These reflections are more common on the side of practitioners and scholars who are trying to bring these perspectives to the local judges. However, while publications like this bring awareness and attention to international perspectives and is evident the effort to advance their incorporation, they do not consider the actual state of affairs of this concept within Mexican law and the judicial interpretive criteria (court precedents). Even if scholars endorse the idea of an international public order, if the law and the courts do not recognize such a distinction, these approaches generate more confusion rather than facilitating a uniform national approach.

Francisco González de Cossío, an arbitration practitioner and scholar, is one of the few local actors who have done a more detailed analysis on the concept of public order for the public policy exception. He has considered rulings from national and international courts as well as national and international scholarship. González de Cossío acknowledges the difficulty of the term at the international level and that Mexico has not been the exception to this challenge since practitioners have shown great creativity in trying to make cases fit into the public policy exception.

González de Cossío recognizes two major tendencies in the world, the maximalist and the minimalist approaches to the public policy exception. In the first one, there is an ample conception of international public order which encompasses all the *lois de police*, a profound control of the awards, and the review of the substance of the award. According to the minimalist approach, the control over the award from local courts should be minimal and the award should be recognized and enforced except in very extraordinary cases. The most progressive jurisdictions align with the minimalist approach. While he recognizes the Mexican legislation is in tune with the international trends, he also affirms that a more definitive approach from the Mexican judiciary is necessary.

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463 González de Cossío, Pointillism, supra note 265.
He was interested in some of the first cases in which Mexican courts had specifically addressed the concept of public order for the purposes of the exception, which happened in 2008. According to these decisions, he summarizes, the courts had framed public order by establishing its function and by establishing a high threshold; they distinguished public order from public law, they distinguished public order from imperative laws, and, at the same time, were ambivalent because those criteria could invite confusion between public order and imperative laws. González de Cossío suggests that Mexico seems to be adopting the minimalist approach, but it is not completely clear, yet. He endorses the idea that the notion of public order needs to be narrower and more elevated. Narrower in the sense of restricting its definition and range of action, and elevated in the sense that its exceptional character should be emphasized. For González de Cossío, public order is an institution that strives to protect the most important principles of a legal order; it should be considered a last resource that is rarely used. The main reason he suggested for endorsing a minimalist approach was that the way in which public order is applied could de-stabilize the foundations of arbitration, which is the most accepted mechanism to solve international, commercial, complex cases.

González de Cossío holds one of the most progressive local views on the approach to public order. He rightly explains certain distinctions fundamental for clarifying the way in which public order needs to be interpreted within Mexico. First, emphasize that imperative norms are not all part of public order because that is only a general statement to indicate they have to be complied with (exposed above in section 5.1.1, the basic provision). The guiding premise is that, while all norms of public order are imperative, not all imperative norms can be considered of public order. Second, public order needs to be composed of the most important institutions of Mexican law, without considering foreign law because it should be based on Mexican most important values and principles. Finally, the review of the award should be kept to the

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464 Referred to in *ibid* at footnotes 4 and 6.
465 In the Mexican legal context, ‘imperative laws’ refer to laws that must be complied with by individuals even against their will, but do not have the higher status of a law of public order in the strict sense of the term. The laws of public order in the strict sense of the term would be equivalent to ‘mandatory laws’ as explained by Mayer in supra section 3.5.2 The content of public policy. ‘Imperative laws’ is commonly used in the Mexican legal context and is used in this dissertation to reflect as accurately as possible the challenges that present the local context for using diverse terms.
466 With this distinction, González de Cossío separates himself from the views that support the idea of an international or transnational public order.
minimum, the violation should ‘burn the judge’s eyes’ to be able to qualify as a violation of Mexican public order.467

The COMMISA Case468 was a recent case in Mexico that attracted renewed attention to the local approach to public order. In this case, an arbitral award was nullified on public order grounds in Mexico due to an interpretation from the courts of what were arbitrable matters pursuant to the Mexican legislation on public works. Herfried Wöss, another Mexico-Austrian practitioner and scholar, made a detailed analysis of the court’s approach to public order in this case, and is another relevant example of the local scholarship regarding the public policy exception. Wöss469 explains that in the last few years there have been multiple efforts to define public order by the courts and scholars, which had been mostly aligned with international practice. However, he believes the legal definition of public order in Mexican legislation has been ignored. He affirms the definition is specified in Article 15 of the Federal Civil Code470 according to which public order are the fundamental principles and institutions of Mexican law. He argues that public order is not created or defined according to an abstract definition but it derives from the fundamental principles in the Mexican Constitution and are specifically protected in particular laws by subject matter.471 Thus, he concludes, what is not related to a fundamental principle or institution of law, is not public order.

Wöss’ opinion adds to the emphasis made by most Mexican scholars and practitioners specialized in arbitration on making the distinction between public order and imperative laws. When a law says, it is a law of public order in its article 1, it should be understood it is an imperative law or lois the police, but it is not of public order in the strict sense. The COMMISA Case reinforced that this distinction is still an issue in the interpretation of public order for the purposes of the public policy exception in Mexico. Wöss warns that the results of this case posed questions on the arbitral system in Mexico; the annulment of the award in this case could affect

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468 See infra section 5.5 COMMISA Case.
470 See supra section 5.1.2. Restrictions for the application of foreign law.
471 Wöss, supra note 469 at 4.
the country’s legal risk and thus affect the attraction of foreign investment. He argues that even if every country had the freedom to decide on the arbitrability of public contracts, what was inadmissible was the lack of predictability regarding the arbitrability of a contractual act from a state enterprise (when it is acting as commercial entity) because such uncertainty goes against the principles of legality and predictability within Mexican law and the transparency standards expected in international economic law. The bottom line for Wöss, regarding the COMMISA Case, is that a state enterprise should not be considered authority when it is acting as a commercial party in a contract, which was the basis for deciding the award violated Mexican public order.

5.3 Mexican court precedents

*Jurisprudencia* or binding court precedents (BCP) is one of the fundamental sources of law in Mexico which provides formal and mandatory interpretive criteria of the law.\(^{472}\) The Mexican Supreme Court of Justice defines it as:

> “a source of law that derives from the constitutional and legal interpretations issued by the courts when deciding the cases put before them, which are mandatory and have the purpose of defining the right meaning and scope of the legal norms and to adjust its content to the dynamic of social life, with the objective of providing legal security in the public and private spheres.”\(^{473}\)

The introduction of digital systems has facilitated its classification and access. Its use has increased exponentially and has gained more relevance for supporting the arguments and decision from parties and judges.

To better understand the results and analysis that follows, it is important to consider that ‘binding court precedents’ are mandatory interpretive criteria and ‘non-binding court precedents’ (NBCP) (*tesis aislada*) are interpretive criteria that have not reached mandatory status, but they are also used as guiding or supporting criteria by lawyers and judges. The documents are referred to as ‘precedents’ throughout this study, they all fit into either BCP or NBCP, which will be specified as needed.

\(^{472}\) For details on how it is created and by which courts, refer to *supra* section 4.1 Court precedents system and amparo.

\(^{473}\) Ruben Francisco Pérez Sánchez, “Análisis de los criterios jurisprudenciales sobre justicia para menores” (Analysis of criteria in binding court precedents on justice for minors), online: Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM <www.juridicas.unam.mx>.

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This section contains a detailed account on the ways in which the highest courts in the country—the Supreme Court of Justice, Collegiate Circuit Courts, and Plenary of Circuit Courts—have interpreted and approached the concept of public order in BCPs and NBCPs. The review of the precedents is a way to look closely at the local perspective. Federal courts are one of the fundamental interpretive communities in this study since they interpret and apply the international standards that Mexico incorporates into its legal system. The classification and analysis of the precedents made more evident the different connotations of the local use of public order. It allowed to understand these connotations, the contexts in which public order is used, and to identify the precedents that are related to the use of public order for the public policy exception of the NYC.

The analysis for this study includes 189 precedents. Their distribution shows that NBCPs (81%) are significantly more than BCPs (19%). Even though NBCPs are not mandatory criteria, the courts and practitioners heavily rely on them for substantiating their arguments. In practice, not much distinction is made in an argument if it is a NBCP or a BCP. Courts and practitioners pay closer attention to this ‘mandatory’ differentiating factor when the precedent becomes the defining point to decide a case.

In the BCP group (36 precedents), 55% of them have been issued by the Plenary of the Supreme Court or one of its Chambers,\(^474\) the other 45% have been issued by Collegiate Circuit Courts. In the group of NBCPs (153 theses), the Supreme Court issued 14% while the Collegiate Circuit Courts issued 86%. From these distributions, it is noticeable that the Supreme Court issues more BCP and the Collegiate Circuit Courts issue more NBCPs. This is related to the fact that at Collegiate Circuit Courts, it is necessary to accumulate five consecutive NBCPs before they can create a BCP by reiteration. The BCPs from Circuit Courts only apply within the circuit, in contrast to the national reach of the precedents from the Supreme Court. The Supreme Court is frequently requested to settle differences between BCPs with divergent criteria and to define a federal interpretive criterion. Another reason for this distribution is the fact that the amendments to the Constitution and federal laws had been oriented to narrow down the number of cases that the Supreme Court decides, for efficiency purposes. The precedents that come out from the

\(^{474}\) There was a change in the structure of the Mexican Supreme Court in 1994 by which the number of chambers was reduced from 4 to 2. Because the study involves precedents that go back to 1969, some precedents refer to the 3rd or 4th Chambers.
Supreme Court are expected to be final interpretive criteria that are mandatory for all the courts in the judiciary.

The distribution of precedents among the Collegiate Circuit Courts is indicative of the central role of the First Circuit, the Federal District (now Mexico City), the nation’s capital. From the total of precedents from Collegiate Circuit Courts (148), 47.3% (70) are from the First Circuit. The next circuit to have more precedents, Puebla, has only 14, a 9.4%, and the rest of the precedents are distributed among the rest of the circuits. Although Mexico is a Federal Republic and in recent times major cities like Monterrey and Guadalajara have grown to be important economic hubs, the economic, political, and judicial activities continue to be concentrated in the capital city.

To better understand how the courts analyze and interpret public order in their precedents, it is necessary to bear in mind that this concept is more frequently addressed in the context of amparo trials. As it was explained in section 5.1.4 above, the amparo is requested as a protection against a general law, an act, or an omission from an authority that is presumably violating the guarantees and human rights of the complainant. As a precautionary measure, the complainant can request the suspension of the contested act until the court makes its final decision to grant or not the amparo.475

In the precedents reviewed, 42.85% (81) are related to the suspension of the contested act in an amparo trial. One of the main reasons for being so significant is that, through BCPs, federal courts offer lower courts interpretive criteria for Article 128 Section II of the Amparo Law476 so that lower courts can decide if the suspension of the contested act should be granted or not.

Over all, the courts have issued interpretive criteria through BCPs and NBCPs regarding situations such as, when an act should be considered in violation of public order; if an act is violating a norm of public order; or if the issue at hand is contained in a norm of public order, all within the context of amparo. In addition, the courts have also issued interpretive criteria for explaining what is public order in a general sense, how it should be understood in the context of arbitration, in which cases it should be pondered, and whether an issue should be considered a matter of public order.

475 See supra note 444 for details on the type and effects of suspension within an amparo trial.
476 This requires that the suspension of the contested act should not affect the social interest or violate norms of public order.
The precedents were grouped into categories as shown in Table 5-1. The creation of these categories contributes to organize a rather disperse collection of precedents. These categories evidence the different ways in which public order has been addressed in precedents issued from the 7\textsuperscript{th} to the 10\textsuperscript{th} Epochs,\textsuperscript{477} which covers a period of over thirty years. The categories also present a diversity of elements that are involved and need to be considered to understand the interpretation of public order by Mexican courts. This way of examining all the court precedents that have been issued on the topic of public order has not been done to this level of detail. For this study, this was a way to better reflect what is happening at the local context. Each category is explained in the following subsections with an analysis of what does each reflect about the local approach to public order.\textsuperscript{478} At the end are summarized the important elements that they provide to understand public order in Mexico.

\textbf{Table 5-1 Categories of court precedents}

<table>
<thead>
<tr>
<th>Category number</th>
<th>Category title</th>
<th>Explanation</th>
<th>Number of theses</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>X is a matter of public order</td>
<td>The courts decide that an issue is considered a matter of public order in Mexico, which implies assigning it a highest importance and thus, justifies a more careful protection.</td>
<td>82</td>
</tr>
<tr>
<td>2</td>
<td>X does not affect public order, nor social interest.</td>
<td>The courts affirm that a certain act or decision does not affect public order nor the social interest.</td>
<td>23</td>
</tr>
<tr>
<td>3</td>
<td>If X, it would affect social interest and contravene norms of public order.</td>
<td>The courts explain the suspension of the act cannot be granted because it affects the social interest and/or contravenes norms of public order; thus, it does meet the requirements of Article 128 section II (before Art. 124 section II) of Amparo Law.</td>
<td>28</td>
</tr>
<tr>
<td>4</td>
<td>X would violate norms of public order or it is contained in a law of public order.</td>
<td>When the courts argue that the suspension of a contested act or an act would violate norms of public order, or an issue is contained in a law of public order.</td>
<td>7</td>
</tr>
</tbody>
</table>

\textsuperscript{477} See \textit{supra} section 1.3.1 Mexican court precedents for the reasons to choose these Epochs. The Mexican precedents system is currently in its 10\textsuperscript{th} Epoch.

\textsuperscript{478} In the following sub-sections, the (C#) at the end of the sub-title refers to the category addressed in that sub-section, which can be correlated to Table 5-1 for further reference.
5.3.1 Matters that are of public order (C1)

When the courts decide that a matter is of public order, it has the purpose of affirming that a specific institution, procedure, or act is considered part of Mexico’s fundamental principles and institutions and thus it ought to be protected and prioritized. The courts declare this by interpreting the law and are informed by constitutional principles. When a matter is declared as of public order, it makes it mandatory for judges to review *ex officio* if the conditions established by Mexican law for such matter are being met, regardless if it was raised or not by one of the parties in a trial.

This category is particularly useful to see which matters are of utmost importance within the Mexican legal system. The most significant matters declared as of public order in the precedents are:

- Family matters like alimony, visitation rights, or conciliation hearing.
- Procedural matters like, courts’ competency and jurisdiction, service of process, compliance with a court judgement, preclusion, expiration (*caducidad*), statutory period of limitations (*prescripción*), legitimacy and personality, causes for dismissal, and all procedural norms.
- Notary services.
• Within amparo trials, matters like the execution of the amparo judgement, the suspension of the contested act, and the analysis of the non-existence of an authority in an amparo trial.

• Laws regarding the exploitation of oil deposits.\footnote{479}

• Norms regarding the creation and protection of the ‘ejido’ (a system of cooperative land tenure) and the protection of small agricultural and livestock farm property.\footnote{480}

• Labor related matters such as the Federal Labor Law and all the rights it protects that cannot be renounced, or the administrative procedure to determine the labor-management contributions.\footnote{481}

• Consumer Protection Law.

When the courts establish that a matter or institution is of public order in a precedent, they generally explain the reasons for it in terms of what is the ‘interest of society’ in protecting these institutions. For example, in one precedent the court explained that the execution of the amparo judgement was a matter of public order because it was in the interest of society that acts of authority adjust to constitutional norms and that individual guarantees are fully respected pursuant to the principle of constitutional supremacy established in Article 133 of the Mexican Constitution, and therefore, to the principles of legal certainty contained in Articles 14 and 16 of the Constitution.\footnote{482} In Category 3, there are more examples that will be presented on how the courts explain which is the interest of society at stake that justify the designation of a matter as of public order.

\footnote{479}{It is important to note that Mexico’s Constitution, in its Article 27, establishes that oil and hydrocarbons in all its forms are property of the Nation.}

\footnote{480}{The ‘ejido’ was a communal type of property created after the Mexican Revolution in 1910, in which people fought for a better distribution of land and the end of large-size property that was inherited from colonial times.}

\footnote{481}{The labor-management contributions are the social security contributions made by the employer, employee, and other entities bound by the Law of the Mexican Institute for Social Security (IMSS). These contributions cover the five basic insurances offered by the Institute. Cervantes, Cuotas Obrero Patronales, ¿qué son y cómo se calculan? (Labor-management contributions, what are they and how are they calculated?) (July 22, 2014), online: Contador Contado (blog) <https://contadorcontado.com/2014/07/22/cuotas-obrero-patronales-que-son-y-como-se-calan/>.}


When a precedent is cited, the ‘Registered Number’ (Reg. Num.) refers to the number assigned to it in the Mexican Judiciary database and would lead the reader to find the precedent. The ‘Database no.’ is the number assigned in the database created for this project, which is used for internal references. ‘Thesis’ (tesis) is the word used by the Judiciary database to refer to each precedent; [TA] refers that it is a non-binding precedent (tesis aislada) (NBCP) and [J] means it is a binding court precedent (jurisprudencia) (BCP).
Procedural norms stand out as some of the institutions that are of utmost importance for the Mexican legal system. It is constantly affirmed that one of the fundamental principles for the system is that due process and all the norms of the legal procedure are a matter of public order. This idea is so engrained in the legal training of the judiciary that, while it sets a specific priority to these norms, sometimes it has also been an obstacle when an interpretation stirs from it, even in a plausible way. Some members of the Judiciary, with a more progressive view, are issuing precedents that, while they continue to affirm the character of public order of the legal procedure, at the same time are setting interpretive criteria clarifying there is some space for the parties to make agreements that touch upon procedural norms, as long as they are related to individual and not the collective interests.

There are a couple of precedents that exemplify this more progressive approach. They established that, as a general rule, procedural norms cannot be altered, modified, or renounced by an agreement between private parties. However, the courts also explain that procedural norms are not always absolute or imperative. The law allows the parties, in specific circumstances and without violating the legal nature of the proceeding or affect public order, to renounce, modify, and make agreements, but only for those rights that are of private interest. An example of which is to submit a dispute to arbitration. The courts emphasize that even if procedural norms are of public order, this does not mean that all norms are non-renounceable or that the parties cannot influence the procedure to some extent. The courts concluded that, according to its nature, procedural law is a public function because it is at the service of private law to give effectiveness to its institutions. These precedents show a pro-arbitration perspective and they are part of a series of decisions issued by the 3rd Collegiate Court of the First Circuit focused on creating more progressive interpretive criteria to support arbitration in the Mexican legal system.

As it was addressed in section 5.2.1 above, arbitration scholars make a lot of emphasis on the importance of the distinction between imperative laws and laws of public order in the Mexican context. The Supreme Court addressed this matter in a BCP, by which it reaffirmed that

483 On the dogmatic perspectives as challenges within Mexican legal culture, see supra section 4.5.2 Legal tradition and section 4.5.4.1 Self-reflection on Mexican legal culture.
the norms on the exploitation of oil deposits and land use are of public order.\textsuperscript{485} However, it made the distinction that they have public order status because they have the objective of protecting urban safety and environmental quality, and the suspension of the effects of those laws cannot be grounded only in the argument of them being laws of public order. The Supreme Court further explained that it is not enough to request the suspension of the act of authority (in an amparo trial) on the argument that such law responds to the general interest of the society and it is of public order because all the laws have these characteristics, to a lesser or greater extent. As such, the Supreme Court established that it is necessary to analyze, among other factors, the degree to which the suspension truly affects society and public order. This type of criteria supports the view of scholars regarding the importance of distinguishing public matters from public order matters, in the strict sense, because the latter are the ones who should inform the judges when there is a challenge to the recognition and enforcement of an arbitral award on public order grounds.

In these precedents, it can be appraised that when the courts determine that a matter is of public order, they are granting it a higher status, which should grant the maximum protection and consideration by the courts. Often, the determination of being of public order comes with an assumed argument for it, the courts simply state it without further explanation as to how they reached that conclusion and this has been the origin of many confusions. Nevertheless, there are certain precedents that give guidance on how the courts approach the most important principles of the system. An example is a BCP\textsuperscript{486} which affirms that service of process is a matter of public order as the lack of it or to make it contrary to what the law establishes is the maximum procedural violation and of the most serious character, for it is the act that gives origin to the rest of the procedural formalities. The analysis of the court in this case provides guidance on what should be considered for determining if a matter is of public order.

5.3.2 \textbf{Situations that do not affect public order, nor social interest (C2)}

Given the protection that the declaration of being of public order carries with it, often the courts issue precedents to clarify situations that should not be considered in violation of public

order or of the social interest. In this category, the majority of precedents (nine) are related to cases in which granting the suspension of the contested act in an amparo trial does not affect public order, nor social interest.\textsuperscript{487} This means that the courts supported granting the suspension of the act of authority to protect the complainant with an amparo. This implies that the situations met the criteria of Article 128, section II of the Amparo Law for not affecting social interest and norms of public order and did not fit any of the situations established in Article 129 according to which granting the suspension would affect social interest or contravene norms of public order.\textsuperscript{488}

The courts use public order in these precedents to refer to norms of public order, to public order in general, and to a matter being of public order—as in having a superior value. Once again, the language is not completely consistent across precedents, however all relate to the superior status that public order encompasses.

The precedents in this category, reinforced the idea that all laws are of public order to a higher or lesser extent, however, this does not reveal the higher importance of an issue. In order to assign the status of public order, it should be related to how much it affects the general interest or the harm it causes to the collectivity.\textsuperscript{489} It is a constant element in the precedents that for a violation of public order to exist, harm should be caused to the collectivity or to the state.

Within Mexican contract law\textsuperscript{490} the principle of party autonomy is one of the fundamental standards for the interpretation of contracts. Courts in Mexico had provided interpretive criteria to make a distinction on which norms fall within this principle and if the parties can make specific agreements on such norms or not. In a precedent in this category, the court explained that the waiver agreed to by the parties in a contract about improvements made to a real estate used for living does not infringe norms of public order because the articles of the Civil Code where this is regulated are not considered norms of public order and thus the principle of party autonomy should apply.\textsuperscript{491} In a BCP, in a similar tenet, the court made a distinction on which sections of the Civil Code should be considered as norms of public order

\textsuperscript{487} See \textit{supra} note 444 about suspension in the amparo.

\textsuperscript{488} For the requirements in Article 128 of the Amparo Law, see \textit{supra} note 445.


\textsuperscript{490} Contract law in Mexican legislation is regulated in the Federal Civil Code and in the local civil codes.

and which should not.\textsuperscript{492} In the second decision the court explained that according to Article 6 of the Civil Code for the Federal District only private rights that do not affect directly the public interest nor affect third-party rights, can be waived. The element of special interest in this BCP is how the court specified that certain sections of the Civil Code are of public order while others are not.\textsuperscript{493} This provides an idea of how Mexican courts can make a distinction on the character of public order even between articles within the same statute.

In a similar manner, one of the precedents distinguishes the quality of the same institution, expiration of the instance, in two different codes.\textsuperscript{494} The precedent establishes that expiration in an executive commercial trial, regulated in the Commercial Code, does not have the quality of being of public order compared to expiration in the Federal Code of Civil Procedure where it is considered as of public order and inalienable. Therefore, for commercial cases, the Federal Code of Civil Procedure cannot be used as the supplementary law on this topic,\textsuperscript{495} because the Commercial Code has a provision on expiration of the instance.\textsuperscript{496} Another precedent distinguishes between the function of an authority and the act of authority.\textsuperscript{497} If the function of an authority is of public order, this does not grant the quality of public order to the acts of that authority.

The precedents in this category, while being case specific, show that the courts make cautious analysis to determine if the collectivity will be affected with the suspension of a contested act. The importance of the protection granted by the amparo requires the courts to consider very carefully if the public interest is affected. If the court find that the public interest is not affected, then it will grant the suspension of the contested act to protect the individual from the act of authority that is being challenged in the amparo.

\textsuperscript{492} Thesis Reg. Num. 226526 [J] I.2o.C. I/4, 8\textsuperscript{th} Epoch, Gaceta del Semanario Judicial de la Federación, no. 22-24, October-December 1989, p. 135 (Database no. 155).

\textsuperscript{493} The criterion in this BCP was overruled by a BCP by contradiction according to which the period to terminate a leasing contract of indefinite time referred to in the case cannot be voluntarily renounced by the parties because it is a norm of public order and is connected to sections of the Civil Code considered as of public order. Thesis Reg. Num. 207 213 [J] 3\textsuperscript{a}.J. (3\textsuperscript{a}. 16/90) Seminario Judicial de la Federación, 8th Epoch, Tomo V, January-June 1990, p. 222. Jurisprudence 3rd/J.66.


\textsuperscript{495} Article 2 of the Commercial Code establishes, when the Commercial Code or other commercial laws does not provide for a specific matter, the norms of the Federal Civil Code shall be applied as supplementary.

\textsuperscript{496} See supra note 440 regarding the change from the Civil Code of the Federal District to the Federal Civil Code.

\textsuperscript{497} Thesis Reg. Num. 239762 [TA] 3\textsuperscript{a} Sala, 7th Epoch, Semanario Judicial de la Federación, vol. 217-228, 4th part, p. 283 (Database no. 164).
A few precedents fit in two categories because the courts establish complementary interpretive criteria in one precedent that fit into two of the categories of this classification. One precedent on one side designates and reaffirms the character of public order granted to the ‘ejido’ and the norms that protect small agricultural and livestock farm property (C1). And on the other, explains that, as a consequence of this, the suspension granted against the decisions canceling the ‘un-affectability certificates’ (certificados de inafectabilidad) does not affect public order nor social interest (C2) because the protection of that type of property has preference over the administrative orders to cancel the certificates.

5.3.3 Situations that affect social interest and infringe norms of public order (C3)

Most precedents in this category are related to the suspension of the contested act in an amparo trial. They establish cases in which the courts found the suspension should not be granted because it would affect social interest and infringe norms of public order, thus not meeting the criteria of Article 128 section II of the Amparo Law for granting the suspension. The courts considered the cases came within one of the situations now contained in Article 129 of the Amparo Law. The consequence is that the contested act against which the amparo is requested shall stay in place and continue taking its effects while the amparo is decided. The precedents in this category touch upon diverse matters including judiciary functions, administrative law, tax law, insolvency law, environmental law, economic law, right to health, and public health.

There are three precedents related to more general matters. One of them clarifies that the cases established in Article 124, section II, second paragraph of the Amparo Law serve as examples but are not an exhaustive list (this list has been extended and further detailed in Article 129 of the new Amparo Law). Another precedent determined that for the purpose of the suspension, when the damage to public order and social interest is evident and manifest, it is not necessary to offer evidence of its existence or non-existence. This BCP was issued as a result

499 Ejido, supra note 480.
500 See supra notes 445 & 448 for the differences in article numbers between the ‘old’ and ‘new’ Amparo Law.
of a Contradiction\textsuperscript{503} in which the court explained that it is incorrect to affirm that when certain conducts are explicitly prohibited by law it is necessary to offer specific evidence to prove that the suspension would affect public order and social interest because the simple authorization to do an act explicitly prohibited by law would bring in itself a notorious and manifest violation of public order and social interest. In the third precedent,\textsuperscript{504} the court explained that the nullity of a decision in an administrative procedure for responsibility of public servants, as regards a procedural violation, should be a ‘nullity for effects’\textsuperscript{505} and not with ‘full effects.’ The reason is that a decision to nullify the full procedure would affect public order and social interest because the state and society are interested in the determination of the responsibility in which public servants might incur and the application of the corresponding sanctions.

There are numerous arguments in these precedents provide examples of how the courts make the analysis for deciding if a matter is of public order and to decide if the suspension should be granted. The courts generally express it in terms of what the society is interested in protecting, which should show the collective interest over the individual interest. Some examples are the state must encourage the development of the national cinematography activity because it strengthens the pluricultural composition of the Mexican nation;\textsuperscript{506} the execution of a bankruptcy agreement cannot be suspended because the society is interested in the pursuit and conclusion of bankruptcy procedure for the protection of the rights of merchant and creditors;\textsuperscript{507} and a tax audit cannot be suspended because the society is interested in the pursuit and conclusion of these administrative procedures so that the state can meet the needs of the community.\textsuperscript{508}

The fundamental focus in this category is to identify the collective interest that should be protected over the interests of individuals, grounded in the idea that the state shall provide for the wellbeing of society. These precedents exemplify what the classic scholarship on public order

\textsuperscript{503} In Contradiction 24/2002-SS the Second Chamber of the Supreme Court made a detailed analysis on what should be understood by public order and social interest and this is the final criterion upheld from its analysis. To see how a BCP by contradiction is created see supra section 4.1 Court precedents system and amparo.
\textsuperscript{505} The nullity for effects involves rectifying a procedural mistake but would not nullify the whole procedure.
explained about the superiority of the collective good and the mission of the authority to maintain public peace.

5.3.4 Violation of norms of public order and matters contained in a law of public order (C4)

The precedents in this category only use the term ‘laws of public order’ without reference to social interest. There are two issues addressed in this category. The first one relates to cases in which there is a violation of norms of public order. The second one helps to explain some of the implications of a matter being contained in a norm of public order.

Regarding the first one, three precedents in this category refer to the provisional suspension in an amparo trial.\(^{509}\) The courts in these cases argue the provisional suspension cannot be granted because it would infringe laws of public order. The laws or norms considered as of public order in these precedents are the norms by which the public prosecutor can order a search warrant under the argument that it is a tool for the prosecution of crimes and it is a constitutional duty of public prosecutors,\(^ {510}\) and certain articles of the Public Electricity Service Law,\(^ {511}\) regarding the suspension of service for obstructing the normal functioning of the equipment.\(^ {512}\) Another precedent states the suspension cannot be granted for not-applying a law in the future because that would affect laws of public order since an authority cannot issue acts without a legal support as this would affect the principle by which all acts of authority must be based on the law.\(^ {513}\) Certain provisions from the Federal Labor Law are also mentioned in this category as being laws of public order.\(^ {514}\) Labor matters are generally considered of utmost importance in Mexico. The Federal Labor Law is a law of public order but, additionally, most of

\(^{509}\) Regarding the suspension in the amparo trial, see supra note 444.


its provisions are of public order as they are considered part of the fundamental values and principles of the Mexican legal system.

Regarding a matter contained in a law of public order, some precedents serve to emphasize the well-stated argument that a situation regulated by a law of public order does not carry as an immediate consequence of its infringement a violation of public order because all the norms are of public order to a greater or lesser extent. Therefore, there are further elements that the courts must analyze and explain in their arguments to decide if there is an actual violation of public order in the strict sense. For example, in one precedent the court established that the importance and transcendence of a tax review does not depend on the circumstance that the applicable law is considered a law of public order – the General Law of Ecological Balance and Environmental Protection in this case.\(^{515}\) The challenging authority must reason why the case is different from others and how its effects are serious enough to justify the tax review.\(^{516}\)

This category shows how the term ‘laws of public order’ is used, on one side, to justify the rejection of a suspension in amparo or a remedy. On another side, it is used as a general term without carrying the major significance that public order should give to a matter. In one more case it is used just to refer to the mandatory laws of another federal entity of the country. All the precedents use the term ‘norms of public order’, however, the use of the term is, again, diverse. The fine distinctions are overlooked as the meaning of the term is assumed and very seldom there is conscious deliberation about it.

### 5.3.5 Interpretation of public order in the context of arbitration (C5)

The six precedents within this category are the only ones in which the courts have issued criteria that is specifically related to public order in arbitration. The oldest criterion is from the 7\(^{th}\) Epoch (from January 1\(^{st}\), 1969 to January 14\(^{th}\), 1988).\(^{517}\) It is a NBCP which reaffirmed that judges cannot review the legality of the substance of an arbitral award; however, it specifies that courts can reject the enforcement of the award when they notice the arbitrator ostensibly


departed from the rules of procedure established in the arbitral clause or compromise because it is a violation of the fundamental norms of procedure, which is a matter of public order.

After this precedent, it is not until 2011, in the 9th Epoch, that the Third Collegiate Court of the First Circuit issued a series of four precedents (all NBCPs) on how public order should be interpreted for cases that involve the nullity of an arbitral award. The most recent precedent (within the period of this study) is from 2012; it is part of the 10th Epoch and touches upon public order in cases of nullity and recognition and enforcement of arbitral awards. Even though, these are NBCP, they are already a step forward to having a clearer interpretive criterion on public order for Mexican courts. The main ideas established in these precedents can be summarized as follows:

- Public order is not defined in the Constitution or the Commercial Code, therefore its meaning should be determined in each specific case. It cannot be assimilated to imperative norms and it is necessary to protect the Mexican legal culture from interferences that can distort it. It is not enough to affirm that in an arbitral award the tribunal failed to apply a norm self-defined as of public order to conclude that public order has been violated. It has to be a more profound study, on a case by case basis, which concludes that the recognition and enforcement of an arbitral award is violating Mexican public order. The court in each specific case is the one who determines if there is a violation of public order or not.518

- Public order serves as a limit to party autonomy and is grounds for nullity of an arbitral award. Using the principle contained in article 1798 of the Federal Civil Code, as supplementary to the Commercial Code, by which all people not excepted by law have the capacity to undertake legal obligations, it follows that only the matters that are at the free disposal of the parties can be arbitrated. This means they have standing to enter into arbitration as an expression of their general capacity to do legal businesses.519

- Public order is an autonomous ground for nullifying an arbitral award. Pursuant to Article 1457 section II of the Commercial Code, an arbitral award is null if it contains a manifest violation of law or equity. Federal Legislature established it as a diverse and autonomous

ground in which public order is the ultimate and most strict sanction of the law to make party autonomy adhere to those principles.520

- The notion of public order in relation to the nullity of an arbitral award is determined in the context of the Commercial Code pursuant to the New York Convention. Accordingly, the national and international framework on arbitration should be used to interpret the notion of public order. Public order cannot frustrate, alter, or obstruct arbitration in its mission, and demands precision in its definition, scope, and content because only in this way the cases and circumstances under which its application is relevant can be established.521 (23)

- In a historical-doctrinal interpretation, the court established there is an inextricable link between public order and the state’s objectives. The idea of public order is based on the obligation of the citizen not to disturb the goals of the community and society with his acts and on the powers of the state organs to ensure that those goals are respected. Public order is external to the action and interest of the individual and is expressed in the form in which the citizens fulfill their interests in a tangible and material way and is regulated by a legal norm. The notion of public order includes the set of rules that, according to a determined historical view of social life and relationships among individuals, are necessary for the existence of the state and for the development of the individuals in equilibrium, harmony, and peace. This involves the defense of the liberties, rights and fundamental goods of individuals, and the principles of juridical organization to develop himself as a member of a society.522

The latest precedent gets closer to a defined concept of public order established by a local court. Even though these precedents are not mandatory, they can be used in cases before the courts to serve as guiding criteria. It is interesting to note that the last four criteria from the above list, were issued by the same court (Third Civil Collegiate Court of the First District -I.3o.C-). It

shows an intention of that court of setting precedents in this matter with the ultimate goal of creating a BCP by reiteration and thus, o have a mandatory criterion. So far, there has not been any more NBCP to support these criteria. These are the expression of a progressive Circuit Court which work under the premise of a pro-arbitration principle with the aim of bringing the interpretation of public order in accordance with the international standards established in the New York Convention. There are another couple of precedents, issued by this court which while not making a specific mention of arbitration are relevant to defining what is public order. These are addressed in the next category.

5.3.6 Definitions of public order by the courts (C6)

From the 7th to the 10th Epochs covered in this study, there are precedents that have specifically addressed public order with the purpose of defining what should be understood by it. The precedents in this category look at public order mainly from a couple of identified perspectives, from the stand point of the suspension within the amparo trial –the majority– and a few of them in the context of civil matters that touch upon party autonomy, which are more related to arbitration. Nevertheless, the precedents that address public order from the perspective of the suspension in amparo trials evidence the principal ideas and criteria that inform the courts to conceptualize public order. A specific group of precedents in this category builds upon criteria from previous Epochs. Most of the precedents in this group are BCPs, but because they come from Circuit Courts, they are only mandatory within their circuit and do not have a national reach. The precedents that are referenced below provide evidence that there are certain features that have been sustained over time while there are other distinctions which been added as the matter has developed.

The starting point of the series is a NBCP from the 7th Epoch, in which a court established that the assessment of public order corresponds, in principle, to the legislator when creating a law. However, it also corresponds to judges who identify its existence in the individual cases submitted before them. This precedent explains that, in general terms and from the study of Article 124 of the Amparo Law, the suspension of an act of authority damages

social interest and infringes norms of public order when the community is deprived of a benefit granted by the law or is damaged by the suspension in a way that would not otherwise ensue.

Later, in 1991, within the 8th Epoch, in another BCP the court affirmed that the criterion that informs the concept of public order for granting the definitive suspension in amparo should be grounded in the collective goods that are protected by the laws and not on the fact that the laws are of public order because all of them are, to a greater or lesser extent. 525

In 1997, within the 9th Epoch, a Circuit Court established a BCP to clarify what should be understood by public order and social interest in relation to the suspension in amparo trials. 526 The court recognized the sustained criterion from the Supreme Court by which it is the duty of the judge to examine the existence of these factors in each specific case, as mentioned above. 527

In this precedent the court, by using a previous NBCP, 528 explained that:

“public order and social interest are indeterminate legal concepts, impossible to define, which content can only be determined by the existing circumstances of mode, time, and place at the time in which they are assessed. In any case, in order to give them meaning, the judge must have in mind the fundamental conditions for the harmonic development of a community, this means, the minimum rules of social coexistence, with the purpose of preventing that the suspension causes major harm than the ones that want to be prevented with this institution [suspension], with the understanding that the decision made in each case cannot be based in mere subjective appreciation from the judge, but in objective elements that translate the key concerns of a society.” 529

In another precedent, from 2005, the court used this criterion to build upon its reasoning in its own NBCP. It added that public order cannot be defined in a formal declaration contained in a law, and when the judge gives meaning to public order he should do it with the purpose of not hindering the efficacy of the rights of third parties. 530

Connected to the above precedent, but adding to it, in a BCP from 2005, a Circuit Court established that the concept of public order must proceed from the idea that the collective goods

527 Related to precedent Database no. 186 in supra note 523.
529 Database no. 121, supra note 526. Translation by the author.
protected by the laws should not be damaged, and not from the fact that the laws have a public order character. The potential damage that the concrete act could have on the collective goals should be assessed. Therefore, to validly infer the content of public order, it is necessary to ponder the consequences of the suspension of the contested act, which means the court must assess if the suspension would deprive the collectivity of a benefit granted by the laws or if it would suffer a harm that would not otherwise ensue. With this line of reasoning the court intended to emphasize that courts should not only consider the fact that the laws are of public order and social interest to decide on the merits of the suspension.

Finally, in the context of the suspension in amparo trials, in a NBCP from 2012, a Circuit Court offered a definition of public order that can be considered a current view of public order in Mexican courts which is worth citing:

“public order constitutes the maximum expression of the social interest as a good constitutionally protected and a guarantee of the society so that the people and authorities can reasonably exercise their rights within the State, and it does not only involve the preservation of the collective tranquility and wellbeing, but it also entails the social harmony in regards of the legitimate exercise of the rights, duties, liberties and powers within the State; this is, the pacific coexistence between power and liberty.”

There are 3 NBCP in this category that have addressed public order in the context of civil law matters and they relate to the previous section that considered public order within arbitration. These precedents do not specifically mention being oriented toward arbitration, but they connect with it since arbitration is an expression of party autonomy. They all come, as well, from the Third Civil Collegiate Court of the First Circuit. In a precedent from 2003, the court established that if the law does not explicitly state that its norms are of public order and inalienable, then the

532 This idea is also established in Database no. 186 (supra note 523) and is supported in another BCP referred to in precedent no. 80 (supra note 531): Jurisprudencia (BCP) II.3º. J/40, Seminario Judicial de la Federación, 8th Epoch, no. 62, February 1993, p. 27 (Reg. Num 217172). The latter BCP (J/40) is not part of the database because it does not contain public order in its title, which was the criterion to include them in the database. As well, in Database no. 80, the court referred to other BCPs that are part of this study (precedents Database no. 121 and 150) which have also been addressed here in Category 6.
534 Ibid. Translation by the author.
judge must decide that by following certain premises.\textsuperscript{535} It states that public order has been understood as the set of rules on which rest the common wellbeing and before which yield the rights of individuals because society is interested in them collectively more than in citizens considered individually. Additionally, public order serves as a limit to restrict the faculty of individuals over the realization of certain valid legal acts that have effects within a legal order. Thus, the public order character of procedural or substantive laws should be determined according to the purpose of each law and its nature.

In the other two NBCPs, the Circuit Court addressed the concept and content of public order in civil matters,\textsuperscript{536} and public order as a limit to party autonomy.\textsuperscript{537} The court identified public order as a limit to the private activities of individuals, which are generally ruled by civil law, and recognized the primary character of legislation as source of law for governing the social order (as established in Article 6 of the Federal Civil Code). For the court, the idea of party autonomy is determined by two dimensions, the first one related to the notion of public interest that translates into the existence of imperative laws that cannot be repealed by the individuals because they defend their interests and those of the state. The second dimension translates into a legal mechanism of judicial application to protect the general interest by limiting any private activity that threatens it. In this way, explains the court, imperative norms need to be distinguished from norms of public order; while a norm of public order is always imperative, not all imperative laws are of public order.

Continuing with the idea of public order as a limit to party autonomy, the Circuit Court explained that public order and its elements can only be defined through judicial activity because it is a general notion and because it depends on the historical moment in which it is applied. For this court, the judge serves as a decanter of the ideas of public order and social reality, which is dynamic and thus adjustable to each specific case. The exercise of individual rights is limited by the concept of public order established in the basic norms of social organization because only in this way the general and harmonic development of individuals can be granted without affecting others or the purposes of the state. The court argues that public order is a limit to the use and

\textsuperscript{535} Thesis Reg. Num. 183781 [TA] I.30.C.64 K, 9\textsuperscript{th} Epoch, Semanario Judicial de la Federación y su Gaceta, Tomo XVIII, July 2003, p. 1158 (Database no. 92).
\textsuperscript{536} Thesis Reg. Num. 162333 [TA] I.30.C.926 C, 9\textsuperscript{th} Epoch, Semanario Judicial de la Federación y su Gaceta, Tomo XXXIII, April 2011, p. 1350 (Database no. 28).
\textsuperscript{537} Thesis Reg. Num. 162334 [TA] I.30.C.925 C, 9\textsuperscript{th} Epoch, Semanario Judicial de la Federación y su Gaceta, Tomo XXXIII, April 2011, p. 1349 (Database no. 27).
enjoyment of the fundamental rights of individuals and said limitations are imposed in the Constitution, in the principles that inform it, and in any other laws that reflect or make them more concrete. Public order has mainly a legal significance regulated in the Constitution that diffuses to diverse areas of the legal system.

Regarding the precedents that fit in two categories, in one of them the Circuit Court affirms that the suspension of an ‘order for a verification visit’ pursuant to Bankruptcy Law would damage the social interest and go against norms of public order (C3).\textsuperscript{538} It also reaffirmed that, all legal procedures are considered of public order and their interruption would affect public order. Of special interest are the definitions for social interest and norms of public order that it suggests (C6). For this court, social interest “refers to those aspects related to the general needs of the society which the State protects in a direct and permanent manner; [i]f a specific situation affects or benefits the collectivity, then there is a social interest.”\textsuperscript{539} It also affirms that norms of public order “are those that are issued to regulate areas where the State is interested, such as its public performance or the regulation of any branch of social significance for the development of society, and in which the latter is interested in its implementation.”\textsuperscript{540}

The precedents addressed here touch upon the most important elements that the courts have considered to construct the concept of public order. While none of them can be considered a general, mandatory interpretation, all have added elements to offer a more complete picture of how Mexican courts have conceptualized public order throughout the years. In this category, we can clearly identify two perspectives of public order, one as the protection of collective goods and social interest, and the other, in recent cases, being the more specific perspective which explicitly identifies public order as a limit to the faculty of individuals. It is important to highlight a distinction that is now well established in the precedents, that mandatory norms are

\textsuperscript{538} Thesis Reg. Num. 182292 [TA] I.14o.C.24 C, 9\textsuperscript{th} Epoch, Semanario Judicial de la Federación y su Gaceta, Tomo XIX, January 2004, p. 1629 (Database no. 90). This thesis was part of a contradiction procedure which was declared inadmissible because there is already a BCP from the Supreme Court on this topic. The BCP referred to in there is also part of the database of this study in Database no. 82 (Category 3). The criteria established in precedent no. 82 is that the judicial procedure is a matter of public order and social interest because society is interested in its conclusion. It also emphasizes that if there is a conflict between the individual and social interest, the collective interest should prevail over the individual one. Therefore, the suspension requested in precedent no. 82 could not be granted or it would had damaged the social interest and go against norms of public order. Thesis Reg. Num. 179439 [J] 1a/J. 69/2004, 9\textsuperscript{th} Epoch, Semanario Judicial de la Federación, Tomo XXI, January 2005, p. 379 (Database no. 82).

\textsuperscript{539} Ibid. Translation by the author.

\textsuperscript{540} Ibid. Translation by the author.
different from norms of public order. Norms of public order involve a strict interpretation of public order and assign a higher hierarchy and protection to those laws.

5.3.7 The judges must ponder the effects of their decisions on public order (C7)

The precedents in this category offer guidance on how judges should analyze public order when there is a claim that it might have been violated. Most of them relate to the suspension in amparo trials, however there are also cases related to contracts, other procedural matters, and requests from public prosecutors.

A precedent that stands out in this category is a BCP\textsuperscript{541} from the Second Chamber of the Supreme Court issued as a result of Contradiction P./J. 15/96.\textsuperscript{542} It states that the judge must do a \textit{simultaneous} study of the ‘appearance of good law’ and the ‘risk in the delay’ along with the possible violation of public order or the social interest that the suspension of the contested act could cause.\textsuperscript{543} The Court explained that this study must be concomitant. The precedent that prevailed in the Contradiction P./J. 15/96 explains that since the Plenary of the Supreme Court decided that it is possible to do a \textit{provisional assessment} of the unconstitutionality of the contested act to decide on the suspension, the confrontation of the individual interest against public order and social interest must be appraised in a \textit{concrete way}.\textsuperscript{544} Therefore, the contested act is not considered in an abstract way, but its potential unconstitutionality can be determined at the moment when the court is deciding on the suspension and, accordingly, it has to consider the confrontation between the individual and social interests. If from an analysis of the ‘appearance of good law’ the contested act exceeds the limits of its competency, then the court can grant the suspension.

\textsuperscript{541} Thesis Reg. Num. 165659 [J] 2a./J. 204/2009, 9\textsuperscript{th} Epoch, Semanario Judicial de la Federación y su Gaceta, Tomo XXX, December 2009, p. 315 (Database no. 35).
\textsuperscript{542} Contradiction P./J. 15/96.
\textsuperscript{543} In 2006, there was an important change in the way in which the courts must assess the act of authority for deciding on the suspension in an amparo trial. Before this simultaneous study of the ‘appearance of good law’ and ‘risk in the delay’ was introduced, the courts could not make a valued analysis, the act was analyzed in an abstract way to determine if the suspension should be granted while the amparo was in process. For further details of the implications of this change see: José Manuel de Alba de Alba & Mario César Flores Muñoz, “La apariencia del buen derecho en serio” (The appearance of good law, seriously) (2006) 25 Revista del Instituto de la Judicatura Federal 47.
Another BCP in this category provides further guidelines to assess if there is a damage to public order and social interest with a suspension in an amparo trial.\textsuperscript{545} The court explained that the fact that the law which serves as grounds for the act of authority is a law of public order and social interest is not enough to justify a violation of public order. The judge must evaluate if the content, goals, and attainment of the act of authority are contrary to the values and principles that inspire public order, if they can restrict the fundamental rights of the citizens or if they are significant enough to affect social interest. Accordingly, to apply the criterion of public order and social interest, it must consider the real and effective damage to the goals of collective interest pursued with the concrete act of authority, against the damage that the complainant could suffer with the execution of the contested act and the value of the damage to his rights. It must be remembered that the act of authority is supposed to be aligned with the interests of society, therefore, the judge must ensure that the suspension of the contested act will not affect the collective interest, being one of the requirements to grant the suspension pursuant to Article 128 of the Amparo Law.

The most recent precedent in this category is a BCP from a Collegiate Circuit Court which stated that in a judicial review,\textsuperscript{546} the Circuit Court can analyze \textit{ex officio} the potential damage to social interest and public order that the suspension could cause because it is its duty to analyze the interest of society and that with its decision the collectivity would not be deprived of a benefit granted by the law or would not suffer a harm that would not ensue otherwise.\textsuperscript{547}

This category emphasizes how the courts have been concerned with giving judges guidance to analyze the effects of their decisions on public order. The judges have the burden of the protection of the collectivity through their decisions and when it comes to public order, the fact that it must be examined and applied on a case by case basis makes it harder to establish a more general guideline. However, as it can be appraised from the discussion herein, court precedents have been aligning over the years on how to interpret and apply public order.

\textsuperscript{545} Thesis Reg. Num. 172133 [J] I.4o.A. J/56, 9\textsuperscript{th} Epoch, Semanario Judicial de la Federación y su Gaceta, Tomo XXV, June 2007, p. 986 (Database no. 58).
\textsuperscript{546} Judicial review (\textit{recurso de revisión}) is the remedy available in an amparo trial against the final decision. It is regulated in Articles 81-96 of the Amparo Law. Depending on the type of amparo (direct or indirect) is the court that decides the review (Collegiate Circuit Courts or the Supreme Court, in Plenary or by one of its Chambers).
\textsuperscript{547} Thesis Reg. Num. 159949 [J] I.16o.A. J/1, 10\textsuperscript{th} Epoch, Semanario Judicial de la Federación y su Gaceta, Libro XI, Tomo 3, September 2012, p. 1461 (Database no. 11).
5.3.8 The use of ‘public order’ to refer to public matters (C8)

The two precedents in this category evidence in a clear manner the diverse, often times confusing, ways in which public order is used in Mexican legislation and in legal arguments. In this category, public order is used to explain that an issue falls within the realms of public law. It follows from the traditional division between public and private law, where public order refers to all those matters in which the state is an actor and thus, a regime that focuses on satisfying collective needs. One of the precedents clarifies that even though a concession granted for providing a municipal service has some characteristics of a private agreement, it has characteristics of ‘public order’ because it attends a collective need.\(^{548}\)

In the other precedent, the Plenary of the Supreme Court established that the administrative nature of a contract between a private entity and a state body has a ‘public order’ purpose and went on to specify that it is also identified as a ‘public utility’ or ‘social utility’ purpose.\(^{549}\)

These precedents bring us back to the language factor in which one has to be mindful of the context in which ‘public order’ is used in any given decision to appraise the way in which that decision fits for the purposes of interpreting public order. In these precedents ‘public order’ clarifies the public nature of the act but does not grant the protection or priority that ‘public order’ in the strict sense gives when used to protect a fundamental value of the Mexican legal system.

5.3.9 A decision in spite of public order (C9)

The precedent in this category has a distinctive purpose since the Circuit Court prioritized who has the legitimacy to appeal the decision which grants a suspension against an arrest warrant.\(^{550}\) The Circuit Court emphasized it is the public prosecutor (Ministerio Público) and not the judge who has legitimacy to request a judicial review\(^{551}\) of such decision, even if the public order might be affected. The judicial review found against the decision granting the suspension


\(^{551}\) About judicial review, see supra note 546 and glossary.
against the arrest warrant. Even though the judge raised the argument that the public order might be affected, the Circuit Court affirmed that the authorities are bound by the powers granted to them by the law, thus the judge cannot start the judicial review. This is the only thesis in the whole set in which public order has been put in a secondary position. But it is significant to see that above public order stands the jurisdiction of an authority and that they cannot act in excess of their faculties; which in the end is another way to protect public order as the society is interested in authorities acting within their faculties.

5.3.10 A matter is of public order (C1) and the suspension would affect social interest and public order (C3)

Within the group of precedents that fit in combined categories, six of them added some topics to the list of matters that are considered of public order (C1):

- The continuation of the conciliation procedure before the National Commission for the Protection and Defense of Users of Financial Services (CONDUSEF)
- The Federal Antitrust Law.
- The notary function.
- The continuation of the administrative procedure.
- The investigation procedure by the Federal Economic Competition Commission (FECC).
- The bankruptcy procedure.

The reasoning for determining that these are matters of public order are explained on grounds of what is the interest of the society at stake in each case. For example, it is in the interest of society that financial institutions follow the legal procedures to eliminate the irregularities that they commit;\textsuperscript{552} that the notary function is performed according to the law;\textsuperscript{553} or that the administrative procedure or the procedure of the FECC are not paralyzed until their

\textsuperscript{552} Thesis Reg. Num. 178515 [TA] VI.1o.A. 176 A., 9\textsuperscript{th} Epoch, Semanario Judicial de la Federación y su Gaceta, Tomo XXI, May 2005, p. 1429 (Database no. 75).
\textsuperscript{553} Thesis Reg. Num. 185129 [J] 2a./J 144/2002, 9\textsuperscript{th} Epoch, Semanario Judicial de la Federación y su Gaceta, Tomo XVII, January 2003, p. 432 (Database no. 98).
objectives are fulfilled. These cases highlight the importance of connecting the matters with the greater interest of society in order to determine they are of public order.

The second element of this group of precedents with double category involved the request for a suspension in amparo trials. The courts decided to deny the suspension because, if granted, the suspension would affect the social interest or would infringe norms of public order, therefore, the requirements of Article 124 section II (now Article 128) of the Amparo Law were not being met (C3).

Of special interest is a BCP from the Supreme Court explaining that the Federal Antitrust Law is a matter of public order because its Article 1 specifies this is a statutory law for the implementation of Article 28 of the Constitution. The Supreme Court went on to explain that if one of its articles is violated, there is damage to public order, which gives grounds to deny the suspension of the contested act. This reasoning illustrates how the courts, following the principles established in the Constitution, assign a higher priority to certain areas to declare them as of public order. Economic competition is a principle established in the Constitution and the implementation law provides the framework to protect that principle. In this decision, the Supreme Court emphasized the importance of this matter and thus, protected it as a matter of public order.

5.3.11 Key learnings from the Mexican court precedents

This analysis involved the review of 189 court precedents issued over a period of over 30 years. The categories were created to show in an organized manner diverse aspects that Mexican courts have considered and decided in order to continue guiding courts on the way to interpret public order. From this examination, it was possible to identify matters considered of public order beyond what is established in Article 129 of the Amparo Law. The expanded list in Article

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555 Federal Antitrust Law, published in the Federal Official Gazette 23 May 2014 (entered into force 7 July 2014). This law repealed the previous Federal Antitrust Law from 1992 which is the basis for the BCP referred to here.


557 In this case, the contested act was a request for information and documentation from the FECC exercising its powers to investigate monopolistic practices.
129 has improved the identification of situations that violate public order, but there are many more that have been added by court precedents as they are analyzed on a case by case basis. Court precedents have also served to complete this list by identifying situations in which it should not be considered that the public order or the social interest are affected.

The precedents reveal that when a court determines that a matter is of public order, they are assigning to it a higher importance and thus imply these matters should be considered in the strict sense of public order. These are matters that involve Mexican fundamental principles. The relative nature of public policy examined earlier in this dissertation is revealed when the courts explain that public order needs to be analyzed on a case by case basis and considering the time and situation of society when the case is analyzed.

A fundamental aspect that emerged from the precedents is that to understand public order in Mexico it is necessary to understand it to a greater extent in the context of the amparo trial, specifically when the suspension of the contested act cannot be granted because it would affect social interest or infringe norms of public order. In these situations, the precedents show that the judges must consider what society is interested in protecting. The cases that refer to ‘violation of norms of public order’ and ‘matters contained in a law of public order’, bring forward a distinction that was addressed in the scholarship and has been also addressed and emphasized in the precedents. The statement that a law is of public order is used to refer to matters that are of public order in the strict sense. On the other hand, the statement that ‘a matter is contained in a law of public order’ should be taken with caution because just by being in law of public order does not carry the protection of public order in the strict sense. The courts have affirmed all laws are of public order to a greater or lesser extent, but not all of them in the strict sense that grants the utmost protection.

The classification of precedents show that the analysis of the courts has been developing through the years to offer definitions and interpretations of public order. However, public order has been considered in the context of arbitration only since 2011. In general, public order is seen from the overall idea of classic theory which establishes the superiority of the collective good over the private good.

Two significant contexts emerge from the precedents. The first context reveal that the most important focus for judges when they address public order is in the framework of amparo
trials. This entails that public order is related to the order of society, with the collective interest, and the collective good of society. According to this context, for the courts public order involves:

- It is the task of the judges to identify if public order exists in individual cases, even if it corresponds to the legislator to assess public order when creating a law.
- There is a violation of public order when the community is deprived of a benefit granted by the law or is damaged by the suspension of a contested act in a way that would not otherwise ensue.
- Public order is grounded in the collective good and interest of society.
- Public order depends on circumstances of mode, time, and place and the judge must keep in mind the harmonic development of the community; thus, its interpretation cannot be based in a subjective appreciation of the judge but in objective criteria.
- When the judge gives meaning to public order should do it with the purpose of not hindering the efficacy of the rights of third parties.
- Public order constitutes the maximum expression of the social interest as a good constitutionally protected and a guarantee of the society. It entails the pacific coexistence between power and liberty.

The second context, which is emerging more purposefully in Mexican precedents, involves the analysis of public order in a civil law context. According to this, public order serves as a limit to party autonomy to protect Mexico’s most valuable principles. This approach is directly related to arbitration, with the nullity and recognition and enforcement of foreign arbitral awards, and therefore with the public policy exception. In this context, public order is the limit to the private activities of individuals. Consequently, it is necessary to distinguish mandatory norms from norms of public order because only the latter would fit within the public policy exception. According to this context, the judge serves as a decanter of the ideas of public order and social reality to analyze the cases and decide over violations of public order. The limitations to party autonomy are grounded in the principles contained in the Constitution, the principles that inform it, and any other laws that reflect or make them concrete. Even though this approach is emerging, there is interest from certain courts to advance these clarifications. This is necessary as it would enhance the implementation of the public policy exception.
The detailed examination of public order in Mexican precedents through this classification served to understand how the concept of public order has developed in the interpretations of the courts. It allowed to identify the different aspects of this concept that influence local judges when analyzing a case involving public order, which also impact on its interpretation for the public policy exception. When Mexican judges analyze a case involving the public policy exception, their perspective is not limited to elements of party autonomy, social interest and fundamental principles, it is also influenced by how the precedents have developed in relation with the suspension in an amparo trial. Finally, it is also important to highlight that in all these precedents, there is no mention about international standards or internationally advanced conceptions on public order (international or transnational public policy). In Mexican courts, public order is a topic that is contained within the boundaries of its national legal framework.

5.4 The perspective of Mexican local actors

The account presented in this section comes from the results of interviews with key local actors who were invited to participate based on their experience in one of three capacities: as counselors of a party, arbitrators, or federal judges.558 The interviews touched upon a variety of common topics across the three categories and some questions were specific to their role. The introductory, general topics addressed the experience of the interviewees with international commercial arbitration, their point of view about Mexico’s approach toward endorsing arbitration, and whether it is perceived as an arbitration friendly jurisdiction. Moving onto the specific topic of the public policy exception, the interviewees were invited to offer their point of view on how the national courts have applied this exception; how they have interpreted the concept of ‘public policy’ for that purpose; and what they considered is contained in the notion of ‘public order’ for deciding on the recognition and enforcement of a foreign arbitral award. They were invited to consider if they could identify the influence of international trends on this matter and, if so, whether these trends shape what should be understood as public order. Legal culture, as it was explained in Chapter 4, was discussed with them in terms of how they would describe the Mexican legal culture, what its most distinctive elements are, as well as its relevance

558 For details about the interviews and the general profile of the interviewees refer to supra section 1.3.2 Interviews with local actors.
in the construction of the concept of ‘public order.’ All the interviewees were invited to offer their opinion on the relevance of having a clearer definition of ‘public order’ within the Mexican legal system for deciding cases in which the public policy exception is opposed to the recognition and enforcement of a foreign arbitral award; how such definition could impact the perception of Mexico as a pro-arbitration jurisdiction; and what are the fundamental elements that should be taken into account to construct such definition.

Regarding the questions that were role-specific, counsellors were asked if they had used the public policy exception in their arbitral practice, and, if so, what factors they took into account in taking this route. They were asked to offer their ideas on the use of international standards for the interpretation of the public policy exception; if those standards could conflict with Mexican perspectives on public order; and if they considered those standards to have been imposed or adopted.

Considering the importance of the enforceability of the award, arbitrators were invited to explain if they had taken into account the public order of a potential enforcing jurisdiction when deciding a case. They were also asked to talk about the differences they had noticed in the application of the public policy exception in other jurisdictions.

Federal judges were invited to share their experience with cases of arbitration or private international law in which they had had to apply the concept of public order; which elements they took into account to decide on cases where the public policy exception was opposed and how they interpreted public order in such cases. They were asked if they had used international instruments (conventions, decisions, resolutions from international bodies) as reference to decide on the application of the public policy exception, and if so, which ones and how. Federal judges were asked if international standards or foreign conceptualizations of public order have influenced their legal reasoning when deciding this type of case. They were invited to offer their reflections about their role as federal judges in contributing to the image that Mexico has within the arbitral community at the international level.

The following sections present the most representative ideas offered by the interviewees, which have been grouped around five main topics: opinions about arbitration practice in Mexico; experiences involving the public policy exception; perspectives about the status of the concept of ‘public order’ in Mexico; views on the connection between national and transnational
perspectives and standards in the Mexican context; and finally, the practical steps they foresee could enhance the concept of public order for the application of the public policy exception in Mexican courts. Intertwined, and summarised at the end of each section, is an explanation of what the results imply about the local context of each of these topics.

The interviews were incorporated in this study to provide a direct account from local actors who participate directly in local practice. The analysis of the law, scholarship and court precedents in previous sections are important to provide a framework against which to examine the local context. The interviews provide information that is only available through conversations with local actors, connecting this study to the realities they experience. The following sections are a narrative of their valuable insights.

5.4.1 Local actors’ perspective about arbitration in Mexico

The interviewees offered two perspectives about the status of arbitration in Mexico, historically and at the time of the interviews. Their perspectives are informed by their local experiences and training, but they also have a comparative perspective informed by their exposure and participation in international cases and forums. In the accounts presented below, it can be observed that in general there is a positive perspective about the development of arbitration in Mexico. They perceive the resistance from the courts toward arbitration has been changing and, following the latest reform to the Commercial Code that updated some topics on arbitration, the judges see themselves more clearly as auxiliaries of arbitration.

On the historical side, they mentioned that Mexico’s first experiences with arbitration were with international arbitrations; mainly because foreign commercial parties would incorporate arbitral clauses commercial contracts as a condition of business. Therefore, many companies were ‘forced into’ arbitration via international institutions like ICC and AAA, the earlier actors before national institutions appeared and arbitration was used for domestic cases.

In the early years of arbitration in Mexico (late 80s, early 90s) there was a defensive approach to it, mainly as a result of a lack of knowledge about it. Counsellor 3 mentioned that as a consequence, practitioners did not see (or avail themselves of) the advantages of arbitration, complicated the procedure, and he witnessed mistakes from certain practitioners that eventually worked for the benefit of his clients. Counsellor 2 recognized there had been an important effort from the Mexican state to promote arbitration but always prompted by the private sector. He also
recognized there had been some key practitioners that had reached relevant roles at the international level, had transmitted the importance of arbitration, and had been the driving force to encourage Mexican state officials to support arbitration. Counsellor 3 also acknowledged there had been ‘horror stories’ in Mexico (referring to cases that were poorly decided), but just as there were in any other advanced jurisdictions. These stories had impacted arbitration and the problem was that the vast amount of cases that went well are little known of and those ‘horror stories’ had reached the public and affected the perception of arbitration.

These comments indicate that even if it was considered an imposition at the beginning, in the following years arbitration was adopted and has been strongly promoted. This is an example of influences that come to Mexico from the US. When Mexico opened its economy, trade parties made arbitration a condition in their agreements in order to provide those foreign interests a framework that would protect them better in case of a dispute. Now arbitration is an important mechanism that is even protected in the Mexican Constitution as an alternative dispute resolution.

Overall the interviewees agreed that arbitration had been positively progressing and growing in Mexico, although it was still considered a niche area of a small group of practitioners. Arbitrator 4 identified two groups of practitioners: those with more experience who were more sophisticated and trained, and the newcomers some of whom were well prepared. A further group of ‘court’ lawyers that had taken some arbitration cases but without enough knowledge about arbitration was also identified. As a positive sign, he explained there had been more access to journal articles; high quality scholarship; knowledge about arbitration rules from a variety of institutions; some sort of arbitral jurisprudence (in its early stages) that practitioners were exchanging (including arbitral awards and courts decisions from diverse jurisdictions); and it was observed that practitioners were using more court precedents in their submissions. This is hopeful and encouraging for Arbitrator 4 and he affirmed this had been growing in recent years.

Arbitrator 4 brought up the fact that Mexico had kept its legal system up to date by incorporating, for example, the UNCITRAL Arbitration Model Law. It was noticeable for him how legislators had been aligning concepts and terminology according to the developments in the international arena. Counsellor 3 and Arbitrator 1 recognized there is a favorable state policy towards arbitration in general, which is evident in quality arbitral laws and in the courts respecting arbitral agreements and awards.
There was a general idea among practitioners and judges that the majority of arbitrations had been complied with and it was a small minority that had reached national courts, which showed the effectiveness of arbitration as a mechanism to solve commercial disputes. For Federal Judge 1 this was very positive because it had reduced cases reaching the courts; the not so positive sign was the cost of arbitration. However, Federal Judge 2 pointed out that people usually lose sight of the amount of resources that go into a case when the judicial machinery is activated, therefore this argument is relative. In connection to this point, Federal Judge 2 added that in Mexico, it was necessary to change the mistaken idea that some practitioners had about arbitration being useless because they would still end up litigating the issue before the courts.

Judges see themselves as auxiliaries of arbitration and therefore they support the idea that judges should not analyze the substance of an award but that they should facilitate the execution of precautionary measures or the designation of arbitrators, among other duties. Federal Judge 3 suggested the importance of disseminating the idea that in Mexico the law mandates judges to collaborate with arbitrators; their role is well established, including how they are expected to collaborate with arbitral tribunals. He added that as long as the rules are clear, this should offer certainty for everybody.

A cause for concern for Federal Judge 2 were the recent cases that were decided at that time (referring implicitly to the COMMISA case) because he felt the federal courts were not being consistent and some cases had been solved in a confusing way. He suggested, “the arbitral award should not be touched, even with the petal of a rose” \(^{559}\) to express how the courts should go about enforcing arbitral awards. There was some level of concern in all interviewees regarding cases that had not been solved in an appropriate or expected way. However, Federal Judge 3 suggested that those cases should be considered to be extraordinary and should not be used to qualify a whole legal system.

Federal Judge 2 expressed the view that arbitration had been opening new horizons and possibilities for the Mexican legal system. The fact that so few cases had reached the courts suggests that most of the awards are complied with without judicial intervention.

All the interviewees agreed that Mexico has been considered an amicable jurisdiction for arbitration. Three referred to a comment made by a former president of the ICC Court of

\(^{559}\) Interview of Federal Judge 2, 29 May 2012.
Arbitration who said that Mexico could be considered the Switzerland for Latin America, as a way to emphasize its importance as an arbitration friendly jurisdiction, its quality, and positive reputation. Some of the indicators they mentioned for these affirmations were a) Mexico has a good and modern arbitral legal framework (the recognition in the Mexican Constitution of the right to alternative mechanisms to solve disputes, the incorporation of the UNCITRAL Model Law, the New York Convention, the Panama Convention, and a recent amendment to the Commercial Code\textsuperscript{560}); b) solid arbitral institutions, either national (CAM, CANACO) or the presence of prestigious international institutions (CCI, IDCR, AAA); c) a judiciary with a positive attitude towards arbitration. Some considered that there has been a very positive and supportive attitude from judicial power, while others considered it has not been optimal, but generally supportive and positive. The ‘Mexican arbitration system’ in general could be considered of good quality according to the interviewees. Counsellor 4 said that the fact there were more cases using Mexico as a seat of arbitration but without the involvement of Mexican parties, also indicated its positive reputation.

There was acknowledgement of cases\textsuperscript{561} that had not been decided in an optimal way, particularly the COMMISA case which was very recent at the time. However, Arbitrator 3 particularly emphasized that a legal system cannot be evaluated by one negative case. The volume of cases, even if specific statistics were not available, compared to having two negative experiences could not account for considering Mexico a negative arbitral jurisdiction or to demonstrate that arbitration did not work in Mexico.

Noticeable in these comments from the interviewees is that all of them are aligned in recognizing that arbitration is important for Mexico’s legal system and it should continue to be strengthened since it enhances Mexico’s position abroad for trade purposes. Mexico has gone to great lengths in adjusting its legal framework to the international changes in trade practices,

\textsuperscript{560} There were a couple of interviewees that expressed they were not completely satisfied with these amendments, but in general they considered them positive.

\textsuperscript{561} The two cases to which most of the interviewees referred to when talking about the negative experiences of arbitration in Mexico are Infored and COMMISA. COMMISA will be addressed in a specific section at the end of this chapter since it is about the public policy exception at the international level. For Infored see brief explanation in supra section 4.5.4.2 Mexican legal culture, arbitration, and public policy and supra note 431. This is a case that many local practitioners use to justify their rejection of arbitration under the argument that it is not worth it because the award was annulled by the courts. The final developments of the case did not receive the same attention by the media, therefore the predominant idea is that the arbitral award was annulled. Also see: Francisco González de Cossío, \textit{Mexican Quixote}, supra note 431.
specifically in consolidating as an arbitration friendly jurisdiction, and these opinions show that local actors are committed to this enterprise.

### 5.4.1.1 The Judiciary’s approach to arbitration

The interviewees generally recognized progress made by the Judicial Branch in its approach to arbitration and to support its positive development, particularly at the federal level. They also recognized challenges to overcome regarding the way in which judges handle arbitration cases. They believe the federal judiciary had generally been ‘favorable,’ ‘respectful,’ ‘supportive’ of arbitration; there is ‘good willingness’ and ‘openness’ to it, in addition to the number of judges that had received specific training on the matter. They considered the courts’ decisions had been generally ‘appropriate’ and they recognized that, as in any jurisdiction, there had been some ‘objectionable’ cases.

There was significant emphasis on the attitude from the Judiciary towards arbitration. The interviewees perceived judges to have been adopting a very favorable approach, noticeable in how they decided cases and in their interpretation of arbitral laws. Arbitrator 4 expressed that judges had been improving the quality of their decisions in arbitral cases, particularly their use of the terminology and understanding of arbitration as a more flexible, not so formal procedure, instead of trying to impose onto it the formalities of the courts’ procedures.

Arbitrator 2 explained the Judiciary had moved from a phase in which there was significant lack of knowledge about arbitration, which was probably the major cause for rejection, to a position in which they were generally open to it.

There was recognition, from counsellors and arbitrators, about the ‘unfortunate’ cases, however, most of them considered that they were not cause for alarm. Counsellor 3 suggested that these ‘unfortunate’ cases just needed to be known and studied. He expected that these cases, in particular the COMMISA one, would be clarified by the Supreme Court, and he was of the idea that the courts had generally handled responsibly cases involving the nullity of arbitral awards.

Counsellor 1 had the perception that national awards were examined by national courts with higher standards and more strictly than foreign awards, and there seemed to be more deference toward foreign awards. She added there were still a lot of cases where judges did not seem well informed about how to apply the New York Convention and they needed to be briefed
by counsellors. She had the perception that most judges, by their own initiative, did not get into the further study of the international trends on topics like public policy. Counsellor 2 added that, despite the growth that arbitration had had in Mexico and the fact that judges had been trained and are more supportive of arbitration, the number of cases reaching national courts is not large enough for them to have a consistent practice and it is still an exception for a national judge to receive a case related to arbitration. Arbitrator 1 mentioned that there was an interesting initiative from the president of the High Court of Justice of the Federal District\textsuperscript{562} to designate a specific number of courts to decide arbitration-related cases, to concentrate arbitration cases to a limited number of courts and allow the judges in those courts to specialize on the matter.

Federal Judge 1 accepted that there had been, and continued to be, reluctance from some judges to accept arbitration. Nevertheless, he added, the law mandates them to accept arbitration (where appropriate) and their function should be an auxiliary one. Federal Judge 2, who declared himself a full supporter of arbitration, expressed that arbitral cases are of utmost importance because they affect Mexico’s image to the world; the confidence that judges offer and the seriousness with which they treat these cases are fundamental to that image. For Federal Judge 2, judges should admit the responsibility they have in their social function and be careful in respecting and understanding the characteristics of arbitration and avoiding judicial formalism. Federal Judge 4 also commented that judges should be cautious to avoid imposing judicial forms onto arbitral cases and to not look at arbitral procedures through those lenses. He recalled comments from practitioners who felt frustrated at the hurdles that parties had encountered when requesting the enforcement or nullity of an arbitral award. Once again, formalism came up as one of the fundamental challenges that Mexican courts face when dealing with arbitral cases; however, judges also recognized the efforts from the courts to be more open to embracing the characteristics of arbitral procedures.

\textsuperscript{562} This is the highest court of the Federal District (Mexico City, now), which is the country’s capital. Every state in the country has its own local highest court. The Federal District is going through a political reform which started with its recognition as a federal entity in February 2016. Until its new Constitution is promulgated, the structure of its government continues to be integrated by the Legislative Assembly of Mexico City (legislative power), the Chief of Government of Mexico City (executive power) and the Highest Court of Justice of the Federal District (judicial power).
5.4.1.2 Distinctive local arbitral practices identified by interviewees

There were several comments from the interviewees about local practices related to arbitration that they had noticed; some of them were considered as questionable or not pro-arbitration. Without entering into the analysis of how generalized or prevalent they are, it is worth taking a look at what the interviewees brought attention to:

- Regardless that many nullity cases had not been successful, the first reaction of a practicing lawyer to an unfavorable award is to challenge it with an action to nullify it.
- There are many lawyers that do not know enough about arbitration procedures and they apply judicial procedural forms to an arbitration. When they do not see in arbitration the procedural rigidity they are used to, they consider there is a procedural violation.
- Practicing lawyers attack arbitration arguing that the rules of procedure are not as rigid or pre-established, compared to judicial rules. They transmit these concerns to the parties and due to their lack of knowledge they attack arbitration and generate mistrust in the clients.
- There seems to be a lack of accountability from the lawyers about their mistakes or they do not help their clients take responsibility for their failures within a commercial deal, which promotes the use of actions to nullify awards.
- Counsellor 2 referred to a study made by the National Association of Corporate Lawyers (ANADE) on the use of arbitration in which they found there was a lack of knowledge about arbitration from in-house corporate lawyers. Most of their contracts included a litigation clause, rather than an arbitration one, mainly because that is the way they had always done it. Their reasons not to use arbitration clauses were because they only had litigators or considered that arbitration was too expensive, but nothing related to arbitration’s efficacy. Most of their contracts did not have arbitral clauses, only when the contract was sent to an external law firm, in case of major projects or transactions was such a clause included.
- There is a lot to be done to increase the number of cases that are solved using arbitration, it was still perceived as an ‘exclusive’ group.
- Not that many awards had been nullified by Mexican courts; even though lawyers continue to try, they are not successful. The courts have been careful when deciding these cases.
• It is not well received by the courts when a lawyer starts quoting foreign precedents. It is perceived as if he did not have a solid case under Mexican law therefore he had to resort to foreign cases. Even though practitioners know cases that could be useful, they refrain from using them because it is not a practice that is successful with Mexican courts.
• The lawyers in Mexico have ex parte contact with the judges; they bring them memorandums or information regarding the case. Counsellor 4 recognized this is a severely sanctioned practiced in many jurisdictions, but in Mexico is ‘part of the game,’ and is a practice that is hard to understand. Problems occur when Mexican practitioners try to make this type of contact with arbitrators, which is forbidden and severely sanctioned. This could be considered a vice in the Mexican system.
• Even though the laws consider the possibility of requesting the assistance of national courts for procedural matters, in practice it is rarely used because it causes great delays in the arbitral procedure.
• Although there are many cases in which the parties who chose arbitration accept the award as the final decision and comply with it, there are also practitioners who go into arbitration predisposed to go to the judicial procedure if arbitration does not favor them. This does not support the positive progress of arbitration.
• There are lawyers that clearly distinguish a procedure before national courts from an arbitration, performing successfully in both, following their respective forms and procedures. The problem are those practitioners who take arbitration as a judicial trial and fail to distinguish between them.

The practices described above demonstrate impact from the civil law tradition and its formalistic processes that have been affecting arbitration. This is part of the process of incorporating new legal institutions from abroad, it requires significant time and effort to adapt the minds of practitioners and judges. Several of these practices show that more work is needed to promote arbitration and to transmit its distinctive features, like the flexibility of its procedure.

5.4.2 The experience of local actors with the public policy exception
The interviewees offered a number of important insights on the topic of the public policy exception and the use and interpretation of the concept of public order in Mexico. One important
aspect to trigger the discussion was to touch upon their own experiences with said exception. Given the fact that counsellors and arbitrators have, for the most part, performed both roles at some point in their professional experiences, in this section their contributions are divided into two groups: the practitioners (including counsellors and arbitrators) and the judges.

Practitioners commented that the public policy exception has been used as ‘the exception to go to,’ usually in cases when there is no other exception that can be used to challenge the recognition and enforcement of an arbitral award. One reason identified by the interviewees is the apparent ‘openness’ of this exception versus the other exceptions, which are more specific and clearly delimited. However, Counsellor 1 recognized that the feeling among practitioners at that time was that the courts are not ‘taking it’ anymore, the exception of public policy does not ‘fly’ with them any longer.

Counsellor 3 suggested there were two angles from which to look at the public policy exception. According to one, everything can fit as going against public order; the attorney who is focused on challenging the efficacy of the award would try to make it fit in any possible way, which Counsellor 3 considered is a light and mistaken view of public order. The second angle is to use public order as a real cause to challenge an award, in cases where a matter is non-arbitrable, for example. When he had seen such cases, they had been addressed and solved during the arbitral procedure, especially when they were related to the arbitrability of the matter. Another example from his experience were cases involving public law, like executing an award against the state’s resources. In those cases, there might be some elements of public order to be considered, but, he confirmed, the simple fact that it involves a public entity does not make it a matter of public policy.

Counsellor 2 explained that the public policy exception might be so frequently used because there is not a clear definition of it. She had seen lawyers considering the exceptions to challenge the enforcement of an arbitral award and, given that the rest of the exceptions are so specific and well delimited, they try to fit into public order anything that could help to convince the judges that the award should not be enforced. This counsellor had noticed that having a restrictive view of public order can generate an adverse reaction towards a practitioner because she is perceived as a pro-arbitration counsellor and others consider that for this reason she would not see a case fit into this exception. However, she explained, this should not be understood as being related to being positive about arbitration, but about understanding the restrictive way in
which public order should be studied, how the judges have to interpret it, and that not everything can fit into public order.

Except for the recent COMMISA case (which is addressed in section 5.5 below), practitioners expressed that even though public order is frequently included in the legal action against an arbitral award, they had not seen cases where it had been the ground to deny enforcement. Counsellor 4 even mentioned that the Judiciary has been respectful of arbitration in this sense and the courts have solved appropriately cases of public order. Some interviewees mentioned there were not enough criteria from the courts. Arbitrator 2 saw public order as a ghost, one that is there causing unrest, but, in reality, it is not a problem. Additionally, he said there was not a solid statistical basis available to determine if it was a problem or not, mainly because there are not enough public records to measure it. Therefore, the idea that public order is a problematic exception should be taken with caution.

The judges, in general terms, considered themselves supporters of arbitration and more so when it comes to the enforcement of arbitral awards. They expressed a general commitment to the enforcement of arbitral awards and have a clearly defined perspective that they cannot analyze the content of the award. Federal Judge 1 explained that he reviews whether the formalities of the agreements were followed; the arbitrators decided according to the terms the parties agreed upon; and verifies whether the decision affects Mexican public order or mandatory rules. He had not denied the enforcement of an award on public policy grounds. Federal Judge 3, expressed that he had not had a case in which the public policy exception had been invoked, however he admitted his court had pronounced on the matter of public order in an indirect manner, although not because it was a specific issue raised in a case.

Federal Judge 4 had an experience in which the public policy exception was opposed in a case involving intellectual property rights, which are not arbitrable according to Mexican legislation. The judge’s perception about this case is that the argument regarding violations of public policy went too far. It was evident the party was trying to find something that could fit within that exception, and the only element that the party thought could fit were the intellectual property rights. Federal Judge 4 considered that the decisions from the courts involved were vitiated –the court of origin, the appeal court and the amparo court—and, in the end, the circuit court declared the nullity of the award on public policy grounds. The judge explained that they
do not see this type of case very often; they receive requests for the nullity of the award, but not frequently on public policy grounds.

The experiences of practitioners suggest that the exception of public policy has been somewhat overused to challenge the enforcement or validity of arbitral awards, provoked in part by the lack of clarity of how it should be interpreted. The practitioners’ comments evidence that they are up to date with the theoretical perspectives suggesting that public policy should be interpreted in a restrictive way and are interested in the courts. The judges admit they do not have much experience with the public policy exception due to the small number of cases that have reached their courts on this matter, but their comments show a general disposition to enforce arbitral awards and to be careful in their interpretation of public order. Additionally, this shows that given that there is no specialized court for arbitration cases, the cases that reach national courts are spread among all the federal courts that can decide them. This does not allow for a concentration on local practice and the development of expertise in judges.

5.4.3 The status of public order in Mexico from the perspective of local actors

This section presents the perspective of the interviewees on what they see as the status of public order, it exposes what they saw happening in Mexico at the time of the interview. They generally recognize positive changes in the development of this area. In the following paragraphs it will be demonstrated that while some interviewees suggest that public order is not a matter of concern for local practice, most consider that clarity and guidance from the courts is needed to improve practices around the implementation of public order.

Counsellor 1 recognized that the public policy exception was a matter of concern when the first amendments were made to the Commercial Code in 1993 to incorporate the UNCITRAL Model Law. However, most of the concern was due to a lack of understanding or fear of it being too wide a concept. There was unease about the courts framing an interpretation of the arbitrator or any procedural issue, as a matter of public order. This same counsellor recognized the movement towards narrowing the concept of public order to a point where such matters are only those that ‘burn’ the arbitrators’ or the judges’ eyes (i.e. are obvious). From her point of view, there is enough judicial criteria and doctrine which clarifies that a violation of public order must be a violation of the fundamental principles of law such as legal security, due process, the right to be heard, equal treatment of the parties, justice and morals. Arbitrator 3 agreed there are
clearer decisions, and that although more clarity was still needed, the courts were on the right path.

Three interviewees considered that public order was not a matter of concern at that point in Mexico. Counsellor 4 would not consider it one of the top ten priority issues to be addressed for arbitration practice and Arbitrator 2 considered it had not been a determining factor. Arbitrator 1 recognized that Mexico was considered a good jurisdiction for arbitration and the matter of public order was in good standing; it had not been a determining factor, even if it had been affected by those unfortunate cases. He did not consider it necessary to have something more specific to clarify the concept of public order and mentioned the courts were aware of the impact that the annulment of an award could have on Mexico’s risk indicator. Counsellor 4 added that while it would be good to have a more delineated concept, it would happen with time, from the continuous practice (as more cases come before the courts) and with continued training for judges.

One point that most of the interviewees agreed on is that there was no Mexican legislation or judicial decision that provided guidance on how to understand public order, nor its elements. Counsellor 1 suggested, for example, that cases where state enterprises were involved were particularly delicate as the line between what is and what is not public order is very thin. Two interviewees explained that the lack of definition combined with an inadequate use of the principle could make for an open door for abuse; it could be used as the ‘bait’ or the opportunity a lawyer needed to challenge an award. Counsellor 2 suggested that the lack of a clear concept, combined with the legal culture of exhausting all possible resources made for a less ideal combination and thus led to the abuse of nullifying procedures. He agreed with those claiming public order’s dynamic nature as the reason for not having a definition, but considered that the basis of the concept are the fundamental principles of morals and justice of the Mexican system.

Arbitrator 3 affirmed that public order causes confusion - “public order sometimes generates public dis-order” - but regardless of its abstract nature and the diverse opinions, it is fundamental because it has a function. For him the confusion exists because the law uses the same words to address different things. He identified three conceptions of public order: reference to imperative norms; the enforcement of foreign judgments and arbitral awards; and public order for the purposes of amparo. These distinctions are similar to the ones explained before in Section 5.1. when examining public order in the legal framework. Additionally, this connects with what
was showed in the court precedents section about the diverse ways in which the words ‘public order’ are used by the courts, in addition to the different words used to refer to public order. All of these elements show there is confusion caused by the use of multiple terms.

Judges admit they would like to have clearer criteria for interpreting public order. In this sense, Federal Judge 1 acknowledged that the judiciary had a restricted role in arbitration as mandated by law, however a strong limitation on the enforcement of arbitral awards was the lack of a definition of public order because it was left to each judge to interpret. Binding court precedents and the Supreme Court had not been able to give a unified criterion and leaving it to each judge to decide had damaged not only the arbitral procedure, according to this judge, but also national law. The law had approached the issue by giving examples and he referred to Article 124 (now Article 129) of the Amparo Law.563 Federal Judge 4 agreed the problem was that neither a law, nor the Constitution or the Supreme Court had established specific criteria on what is public order; it is a very subjective matter and for this reason the judges had had to delineate it little by little. However, he acknowledged that it was evolving in a positive way.

As an example of the diverse perspectives around the topic it is worth noting that while Arbitrator 3 tried to give these three different conceptions of public order as mentioned above and even considered the amparo-related concept as a separate topic from arbitration, Federal Judge 1 offered, as the immediate reference to public order, the situations contained in the Amparo Law. One way to understand this difference in approach is that one of the fundamental laws for federal judges is the Amparo Law, due to the amount of cases they decide on this matter, therefore this is their direct frame of reference. And since practitioners are focused on arbitration they see the importance of these distinctions within a larger context. Thus, it is not surprising to see a more narrow perspective from an arbitration practitioner versus a broader perspective of a judge.

Interviewees commented on what content they had noticed that Mexican courts were giving to public order. Counsellor 1 mentioned the courts seemed to be using two avenues, a procedural public order and a substantive public order, while Counsellor 3 referred to the lack of a judicial decision to provide guidance. Counsellor 4 noted there had been some arguments in judicial decisions which might not be very profound or elaborate but they had been correct and

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563 Refer to supra section 5.1.4 Deny the suspension of a contested act in amparo trials.
that is what counted for him. Arbitrator 4 noted that, from his experience, judges considered
public order as the national public order and this was their only point of reference, referring to
the fact that they do not consider the concepts developed from international practice and
literature. Federal Judge 1 agreed that due to the lack of an official definition every judge, based
on his own criteria, could deny the enforcement of an award using the argument of public order
but this could provoke insecurity at the international level on the enforcement of arbitral awards
in Mexico. This shows an awareness of possible effects of their decisions for arbitration and
could be considered a positive sign because they see their activities connected to a broader
context.

All the interviewees offered examples of what they considered matters of public order in
Mexico, such as:

- Equal treatment of the parties in a procedure.
- Legal certainty.
- Due process, procedural guarantees, the jurisdictional contentious process.
- The right to be heard.
- At the international level, topics of justice, morality, and the generally accepted
principles contained in international conventions.
- No discrimination, respect to people, and the respect to the procedural guarantees.
- To not affect the rights of third parties.
- Consumer rights.
- Arbitrability of the matter.
- Key issues of public law, like those related to the use of the state resources.
- The solvency or insolvency qualification of an individual or a company.
- The sovereign power to separate the contractor in contracts involving public entities.
- Issues that are res judicata.
- Any incongruence in the application of the law in the award.
- Ownership of oil deposits. All oil matters ae of public order and thus not arbitrable.
- The cases listed in Article 129 of the Amparo Law.
- The fundamental rights of a person, such as the right to be heard, party equality, due
process.
• The fundamental institutions of the state, the fundamental values of a society in a
determine time and place.
• Topics like democracy, liberty, inalienable rights, matters of human dignity, and matters
reserved to the state.
• Matters of due process on one side and substantive matters, like national security,
individual security, and public interest on the other.

These topics align in most part with topics that were found in the court precedents. While
some of these refer to general matters, like fundamental values, others are more specific, like
insolvency qualifications. In general terms, there is agreement of what fits within public order; it
can be inferred from this list and from the court precedents. However, this also evidences that for
a concept that carries so much weight, more clarity would be useful and welcomed.

There were also references to practices that the interviewees had noticed on the
interpretation and use of public order that caused concern. For example, Counsellor 2 explained
that when litigators notice that the other exceptions to challenge the enforcement of an arbitral
award are specific, they try to fit into the public policy exception anything they consider could
convince the judge to deny the enforcement, breaking off from what public order really is. She
had seen attempts from lawyers to connect the public policy exception with the fact that the legal
reasoning in the award did not convince them or there was a lack of consistency in the legal
reasoning which, she emphasized, is not public order. Thus, she suggested there was a
combination of two issues: the idea of using anything that is available, with the lack of a clear
concept of public order. Those litigators use the public policy exception to attempt to force the
judges to review the content of the award. Arbitrator 4 agreed there was a tendency to request the
nullity of an unfavorable arbitral award and it was frequent practice to use public order for that
purpose since it was one of the most useful tools available.

From these opinions it can be observed that some consider the topic of public order is not
a problem – it is evolving properly in courts decisions and it is a matter of time until a more
detailed concept is expressed. Nevertheless, most interviewees showed there are important
reasons to attend more carefully to this topic, mainly in order to enhance arbitration practice in
Mexico by improving certainty and predictability of the legal system. There are guiding criteria
from the courts but they are spread over many decisions and interpretations accumulated over
time. Establishing something more specific - improving the interpretation of public order - is important: practitioners expect criteria aligned with international practices of interpreting public order in a strict way, while judges, with very few exceptions, are not paying much attention to international developments (although judges seem to be paying more attention to international developments as some of them are aware that their decisions in arbitration cases could have an effect at the international level).

### 5.4.4 The connection between national and transnational levels

The exception of public policy is contained in an international convention, it is a rule of international law, and, according to the original intention of the drafters, it was created as a protection for national legal systems, a ‘safety valve.’

One of the objectives for the interviews, in order to better understand the perspective of local actors, was to explicitly discuss with the interviewees’ perspectives on public policy from other jurisdictions, for example the French approach of breaking down public policy into different levels (national, international, and truly international), and internationally suggested standards to public policy, as developed in the ILA Resolution on Public Policy.

This section presents the ways in which local actors see these concepts or approaches within the context of the Mexican legal system, in particular whether they consider them to be factors influencing the decisions of the courts, or if it would be desirable to (further) incorporate them.

Regarding the specific distinction between national and international public order, there was a different perspective from practitioners, i.e. counsellors and arbitrators, and from federal judges. Practitioners were more familiar with the French approach of differentiating between national public order, French international public order, and international public order. Counsellor 1 considered that if one examined closely the judicial decisions, one could find that there are distinctions between national and international public order, because she considered that judges were stricter when a case involved a national award than with an international award. However, the rest of the practitioners, while they recognized and were familiar with these distinctions between national and international public order, they also agreed that judges in

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564 Refer to supra section 3.3 The origins of the public policy exception.
565 See supra section 3.4 Challenges in the implementation of the public policy exception, particularly the text related to footnotes 271 et seq.
566 See supra section 3.6 Recommendations from the ILA Resolution to promote a uniform interpretation.
Mexican courts do not apply them. Some had observed this distinction being made in cases they had participated involving foreign parties, but not in Mexico. While some of them considered that these distinctions would be useful for analytical purposes, others suggested it would be problematic to try to incorporate this approach into Mexican legislation because it would add an extra layer of complexity to the topic of public order, or it would create a problem when public order is not considered to be a problem.

On the judges’ side, it was observable that their answers on the distinction between national and international public order were highly informed by the recent (at the time of interview) amendment to the Mexican Constitution relating to human rights, which expanded the protection of human rights from the guarantees in the Constitution to, in addition, the rights contained in the international treaties that Mexico has ratified. Federal judges looked at this topic through the lens of the Human Rights Amendment and not simply in terms of the distinction made in the French doctrine of public order. For example, Federal Judge 1 suggested that before the amendment public order was national, but after the amendment judges needed to consider an international public order. However, this was only for matters related to human rights; if it was about commercial matters, then it had to continue being a national public order. Federal Judge 2 emphasized there should not be a distinction between national and international public order, because international law had been incorporated into national law. Therefore judges should use their interpretive tools within the Mexican constitutional framework and, if and only if the constitutional interpretation is not enough, they should use the principle of conventionality, although they cannot go straight to the principle of conventionality to decide a case.

Federal Judge 3 considered these two public orders, national and international, were clearly distinguishable, but in a theoretical way. However, he also made reference to the principle of constitutional supremacy, a fundamental principle in the Mexican legal system.

567 See supra section 4.1 Court precedents system and amparo.
568 The principle of conventionality was established by the Inter-American Court of Human Rights and incorporated to the Mexican legal system with the Human Rights Amendment from 2011. According to it, national judges must assess the compatibility of national norms with the Inter-American Convention on Human Rights, its additional protocols, and the precedents from the Inter-American Court of Human Rights. See Eduardo Ferrer Mac-Gregor, “Interpretación Conforme y Control Difuso de Convencionalidad. El nuevo paradigma para el juez mexicano” (Conforming interpretation and diffuse control of conventionality: the new paradigm for the Mexican judge) (2011) 9:2 Estudios Constitucionales 531 at 532.
When international treaties are ratified, their concepts are incorporated into national law, thus, the reality for him was that those rights with an international source were already part of the national legal system, it is only that their source is international. Finally, the Federal Judge 4 was of the opinion that due to the human rights amendment, judges needed to consider and be aware what was happening in other jurisdictions. They needed to be careful not to incorporate views that did not adjust to the Mexican reality. He saw a path in which the concept of public order would be less ‘localist,’ without losing basic characteristics, and one in which it could be possible to reach international standards.

The above paragraphs show that in matters involving distinctions between national and international public orders, practitioners and judges, while being aware of an international dimension, look at it from different points of view. This suggests that trying to add the notion of levels of public policy would add unnecessary complexity to the topic of public order. Their answers also show that it would be necessary to create a common perspective before moving onto creating guidelines on how to understand levels of public order for the purpose of the public policy exception.

The interviewees identified influences in the Mexican legal system from Europe because of the civil law shared background. They also recognized significant influences coming from the common law, in particular from the United States. Generally, however, there is not a perception of the imposition of standards from abroad. Some interviewees commented that Mexico has actively participated in adopting standards, laws, conventions, and legal institutions to participate more effectively in the international arena. For example, Arbitrator 2 was certain the distinctive characteristic of the Mexican legal system was openness to conventionality and change derived mainly from the Human Rights Amendment mentioned before. Only Federal Judge 1 mentioned that, even if beneficial, arbitration had been an imposition and the reforms to the Commercial Code on arbitration were result of an international drive. Federal Judge 4 warned about bringing ideas from other legal systems and adapting them in Mexico because of problems caused in the past. Therefore, he suggested all those ideas should be treated carefully, legal reforms should be carried out with caution and adapted to the Mexican ‘idiosyncrasy and policies.’ In this sense, Arbitrator 4 also emphasized that to adopt foreign norms, it was necessary to assess their viability for the Mexican legal system and use documents, like the ILA Resolution, as analytical tools but seen through the lens of their governing legal system.
During the interviews, attention was given to whether Mexican judges considered international standards when making their decisions. This was framed mainly around commercial topics since they are closely linked to arbitration. Seven of the full set of interviewees expressed that Mexican judges did not explicitly use international standards, i.e. international treaties, conventions, resolutions, or scholarship. Counsellor 3 suggested it would be healthy and methodologically sound to use international standards and instruments because once the judges had reviewed the origins of a norm, and reviewed how it had been interpreted by national and international scholars and courts, this would assist the judge in forming his/her own criteria and decide from a more informed perspective.

Practitioners (counsellors and arbitrators) mentioned they had not seen Mexican courts using international standards, but that they mainly stay within national law and its principles. This was addressed in Chapter 4 when examining the Mexican legal context of private international law in that there is an ingrained idea that all the elements that judges need to decide cases are contained in national law because international law has been incorporated. In connection with this, Arbitrator 4 mentioned he could observe two ‘worlds’ within the courts. One with up-to-date judges who are interested and consider international sources. The other in which judges do not know them, understand them, or are not even interested in learning about them. But he recognized there was some positive progress done in this regard. Federal Judge 4 also recognized this was changing after the Human Rights Amendment, key to changing the judges’ perspective because now they see it as their obligation to consider international treaties when studying a case.

Now that the law requires judges to ‘harmonize’, according to the principle of conventionality as established in the Human Rights Amendment,569 there were other problems that a couple of interviewees brought up that are worth mentioning. Federal Judge 1 foresaw there was going to be a difficulty because the harmonization between the internal and external orders would depend on the interpretation of each judge. For this reason, he emphasized they needed to be cautious and should not stop applying national law for the application of international law. It was important for every judge, he added, to apply this principle of conventionality within their sphere of competence because international law requires them to

569 See supra note 568.
investigate within their competence. The path for them to follow was to go to their general laws, then to the Constitution and, as a last resort, to the principle of conventionality. Additionally, Federal Judge 2 admitted Mexico needed to be aware it is an element in an ‘international concert’ and to be taken seriously by other countries, Mexico needed to respond to such responsibility. Arbitration, for him, was a way to act upon such responsibility but remaining within their core principles, such as prudence and justice.

While there is a general support for following international trends in order to maintain international competitiveness, there was some concern about importing legal forms without proper consideration of the local legal system. One example given was the incorporation of ‘class action,’ which was added to legislation but without clear guidance of its application when it is a legal principle that is not known to the Mexican legal system.

The interviewees, as local actors, demonstrated an increased awareness of international standards and diverse approaches to public policy at the international level. However, the way that practitioners made sense of them was quite different from the judges’ point of view. Among all the interviewees there was a general feeling of openness and progress towards embracing international standards. At the same time, the judges were wary of not ‘abandoning’ themselves to international trends. The Human Rights Amendment was a significant topic: on one side there was hope that it would encourage the courts to incorporate, or at least consider, international sources more directly. On the other side, there was a concern about keeping the priority of Mexican principles and values without using the principle of conventionality as a way to drop fundamental principles of the local legal system.

5.4.5 Toward the future of public order in Mexico

In order to look into the future of public order in Mexico, it is useful to keep in mind the importance of Mexico as an arbitral jurisdiction. Like in the local literature, the interviewees recognized Mexico as an arbitration friendly jurisdiction that has been positioned as a relevant commercial actor in America due to its geographic location and its participation in international trade. Some interviewees also mentioned how Mexico had been recognized by the ICC as the second place selected for arbitration in America and within the top ten in the world. For these reasons and the others that have been stated in previous sections, it reinforces the importance of addressing specific topics such as public order in order to continue improving as an arbitral
The following paragraphs present the reflections from the interviewees on the ways in which they suggest moving forward in addressing the concept of public order within the Mexican legal system and how this could improve arbitral and judicial practice in Mexico.

The interviewees acknowledged and celebrated the growing interest in arbitration from the business community. This shows a support for the culture of using arbitration that needs to continue permeating and gaining trust. At the same time, they recognized there is skepticism about arbitration’s effectiveness to solve disputes on certain matters like the administrative rescission that need to be addressed at the judicial level and to make clear when public authority will not allow for arbitration. This is a concern because this impacts Mexico’s position as a recipient of foreign investment. They still saw the need to improve the promotion of arbitration among practitioners to counter the idea that arbitration is not useful because it is ‘juris-problematic’ to execute an award and eventually the cases end in the courts. They identified some other challenges to be addressed such as the practice of the immediate appeal to the courts that one of them associated with being an ‘immature society;’ the delaying or hindering of the solution of cases using ‘public order’ in broad terms; and the negative perception of the Mexican justice system as slow and corrupt.

The importance of establishing an interpretive criterion on public order from the Supreme Court was one specific aspect addressed with the interviewees because, as a preliminary thought, I considered this could be a solution. Three practitioners suggested it was necessary to have a judicial interpretation of public order and that it would be useful to update the definition of public order through a binding court precedent. However, they advised caution. Making the concept into a fixed definition or list would not be appropriate because this type of concept evolves and changes over time. Nevertheless, it would be beneficial to have clearer criterion, whether separating public order for local and arbitration-related purposes or not.

Federal Judge 1 was of the opinion it was the duty of the legislators to amend the law and to establish the way in which public order must be understood. It would be useful if they set out a range of acts that violate public order, which would offer a little more security of understanding at the international level and attract foreign investment. At the same time, he recognized that public order needs to be approached on a case by case basis and providing a generic definition is an impossible, and undesirable, task. It needs to give space for the interpretation of the judge when analyzing each case.
Two counsellors and an arbitrator emphatically suggested that public order should not be defined in the law because it would make it rigid when it needs to adapt to the circumstances the society is going through at any point in time. Public order needed to be evaluated in each specific case and should not be intended to establish a universal definition given the richness, complexity, and dynamism this legal principle carries with it. Arbitrator 2 suggested a definition would make actors focus on interpretation of the law rather than on solving the problem at hand. He agreed arbitration needed to give certainty, but if they started adding extensive rules or requirements to meet a criterion, then it would act against the essence of arbitration as flexible and focused on the resolution of a problem.

The interviewees addressed the effects of having a more specific interpretive criterion set in a binding court precedent from the Supreme Court about public order. They suggested that an interpretive criterion would provide legal security if it was made compatible with the international idea of public order. It would give guidelines to follow for judges and counsellors alike. These guidelines would need to be established in general principles whose content could change. Therefore, it was suggested that providing examples would help to clarify its meaning and to minimize the abuse of the exception of public policy that is meant to be applied in a restrictive way. While it was considered useful to have an interpretive criterion, it was also suggested that it will evolve as the courts decide more cases and set precedents; it cannot be forced academically, it will emerge from practice. One interviewee suggested it would be useful if the Supreme Court established its criterion in a binding court precedent because it would make it mandatory, but it needed to be ampler and more explicit so the judges would know how to apply it. Additionally, it was suggested this criterion needs to emerge from the new constitutional context as a result of the Human Rights Amendment from 2011.

It can be concluded that interviewees generally see as positive the definition of a mandatory interpretive criterion from the Supreme Court, with several cautionary notes about

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570 When the interviewee referred to an ‘ampler’ criterion, he referred to make it more inclusive of the international approach to it, not to make it ampler in the sense of including more areas to be considered as of public order.

571 For this purpose, Federal Judge 4 mentioned it was necessary to clarify whether the approach from the judiciary would be one of a ‘legality block’ or a ‘constitutional block’ because that would determine how the international treaties would be considered (as part of the supreme law with the Constitution) and would have an effect onto public order and the protection of fundamental rights. For more on the constitutional block approach see: Graciela Rodríguez Manzo, et al, eds, Bloque de constitucionalidad en México (Constitutional block in Mexico) (Mexico: Comisión de Derechos Humanos del Distrito Federal, Suprema Corte de Justicia de la Nación & Oficina en México del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, 2013) at 17 et seq.
making sure the criterion remains open to adaptation given changes in society and the legal system.

With their professional experience and knowledge on arbitration and on the solution of legal disputes, the interviewees suggested how public order should be understood, applied, and conceptualized for the Mexican context. There was acknowledgment of the work that had been done at the courts level despite the challenges they noticed. As it has been observed in previous sections, counsellors and arbitrators concurred on many opinions while the judges, without having a completely divergent idea, they had a slightly narrower perspective because of their focused practice and knowledge. Therefore, their suggestions are presented in the following paragraphs following that distinction.

Counsellors and arbitrators in general suggest and agree that public order should be stated and interpreted in a restrictive way. The grounds for violations of public order needed to be limited and stated in more precise terms in a Mexican binding court precedent, without making it a restricted concept and being careful not to fall into ‘dogma.’ Definitions were considered useful as analytical tools but not if they would create a dogmatic approach. They affirm a universal definition cannot be achieved given the richness, complexity, and dynamism of the concept. It was important for them to recognize that public order is a fundamental institution in a legal system and its ‘beauty’ lies in the need to apply it in each case.

Practitioners saw it as still necessary more training for judges so they would understand better the specific characteristics of arbitration, its purposes, and the type of disputes that are solved through it. For them, judges should not only consider the national but also the international public order and have a wider view within this restrictive concept.

There was a mix of opinions about stating what is public order in a list of cases or situations. Some considered that the content of a clarified criterion cannot be cases with examples because that could leave gaps. On the contrary, others suggested that by using cases and providing examples it would give more clarity without making it a fixed definition. There was consensus that it should continue to be analyzed on a case by case basis.

A clearer criterion was desirable, however some interviewees considered that it needed to be stated in a document to limit the attempts to the promote public policy exception for causes that were not adequate. Others, like Counsellor 4, considered such a concept was emerging in practice since the courts had been solving cases in the right way and this was a process that could
not be forced, it needed time to evolve. One practitioner mentioned that having a clearer criterion is not the only feature that made Mexico an arbitration friendly jurisdiction. Arbitrator 4 suggested that to have a clarified criterion would eliminate several problems and would cleanse the development of arbitration. He explained it was necessary to update the definition as it is an evolutionary concept but it was necessary to decide whether the concepts of national and international public order would be separated or whether the same concept across all areas would continue to be used. If the first way was chosen, one of the interviewees suggested using the ILA Resolution as the basis for the analysis and as the starting point to then move on to give it the ‘Mexican form.’

Practitioners concurred public order should be understood as the most important values and principles of the legal system. There should be an evaluation of the most basic principles of equality, equity, and justice of the national legal order as well as being careful there was not an attack on the economic and financial structure of the country.

Arbitrator 3 was very thorough in his opinion as he has been interested in this topic for some time. His suggestion on how to approach public order is a very useful perspective for this study. He explained that the word ‘public’ could be what the Italians call a ‘falso amico’ (a false friend), something that apparently facilitates but, in reality, complicates things. It is a ‘falso amico’ because when a matter is public it does not always activate the public policy exception for the effects of nullifying or denying the execution of an award, they are different topics. For him, public order also had a specific and important international function; it cannot be properly seen at the national level, you need to observe it from above, at the international level, to see what it is for and why it must exist. Each state has its own public order and the public order that is sensible for that state should be respected at the international level. If one state does not respect it by using the argument that it is done differently in a certain place, then that state would not be able to trade or have relations with others because it is not acknowledging that they are different. For Arbitrator 3 public order should be an ‘open textured norm’ that allows you to set foundations where things are different. He suggests this is done by acknowledging states are different and at the international level is designed an open text that is nurtured by the judiciary of every country. In this way, the international infrastructure gears up with the local infrastructure. Arbitrator 3 affirmed that public order is a necessary link in the international machinery comprised by the arbitration system and the system for the execution of arbitral awards. Public
order is not the same as imperative norms and the problem arises because the law uses the same words for different things. He acknowledged that the decisions from the judges are getting clearer but they needed to be very clear on how they, as Mexicans, will understand public order. He argued it is necessary to define it because being an open texture norm does not mean that anything fits in there. Arbitrator 3 suggested that they (as Mexicans) ‘need to be clear on what they are not clear,’ and need to make the notion of public order narrower and more elevated. Narrower in the sense of defining what they mean and more elevated in the sense of making it more strict. In his opinion, they needed to add a strict standard to it, add some strong adjectives. He referred to cases like Thalés in Europe which said a violation to public policy would need ‘to burn the judge’s eyes’ or the concept of ‘unconscionable’ that is used in common law jurisdictions, to make the point that matters of public order needed to be something serious. He agreed it would be positive if the Supreme Court would offer a clear directive following these terms.

Federal judges mainly concurred on the idea that public order is a concept that cannot be defined, should remain established as situations in law and be analyzed on a case by case basis, as had been done so far. However, they recognized they would benefit from having a clearer criterion on how they should apply it for arbitration purposes. They also agreed that not everything fits in public order, it is an exception that must be rarely used, and should be administered carefully. They suggested it would be healthy for the legislators to make an effort to establish which acts violate public order. This would offer a little more security at the international level and make Mexico more attractive for foreign investment.

Finally, the depth of the judges’ comments offered important insights from the Judiciary’s point of view.

Federal Judge 1, using a criterion established by the Supreme Court in a binding court precedent from 1997, explained he conceptualized public order very carefully as any act or


573 He referred to the criterion contained in the BCP Thesis Reg. Num. 199549 [J] I.3o.A. J/16, 9th Epoch, Semanario Judicial de la Federación y su Gaceta, Tomo V, January 1997, p. 383 (Database no. 121) which indicates that “public order is not a notion that can be constructed from the formal declaration contained in a law, on the contrary, it has been a constant criterion from the Supreme Court of Justice that it is up to the judge to examine its presence in each case, therefore, it is an indeterminate legal concept impossible to be defined and its content can only be delineated by the circumstances of mode, time and place that prevail at the time of the valuation.”
norm that contravenes the customs or affects the human being, as it is established in Article 124 of the Amparo Law (now Articles 128 and 129 of said law). When the act affects the collective in its morality, customs, or facts it is a public order matter. Public order is very specific because one would need to look at every nation, state, or municipality. For him public interest should refer to society; the interests of the society regarding its morality and customs is what they should understand for public order. The concept of society and its customs and habits change and if they change then public order also changes. For these reasons, it is studied on a case by case basis and should be considered from a collective point of view of what is important for the people.

For Federal Judge 2, violations to public order referred to violations of the fundamental principles contained in their Constitution and included other principles of international law that would otherwise violate the international public order, therefore they should also be guarded and protected, for example like pacta sunt servanda. Public order needs to be very specific and concrete in each case. The judges must start from the premise that the arbitral award does not violate public order and the party must prove that such violation exists. He identified as a challenge the fact that the analysis of a violation to public order necessarily implied the review of the award even if superficially and very carefully, but in these cases judges needed to get into the arbitral matter.

Federal Judge 3 believed public order is a limitation to party autonomy. It is a value that accompanies the institutions, or the society, and the judges must have the sensibility to determine when they are in front of such a valuable institution and important prohibition. It should be a detailed prohibition; it must be punctilious. He mentioned there is a binding precedent from the Supreme Court that had been more a recommendation rather than a definition because it gave the judges the responsibility of determining public order in each case. For Federal Judge 3, the Supreme Court, knowing the nature of this concept, had given elements, but not a full definition, to help the judges determine this concept. It had been a partial, descriptive definition so that each judge could establish in each case if there was a violation to public order. According to this precedent, he explained there is public order when the structure of the state, fundamental

574 He used pointillism as a metaphor introduced to him by a Mexican author who suggests that the concept of public order should move from impressionism to pointillism to become a more detailed concept. See, González de Cossío, Pointillism, supra note 265.
institutions of the state, and fundamental values of the society in a determined time and place are involved. Additionally, for Federal Judge 3, public order is defined by exclusion, following the legality principle according to which what is not prohibited by law is allowed. Therefore, if the law establishes the matters that are not arbitrable and those are per the fundamental values in the Constitution, then if the matter does not fall within this prohibition there would not be a violation of public order.

Finally, Federal Judge 4 affirmed the Human Rights Amendment must necessarily have an impact on the concept of public order and expand it through consideration of the international treaties. The amendment should broaden their perspective to ensure that public order was respected. For him public order related to the respect for fundamental rights and involved taking care of the balance between the parties and verifying that the matter was available for the parties to arbitrate. He saw that a broader concept of public order was a tool for the judges that was more adjusted to reality, but they (judges) needed to be careful not to go to extreme positions. They, as judges, needed to ensure that public order is complied with as per the standards established not only in the Constitution but in international treaties. Federal Judge 4 considered that they would adopt this perspective when they understood that public order is related to respecting fundamental rights.

Additionally, Federal Judge 4 suggested that public order needed to fit like a perfect gear in a political and legal system and they should try to strive in every case for effective justice and not only deciding according to the law, which can result in decisions that are completely inoperative given the rights at stake. He suggested that judges in Mexico needed to understand arbitration better to avoid approaching it from the perspective of the jurisdictional formalities. To be able to construct an adequate concept of public order, an adequate arbitral procedure, and for the judges to understand it and decide these cases adequately, they needed to understand the national idiosyncrasy but framed within the international standard of respect for human rights and try to make it functional and efficient for those individuals that approach the courts.

For Federal Judge 4, the fundamental elements of public order should be social factors that are not only related to the existence of fundamental rights but to how they are applied; whether the population have effective access to enforce them; and if the people have consciousness that those rights exist and are at their disposal. For him it was not enough to be mandated in the law to broaden the protection of fundamental rights and to have an adequate
concept of public order. It was necessary to understand public order in its context so the legal concept was not misinterpreted as had happened with other concepts. Overall, he was of the idea that this was a problem of equilibrium, and public order needed to be based on the balance of all the sectors of the population.

From all the detailed and careful considerations from practitioners and judges, it can be observed that they see enough elements within the Mexican legal framework to define more clearly a guideline on how to apply public order. Interviewees are convinced that arbitration should be strengthened and improving the interpretation of public order would contribute to that, even if it is not a pressing problem in the broader context of arbitration practice. Their suggestions show the importance of recognizing public order as a fundamental element of the legal system; of using more clear terms and of making detailed distinctions when using terminology; and that public order should be strictly and exceptionally interpreted and applied. Their observations reveal that the guideline should not be limited to specific cases but open enough to keep it adjustable to changes over time. As well, a guideline should consider the international developments in this topic while staying grounded in the fundamental principles of the country.

5.5 COMMISA Case

The COMMISA Case, with its complex procedural chronology that involves arbitration and legal procedures before Mexican and US courts, exemplifies the tension between globalized standards on the public policy exception and local legal arrangements. The analysis that follows evidences the problematic and confusing approach of Mexican courts to public order, and how the Mexican legal framework on the topic required renewed attention to keep Mexico’s competitiveness as an arbitral jurisdiction. The situation is further compounded with the contrasting decision from US courts on the recognition and enforcement of the award. The case brought the discussion about the Mexican approach to the public policy exception to the forefront in the local and international contexts and allowed for analysis on how to offer certainty within the Mexican legal framework at a time when global legal standards put pressure on local legal systems.
Corporación Mexicana de Mantenimiento Integral S. de R.L. de C.V. (COMMISA), a Mexican subsidiary of KBR, Inc. from the United States and PEMEX- Exploración y Producción (PEP), a subsidiary of Petróleos Mexicanos (PEMEX), the Mexican state-owned petroleum company, entered into contracts in 1997 and 2003 for the construction of two offshore natural gas platforms in the Gulf of Mexico. The contracts provided for arbitration in Mexico City of any disputes that might arise, using Mexican law as the applicable law, and the parties agreed to use the Conciliation and Arbitration Rules of the International Chamber of Commerce (ICC). PEMEX’s enabling statute allowed it to engage in arbitration agreements, consistent with principles of the North American Free Trade Agreement (NAFTA). The contracts also included a provision allowing PEMEX to administratively rescind the contracts if COMMISA failed to comply with certain obligations. Table 5-2 shows the chronology of the case.

The administrative rescission in Mexico exists in the context of administrative contracts which are contracts involving entities of the public administration that can be government agencies or state-owned companies, like PEMEX. The elements that characterize an administrative contract are: one of the parties in the contract is the public administration, these contracts are subject to a specific legal regime, and there is a public interest involved in these contracts.575 The administrative rescission is the early termination of an administrative contract for the breach of obligations from the private party (the contractor). The administrative rescission in Mexico is considered an administrative act therefore it can be challenged through a federal administrative procedure before the Federal Administrative Court (Tribunal Federal de Justicia Administrativa). Pursuant to Article 13 of the current Federal Law of Administrative Proceedings, the plaintiff must file its lawsuit within 30 days after being notified of the administrative act.576

576 In 2006, this period was reduced from 10 years to 45 days and in 2016 it was reduced again to the current period of 30 days. Article 13 of the Federal Law of Administrative Proceedings (Ley Federal de Procedimiento Contencioso Administrativo), published in the Federal Official Gazette 1 December 2005 (entered into force 1 January 2006). Before 2005, the administrative procedure was legislated in Title VI of the Federal Tax Code.
Table 5-2 Chronology of COMMISA case

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
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<tbody>
<tr>
<td>2003</td>
<td>The parties reached a conciliation agreement, but problems continued.</td>
</tr>
<tr>
<td>Mar 2004</td>
<td>PEP notified COMMISA that it would administratively rescind the contract.</td>
</tr>
<tr>
<td>Dec 2004</td>
<td>Second conciliation failed and PEP administratively rescinded the contract.</td>
</tr>
<tr>
<td>Dec 2004</td>
<td>COMMISA challenged the constitutionality of administrative rescission. The amparo was dismissed on the merits.</td>
</tr>
<tr>
<td>Dec 2004</td>
<td>COMMISA commenced arbitration before the ICC. PEP challenged jurisdiction but it was affirmed.</td>
</tr>
<tr>
<td>Jun 2006</td>
<td>Second Chamber of the Mexican Supreme Court confirmed the constitutionality of the administrative rescission in this case.</td>
</tr>
<tr>
<td>2006</td>
<td>Amendments to Mexican laws reduced the limitation period to challenge an administrative rescission from 10 years to 45 days.</td>
</tr>
<tr>
<td>May 2009</td>
<td>Amendments to Mexican laws established the administrative rescission as a non-arbitrable matter.</td>
</tr>
<tr>
<td>Dec 2009</td>
<td>Arbitral award in favor of COMMISA for +US$300md.</td>
</tr>
<tr>
<td>Jan 2010</td>
<td>COMMISA requested recognition and enforcement of the arbitral award to the District Court of the Southern District of New York (SDNY).</td>
</tr>
<tr>
<td>Jun 2010</td>
<td>PEP started annulment proceedings in Mexican courts. The 5th District Court for Civil Matters in Mexico City denied the annulment.</td>
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<tr>
<td></td>
<td>PEP started an indirect amparo against this decision</td>
</tr>
<tr>
<td>Oct 2010</td>
<td>The 10th District Court for Civil Matters in Mexico City confirmed again the validity of the award in the indirect amparo.</td>
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<tr>
<td></td>
<td>PEP appealed this decision in an amparo review.</td>
</tr>
<tr>
<td>Nov 2010</td>
<td>The SDNY District Court recognized the award and ordered PEP to pay.</td>
</tr>
<tr>
<td>Oct 2011</td>
<td>The 11th Collegiate Circuit Court decided on the amparo review, it vacated the ruling from the 10th District Court and ordered it to nullify the award. PEP used this decision to appeal the decision from the SDNY District Court.</td>
</tr>
<tr>
<td>Feb 2012</td>
<td>The US Court of Appeal of the Second Circuit vacated the ruling and remanded the matter to the SDNY District Court for reconsideration in light of the annulment.</td>
</tr>
<tr>
<td>Aug 2013</td>
<td>The SDNY District Court confirmed the arbitral award in favor of COMMISA. PEP appealed this decision.</td>
</tr>
<tr>
<td>Aug 2016</td>
<td>The US Court of Appeals for the Second Circuit enforced the arbitral award in favor of COMMISA</td>
</tr>
<tr>
<td>Apr 2017</td>
<td>KBR announced it had reached a settlement with PEP, ending all litigation in the matter.</td>
</tr>
</tbody>
</table>

The parties started having problems and began a conciliation procedure that ended with a conciliation agreement. However, the problems continued and in March 2004 PEP notified COMMISA the start of the procedure to administratively rescind the contract. In December 2003, PEP administratively rescinded the contract and this started the lengthy legal battle of this case. The reasons that PEP offered to administratively rescind the contract with COMMISA were: un-justified abandonment of the work, delays and breach of the critical dates, and breach in the execution of the work required to complete the contract. COMMISA challenged the constitutionality of PEP’s rescission power through an indirect amparo.

In December 2004, COMMISA commenced arbitration before the ICC. PEP challenged the jurisdiction of the arbitral tribunal arguing that the administrative rescission is an act of authority that cannot be reviewed by arbitrators and that COMMISA had renounced arbitration when it requested the amparo against the administrative rescission. The arbitral tribunal denied this challenge and affirmed unanimously its jurisdiction to decide the case and proceeded to hear the merits. PEP did not challenge this interim award. In December 2009, the arbitral tribunal, by majority, issued an award worth over $300 million US dollars in favor of COMMISA.

After the 10th District Court on Civil Matters in Mexico City affirmed the validity of the arbitral award, PEP filed an amparo review. In the amparo review the 11th Circuit Court for Civil Matters in Mexico City ordered the District Judge to vacate its ruling that confirmed the arbitral award. Accordingly, on October 2011, the 10th District Court annulled the arbitral award. The 11th Circuit Court argued that the award violated Mexican public policy and was against the general interest because it decided on a non-arbitrable matter, the administrative rescission, which is considered an act of authority according to the Law of Public Works and Acquisition from 2009 and Mexican binding court precedents (jurisprudencia). In addition, it was argued that national courts have exclusive jurisdiction when it involves acts of authority and, pursuant to the ruling from the Supreme Court from 2006, the administrative rescission had been declared constitutional in this case. On the matter of public policy, the Circuit Court decided it had been violated because administrative contracts are ruled by administrative laws and the Constitution since they involve very delicate decisions that cannot be decided by a private arbitral tribunal.

In January 2010, COMMISA requested the recognition and enforcement of the arbitral
award before the District Court for the Southern District of New York (SDNY) in the United States. In November 2010, the SDNY District Court recognized the award and ordered PEP to pay.

With the annulment decision from Mexican Courts, PEP appealed the decision that confirmed the award at the US Court of Appeals for the Second Circuit. In February 2012, the Appeal Court remanded the matter to the Southern District New York District Court for reconsideration, in light of the Mexican court judgement.

In August 2013, Judge Alvin K. Hellerstein, from the US District Court for the Southern District of New York, confirmed the arbitral award in favor of COMMISA, despite the annulment at the seat of arbitration. The court concluded that, according to the standard set in *TermoRio*, the Mexican court judgement violated basic notions of justice and therefore declined to defer to the annulment and instead confirmed the award.

In *TermoRio*, the D.C. Circuit declined to enforce an award that had been nullified by a Colombian court and the US court held that “a secondary Contracting State normally may not enforce an arbitration award that has been lawfully set aside by a ‘competent authority’ in the primary Contracting State” but that there is a “narrow public policy gloss on Article V(1)(e) of the [New York] Convention and that a foreign judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the United States.” Judge Hellerstein found that COMMISA had a legitimate expectation that the dispute was arbitrable pursuant to the Mexican law in force at the time of the contract. For the US Court, the major violation and unfairness was the retroactive application of Mexican law rendering administrative rescission non-arbitrable. Furthermore, if the US Court had deferred to the Mexican court decision, COMMISA would have been left without any forum to litigate its claim because administrative rescissions were subject to a mandatory administrative proceeding for which the statute of limitations had lapsed, according to the amendment to Mexican laws in 2007 (it changed from 10 years to 45 days, at that time).

Legislative changes that occurred in Mexico while this case was before Mexican courts had strong impact on the decision from Mexican courts to annul the award but also on the decision of US courts to recognize it. One amendment was related with the limitation period

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578 COMMISA, *supra* note 267.
579 *TermoRio, supra* note 272.
given to a party in an administrative contract to challenge an administrative rescission, which was qualified by the Mexican Supreme Court as an administrative act. Before 2005, administrative decisions were challenged using the procedure legislated in the Federal Tax Code which established a limitation period of 10 years. In 2006, the Federal Law of Administrative Proceedings entered into force and established a 45-day limitation period, which was later amended again in 2016 and reduced to 30 days. This is one of the reasons argued by Judge Hellerstein from the US to enforce the award because otherwise COMMISA would have been left without forum to litigate its claim. The second set of amendments to Mexican laws happened in 2009 involving the Law of Public Works and Related Services and the Law of Procurement, Leases, and Services for the Public Sector. These amendments involved the addition of a specific provision to establish that the administrative rescission was not amenable to arbitration. Both legislative changes happened after the parties entered into contracts, hence the critique of they being applied retroactively against COMMISA.

5.5.1 The approaches to public policy in the decisions involved in this case

In the long chronology of the COMMISA case, public policy is used to both nullify the award by Mexican courts and enforce the award by US courts. Although the approaches to public policy are generally in line with the consensus found in the literature and other documents that have been examined, the language used makes a difference and thus points at different aspects of the concept.

The decision from the Mexican Circuit Court that gives the basis for the annulment of the award is grounded in two elements: the inarbitrability of the matter and the violation of Mexican public order. However, on both issues, the court found and reasoned there was a violation of Mexican public order. The following are the main arguments given by the court to support its decision to nullify the arbitral award:

1. There was a violation of public order and of the general interest when the arbitral tribunal decided on the administrative rescission because the administrative rescission is not

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580 See supra note 577.
arbitrable since it is an act of authority. The Circuit Court used Mexican binding court precedents (*jurisprudencia*) to support this finding. The Circuit Court mentioned it was using as a ‘guiding principle’ the fact that the administrative rescission had been established as not arbitrable in other administrative legislation. In this case, the court was referring to the Law of Public Works and Related Services and the Law of Procurement, Leasing, and Services for the Public Sector that came into effect in 2009 and according to which the administrative rescission is not arbitrable.

2. The Circuit Court ruled that the inarbitrability also comes from the fact that acts of administrative authority are of the exclusive jurisdiction of national administrative courts. For this case, it meant that COMMISA should have filed for annulment (*recurso de nulidad*) of the administrative rescission before the Federal Court of Administrative and Tax Justice (*Tribunal Fiscal de Justicia Fiscal y Administrativa*). The action would have challenged the validity of the act of authority (the decision from PEP which is a state-owned company) to administratively rescind the contract.

3. In addition, there was the issue of ‘*reflected res judicata*.’ The Circuit Court found that because the Supreme Court had ruled in 2006 that the administrative rescission in this case was constitutional, this decision should be considered ‘*reflected res judicata*’ in relation to the arbitral tribunal. According to Mexican binding court precedents, ‘*reflected res judicata*’ exists when there is the same object of a contract and the same parties in two proceedings, but the actions in each trial are different. However, the decision in the first proceeding influences or serves as a ground to decide the second with the purpose of avoiding contradictory rulings, thus, it has effects in the second one, either positive or negative, but always ‘reflected’. The reasoning was that the arbitral tribunal decided upon issues involving the administrative rescission and the tribunal created legal consequences (conventional penalties and damages) accordingly, therefore the arbitral

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582 In 2016, this court changed its name to Federal Court of Administrative Justice (*Tribunal Federal de Justicia Administrativa*).

tribunal exceeded its mandate on a non-arbitrable matter.

4. The arbitral award violates Mexican public order because administrative contracts are regulated by administrative laws and the Constitution, and involve sensitive decisions and government needs that cannot be decided by an arbitral tribunal.

Two renowned Mexican scholars and practitioners, González de Cossío and Wöss made important analyses of this annulment decision to highlight the problematic issues that it brought.\footnote{González de Cossío, *Arbitration and Government Contracts*, supra note 574 and Wöss, *supra* note 464. Also see: Herfried Wöss, Dante Figueroa & Jeniffer Cabrera, “El contrato administrativo, inarbitrabilidad y el reconocimiento de laudos anulados en el país de origen - El caso COMMISA” (The administrative contract, inarbitrability and the recognition of awards annulled in the country of origin – The COMMISA case) (2015) 75 PAUTA 5-29.} First, arbitrability and public order cannot be considered the same because not all public order issues are not arbitrable nor all non-arbitrable issues are matters of public order. Arbitrability and public order are separate ground for deciding on the nullity or the recognition and enforcement of an award, and thus they need to be considered separately. The decision to consider the administrative rescission not arbitrable is a matter of object and it is not related to public order in the strict sense but rather with administrative law. Second, it follows then that there should be a clear distinction between mandatory laws and public order in the strict sense. The fact that most of the laws in Mexico start by declaring that they are norms of public order can be wrongfully interpreted when a party raises the public policy exception. Therefore, it must be remembered that the characteristic of being laws of public order should be understood to mean that they are laws that impose prohibitions or are of public interest, but not to mean that they refer to public order in the strict sense of the term that is used for the public policy exception.

The issue of ‘reflected res judicata,’ was surprising for González de Cossío and Wöss since it had never been applied before between national courts and arbitral tribunals, and so they also considered it was wrongly applied. The nature of an administrative nullity trial (*juicio de nulidad*) is different from a proceeding for breach of contract, which can be either an ordinary administrative proceeding before national courts or arbitration. The administrative nullity action decides on the validity of the administrative rescission; while the ordinary administrative proceeding or arbitration is to decide on the rights and obligations of the parties that derive from
the breach of contract and the legal consequences that follow. There is no coincidence between
the object of an administrative nullity trial and the ordinary administrative trial, neither with the
arbitral proceeding, therefore this cannot be a ‘reflected res judicata.’ In addition, alternative
dispute resolution mechanisms are now a fundamental right granted by Article 17 of the Mexican
Constitution, thus this right cannot be violated by a validated act of authority. To apply the
principle of res judicata in favor of a nullity trial would be in violation of the basic principle of
access to justice also protected in Article 17 of the Mexican Constitution. González de Cossío
and Wöss agree that public order in Mexico should be interpreted with a restrictive approach to
include only the fundamental principles and institutions of the Mexican legal system.

The general approach in the United States to public policy as a ground to deny the
recognition and enforcement of arbitral awards follows the “Parsons standard” according to
which “enforcement of foreign arbitral awards may be denied on this basis only where
enforcement would violate the forum state’s most basic notions of morality and justice.”585 This
has been the basis for their approach to the public policy exception and to how public policy is
constructed in cases related to international arbitration. Separately, the US courts follow the
TermoRio586 standard to decide if a decision from another jurisdiction (generally the seat of
arbitration) that nullified an award would prevent a US court from enforcing the arbitral award.

The dilemma faced by the US District Court in COMMISA -whether to enforce the
arbitral award or to defer to the Mexican annulment judgement- renewed a debate that had been
addressed by the US courts in cases like TermoRio, Baker Marine,587 and Chromalloy588 on
whether an award annulled in the seat of arbitration should be enforced or not by US courts. In
the first two cases, the courts decided not to enforce an arbitral award that had been nullified in
the arbitral seat. This has been the trend followed by US courts and pursuant to US public policy.
However, in Chromalloy, while the award had been set aside in Egypt, the US court concluded it
must enforce the award because to decide otherwise would had violated US public policy which
favors the enforcement of binding arbitration clauses. In COMMISA, although the ruling aligns

585 Parsons, supra note 271.
586 See TermoRio, supra note 272.
587 Baker Marine (Nig) Ltd. V. Chevron (Nig.) Ltd. 191 F2d 194 (2d Cir. 1999). [Baker]
with the outcome in *Chromalloy*, the judge followed *TermoRio* to decide the case. Judge Hellerstein explained that in *COMMISA* his role was to determine the extent of the discretion given in *TermoRio* to confirm the award. He found that “under the standard announced in *TermoRio*, the decision vacating the Award violated basic notions of justice and that deference is therefore not required.”

In *COMMISA*, although it is a decision to enforce an award and not a decision to deny the recognition and enforcement, the argument is constructed on public policy grounds. The US District Court is deciding that the procedure in Mexican courts according to which the award was nullified, violates US public policy for violating basic notions of justice. For Judge Hellerstein this violation is evident in the retroactive application of Section 98 of the Law of Public Works that deemed the dispute non-arbitrable and the unfairness associated with that because it left COMMISA without a remedy to litigate the merits of the dispute. The District Court added that COMMISA had a legitimate expectation that any dispute that might arise from these contracts was arbitrable.

Other details that the US District Court noted for supporting its reasoning were, first, the fact that the arguments on public policy grounds from PEP emerged late in the proceedings while the first arguments against arbitration where based on *res judicata*. Second, that the 11th Mexican Circuit Court, while it argued that it used Article 98 of the Law of Public Works only as a ‘guiding principle,’ the reality was that it heavily relied on it and it was critical in the court’s decision to nullify the award.

5.5.2 The opinion of interviewed local actors on the COMMISA case.

At the time of the interviews, the COMMISA case was very fresh in the interviewees minds. There were three important comments about it. Counsellor 3 who offered a detailed analysis of the case in the interview and was of the opinion that the administrative rescission is a

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589 In *TermoRio, supra* note 272, the US Court of Appeal for the D.C. Circuit declined to enforce an award that had been nullified by a Colombian court and set the standard that is now followed to decide on this type of cases. The court held that “a secondary [New York Convention] Contract State normally may not enforce an arbitration award that has been lawfully set aside by a ‘competent authority’ in the primary Contracting State, but that there is a narrow public policy gloss on Article V(1)(e) of the [New York] Convention and that a foreign judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the United States.”

590 *COMMISA, supra* note 267 at 25.

591 *COMMISA, supra* note 267 at 27-28.
power of the state to withdraw a contractor from a project because, according to the state, the contractor is not fulfilling his duties; in other words, this is definitively a matter of public order and therefore not arbitrable. However, Counsellor 3 argued that the contractor could start an arbitration regarding the effects of the administrative rescission. He believed the arguments from the Mexican courts were too superficial when they considered that everything that is related to an administrative rescission is non-arbitrable and they closed any possibility of arbitrating the effects of the administrative rescission. If the Mexican state established this approach it could be risky for Mexico because it would mean that its public agencies can apply an administrative rescission and then leave a contractor with no option but to go to the Mexican courts, generating an adverse environment for arbitration for this type of contracts. Counsellor 3 explained this is a grey area that came with the 2009 amendments that said yes to arbitration but not in the case of administrative rescission. He was expecting the Supreme Court to hear the case to clarify this situation and either strengthen a policy in favor of the arbitral commitments of public entities or not, but give a precise criterion.

Counsellor 4 considered this decision was a big mistake from the Mexican courts because the Circuit Court was prohibiting any possibility for arbitration if a contract is administratively rescinded. He also believed this situation derived from the 2009 amendments and found them very problematic because only a minimal percentage (5-10%) of the problems in this type of contract are related to administrative rescission. With this decision, the court was precluding arbitration completely. For him this approach would kill arbitration for large infrastructure projects which depend on it.

From a different perspective, Arbitrator 1 explained that if the law said that an administrative rescission was not arbitrable and they applied for it, then that was a tactical mistake by the counsellor representing COMMISA. Even though, given he was not very familiar with the details of the case, this case was not so worrisome for him regarding the Mexican arbitral context.

Finally, Arbitrator 3 cautioned not to generalize about arbitration in Mexico based on a single case. For him the approach established in the COMMISA case was a problem that needed to be solved but arbitration was still a better option for business partners who contract with PEMEX or any other public agency.
5.5.3 Reflections about the COMMISA case

With its complicated procedural history and the multiple analyses, there are some key reflections to record. The decision by Mexican courts to nullify the award could have an effect on Mexico’s perceived risk level for public contracts and the overall perception of Mexico as an arbitration friendly jurisdiction. However, as mistaken as the decision from Mexican courts was in this case and with all the concerns it raised, COMMISA is just one case. Therefore caution should be taken not to use it to qualify a jurisdiction that has generally been pro-arbitration.

At the same time, this case provided the opportunity to consider public order in Mexico, a topic that had generally not caused concerns in the past. COMMISA can be used to reinforce the need to have a clearer guiding criterion from the Supreme Court on how public order should be understood for the purposes of the public policy exception in arbitration cases and to continue its analysis and discussion.

The international standards that have been cautiously debated and developed in diverse forums and in which prominent Mexican practitioners have participated, have not really permeated into the framework of Mexican courts. Therefore, it is necessary to set spaces to discuss and define the Mexican position regarding these international standards. This discussion must include practitioners and members of the judicial branch to ensure that the Mexican approach to public order is clarified and the international ideas are considered in ways that fit the Mexican legal system.

One last issue that this case exposes and is worth mentioning is the ‘evaluating’ approach that the US courts took to decide on the recognition and enforcement of the award. The decision from the US courts is grounded in the assessment they did of the decisions from the Mexican court, resulting in the conclusion that the decision from the Mexican court violated US basic notions of justice. Contrasting to this approach is the way in which French courts have decided similar cases. The French approach is to evaluate the recognition and enforcement of the award vis-à-vis its national legal framework, i.e. French courts do not assess the decision from foreign courts, they focus on the arbitral award and see it as a separate entity from any national legal order, including the seat of arbitration. Their rationale is that they do not review the fairness

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or unfairness of the annulment proceeding in the seat of arbitration, but they analyze the awards in light of their own legal system which has a strong pro-arbitration policy. This is not to suggest that the outcome would have been different if the enforcement of the award was requested in French courts. It is likely that the French courts would also have enforced the award but having made a decision grounded in the analysis of the arbitral award and its proceedings, not by analyzing the decision of the Mexican courts to nullify the award. In an international context, the French approach, while it has been criticized for being ‘too liberal’, is much more ‘amicable’ to other jurisdictions. The French approach does not see itself as evaluating other legal systems and how their courts decide their cases, which is what the US courts did and was the basis for their decisions. The French courts would probably have arrived at the same conclusion of enforcing the award but grounded in the arbitral award per se. In the context of this study, the French approach is more aligned to the pluralistic perspective proposed because it recognizes legal systems as equals in the international arena, not one superior to the other.

5.6 Summary

This chapter took the long road of examining in detail multiple elements of the Mexican arbitral context and it shows that in order to understand public order from within in a specific jurisdiction as it has been suggested, it is necessary to consider a variety of elements in depth.

The Mexican scholarship has generally focused on the philosophical study of public order within a national view; authors have been concerned with the public/private divide and how public order must be protected within a national perspective. Public order in the context of arbitration has been addressed in a very limited number of publications. However, there are some authors who have brought increased awareness to the matter and have offered suggestions on how public order should be understood for the purposes of the public policy exception. The most recent scholarship shows evidence of awareness of the developments on this topic at the international level.

The data from the Mexican court precedents showed that the focus has been in analyzing public order in the context of the amparo trial. These findings are important to understand the main point of reference that federal courts have when it comes to interpreting public order. The classification of courts’ precedents permitted the identification of those decisions that had been made for the specific purpose of the public policy exception as related to arbitration. This
examination of Mexican court precedents gave the opportunity to recognize the steps that courts have taken to make public order a manageable concept for the courts in the diverse situations in which they encounter it. It emphasizes the fact that the courts continue to have a view that is restricted to the national context. The perspective within the amparo trial informs the perspective of the civil law context in which public order is considered a limit to party autonomy in order to protect Mexico’s most valuable principles. There is an emerging interest from some courts in giving legal interpretation guidelines for public order in the context of arbitration.

Finally, it is important to acknowledge that there is no evidence in the precedents examined that the courts are using international standards as reference to interpret public order. International developments on the topic of public order have not reached the courts and their legal reasoning for deciding cases related to arbitration.

The interviews with Mexican actors allowed a better understanding of the Mexican context, its legal culture, the situation of public order in Mexico, the challenges they have encountered, practices that are conducive for a better arbitral jurisdiction, and those that continue to restrict it. The interviewees offered a perspective of Mexico stance on the public policy exception, which can be considered positive in general, and suggested ways to move forward in developing and maintaining Mexico as an arbitration friendly jurisdiction by offering more certainty when it comes to the operation of the public policy exception. There is generally a positive atmosphere for arbitration in Mexico, which has also been acknowledged from abroad, that includes a good legal framework and positive attitude from the courts to enforcing arbitral awards and to collaborating with arbitral tribunals.

Regarding public order, there is consensus there is no clear guidance, either from legislators or the courts, on how to interpret this concept for arbitration purposes. Positive steps have been taken and the interviewees generally agree that a criterion from the Supreme Court could be useful, but is also something that would come with the practice. An interpretive criterion could help to counter practices in which the public policy exception is used as the exception ‘to go to’ in order to challenge the enforcement of an award. The main suggestions were to continue training the judges on arbitration topics and to have a restricted interpretation of public order for the public policy exception, drafted in a way that permits the judges to assess it on a case by case basis since it is a concept that is hard to define, depending on circumstances of time and place.
The COMMISA case brought the topic of public order to the forefront. It renewed attention to the problematic status of the concept of public order in Mexico and provided an opportunity for its examination. The fact that the public policy exception had not been seen as problematic meant it had been kept as a dormant issue. It evidenced there is still some resistance from the Mexican public sector regarding arbitration when it comes to contracting with state-owned companies that is in conflict with the desire to promote a pro-arbitration attitude. The grey area left with the amendments from 2009 regarding administrative rescission needs to be clarified and with it needs to come a discussion at the Supreme Court of what public order means in those type of cases so that the Mexican state can protect its sovereign power to rescind a contract while also advancing a pro-arbitration approach by allowing arbitration of the rest of the elements involved in a public contract.

With the combined data presented in this chapter it can be said that Mexico contains rich elements to delineate its concept of public order for the purposes of the public policy exception within the international arbitration context. In order to advance a pluralistic approach to the public policy exception, it has been argued in this dissertation that it is necessary for each country to establish its approach to public policy in alignment with its local legal context. Therefore, it was necessary to undertake this in-depth analysis of the local elements incorporating all these diverse perspectives. This way of examining the local context gives an opportunity to build up a concept of public order from within.
Chapter 6: Conclusion

Globalization, convergence, and the creation of harmonizing laws and standards support the connection of the world internationally and have made mechanisms like arbitration more efficient to solve disputes arising from trade. Nonetheless, this dissertation has demonstrated that the interpretation and implementation in Mexico of the public policy exception under the New York Convention reflect the impact of local legal arrangements on globalized standards. Additionally, it demonstrates that a pluralistic approach to this exception advances a more inclusive perspective for the implementation of globalized standards while at the same time offering certainty.

In this dissertation, I have argued that the implementation of the public policy exception is a place of tension between globalized standards and local legal arrangements because the expectations accompanying the adoption of international standards are not reflected in their implementation at local levels. Convergence ideas have suggested that a uniform interpretation of the public policy exception would improve the efficacy of the system created by the New York Convention for the enforcement of arbitral awards. A way to advance this has been the introduction of added levels of public policy, such as international and transnational (or truly international) public policy. However, I have argued that a pluralistic approach to this exception would provide certainty and improve its efficacy while giving space for local interpretations to be legitimized. A pluralistic approach sees legal pluralism as a solution because it starts from acknowledging there are differences between legal systems, recognizes the importance of each of them, and engages states in mutually constructive conversations.

This dissertation engaged in the discussion of how the exception of public policy should be interpreted and applied by examining the origins of the public policy exception and bringing forward its original purpose of protecting the fundamental values of each legal system. In accordance with a pluralistic approach, each legal system needs to establish what is public order for its own jurisdiction before engaging in adopting international or transnational concepts; this definition needs to come from within each jurisdiction. To achieve that, I applied four factors – language, legal tradition, legal context and legal culture– to better understand the local approach to public policy and examined relevant local elements to understand public policy in local terms. I used Mexico as a case study to test the tension by applying the four factors and examining in
detail its relevant local elements, i.e. legal framework, scholarship, court precedents, opinions of local actors, and the COMMISA case.

This dissertation demonstrates, a) Mexico is an example of the challenges and opportunities that come from the interaction between a globalized legal order and local legal arrangements; b) there are benefits in advancing a pluralistic approach to the interpretation of the public policy exception; c) the examination of Mexico’s local context carried out in this study is a means in which other local legal contexts can be examined to establish their interpretation of public policy; and d) concrete elements that can be used to establish a national guideline for the interpretation and implementation of the public policy exception in Mexico.

6.1 Mexico’s local context as an example of the challenges and opportunities of the interaction between globalized legal orders and local legal arrangements.

The study of the public policy exception in the New York Convention as interpreted and applied in Mexico reveals the tensions between pressures of globalization and legal convergence and the resiliency of local legal arrangements. The way in which this study reflects the challenges and opportunities of the interactions between globalized legal orders and local legal arrangements can be appraised in the detailed exploration of how the interpretation and use of the public policy exception operates in the Mexican local context. This dissertation looked at diverse elements of the local context, i.e. legislation, scholarship, court precedents, local actors, and the COMMISA case to have as complete a picture as possible. The challenge of providing certainty to foreign actors in the interpretation of the public policy exception is enhanced by the uncoordinated dialogue between the international context (that expects convergence) and the local context (that struggles to give answer to those expectations and does not address all the necessary elements to provide the expected certainty).

From the late 1980s and early 1990s Mexico has been keeping pace with the international developments to promote trade and foreign investment, and has done so by adopting international agreements and conventions. The Mexican legal framework has evolved to underpin arbitration to solve commercial and investment disputes more effectively. This was evident with the adoption of the New York and Panama Conventions, the incorporation of the UNCITRAL Model Law on Commercial Arbitration, and the latest amendments to the Commercial Code in 2011.
When the operation of the public policy exception was explored in more detail in the local context, the tensions became evident. Starting with language, it was necessary to make a distinction between public policy and public order, where the differences that underlie these concepts continue to be overlooked. It was clarified that public policy encompasses more than public order in that public policy includes both government policies and the idea of the fundamental principles and values of a legal system, whereas public order only refers to the fundamental principles and values. In order to understand the local perspective, it is necessary to recognize that in the Mexican legal context they use public order as it refers to the fundamental principles and values.

There is no specific Mexican legislation for the implementation of the public policy exception. The only guidance is the provisions in the Federal Civil Law (Articles 12-15) as the local rules of private international law. Public order is legislated mainly for a national context. The Mexican legal framework shows four uses of public order that are significant in the local context: a) to characterize a law as being of public order; b) public order as a restriction for the application of foreign law; c) public order as grounds for nullifying an arbitral award or denying its recognition and enforcement; and d) to deny the suspension of an act of authority (contested act) in amparo trials.

The general Mexican legal scholarship focuses on the national scope of public order. It does not consider international trends on the interpretation of public order, much less in the specific context of arbitration. Arbitration-specific local scholarship shows an awareness of international trends and suggests the incorporation of these approaches. However, it does so from an assumption that judges are generally clear and aware about the distinctions and interpretations advanced by international scholarship, which is not the case.

From the court precedents, it was possible to identify two main contexts: public order for the purposes of amparo trials and public order within civil law as a limit to party autonomy. The focus of the legal framework and court precedents on amparo tells us that while there are some emerging precedents addressing public order in the context of arbitration, the local context is fundamentally framed around the conception of public order within the amparo trial. This is expected considering that the amparo is the main protection that citizens have against acts of authority. It is only in the last ten years that courts have specifically addressed the interpretation of the public policy exception, but it is still an emerging trend. The precedents from the courts
show that no international trends or concepts are brought up in the arguments, even in cases that involving international commercial arbitration; the decisions stay within the national framework.

The interviews with local actors helped to illuminate the challenges and opportunities faced in the local context in relation to interaction with standards and concepts developed from the globalized legal orders. There is generally an increased awareness about international agreements derived from the 2011 Human Rights Amendment; the judges explained that it has shifted the paradigm for the protection of human rights in Mexico and has also increased the awareness of other international agreements that Mexico subscribes. Practitioners (counsellors and arbitrators) considered that this could have a positive impact on arbitration-related cases. Practitioners are the most aware of the international trends on the interpretation of the public policy exception and would like to see the courts acknowledging or incorporating them. While practitioners consider there has been progress, they perceived the judges were still at a different, more nationally contained mindset; there is a general idea that things were progressing in the right direction for the use and interpretation of the public policy exception, with mixed ideas about pushing for a more defined criterion from the Supreme Court versus letting practice evolve.

This study analyzed the interaction between globalized legal orders and local legal arrangements by doing a detailed exploration from within that can contribute to building a framework that provides guidance and offers certainty. This has been possible by using a Mexican perspective of public order, built from the national framework and perspectives and by using the international developments that could contribute to enhancing Mexico’s position as an arbitration friendly jurisdiction. It offers an opportunity to observe how Mexico is a jurisdiction that aims to stay up-to-date with the international developments while staying grounded in its national values and principles.

6.2 The benefits of advancing a pluralistic approach to the interpretation of the public policy exception

The analysis of the implementation and interpretation of the public policy exception in Mexico exemplified the challenges that national legal systems face in balancing the tension between globalization and convergence and their local legal arrangements. Considering the important purpose for which the public policy exception was created—as a provision to allow
every country to protect its most important values and principles— it is fundamental to value the space left in the New York Convention to acknowledge each country’s perspective. ‘Functional ambiguity’ in international law helped to understand the importance and value of these spaces, while the lessons from legal pluralism, as a framework that acknowledges difference and recognizes value in each perspective, suggested a way to maintain an open door for diversity.

When a pluralistic approach to the public policy exception is used, the recommendations on how public policy ‘should’ be interpreted pursuant to the New York Convention are more engaged with diversity rather than solely informed by the perspective of a hegemonic group. The problem with following a hegemonic perspective is that a small group dictates interpretation, disregarding those at the periphery. This generates a ‘false’ expectation of compliance and leads to criticism for ‘lack of compliance’ with international standards that did not consider, at the outset, the realities of diverse actors.

To promote collaboration and continue strengthening the system created by the New York Convention, it is necessary to stay true to its objective of creating a space to account for diverse perspectives and protect the most important values and principles of a legal system through the public policy exception—which should be understood as referring to the public policy of the country in which recognition and enforcement of an arbitral award is being requested. A pluralistic approach to the public policy exception recognizes the agency of each country to establish its own concept of public policy for these purposes and allows divergent perspectives to public policy to validly co-exist. From this perspective, there is no expectation (or demand) that every country understands public policy in exactly the same way: all perspectives are valid and can be informed by the developments proposed in international forums. There is value in taking into consideration the recommendations issued by the ILA Final Report, but after a state has made the national analysis of its own context and (grounded in that analysis) it will be in a clearer position to incorporate the ILA Recommendations in a way that resonates with its national context.

The suggested pluralistic approach does not disregard the international trends. On the contrary, it values the extensive research, discussion, and efforts that have been put in to reaching consensual ideas about public policy for improving the system of enforcement of international arbitral awards. However, the guidelines need to start from considering national perspectives. It is also agreed that public policy should be an exception with a very narrow
definition and strict interpretation. Public policy should be rarely used, only in situations that challenge the most important values of a legal system. For a country to develop its own perspective it does not need to look abroad for models to import; it would find most value in making a deep analysis of the national context to account for all the elements that are relevant for that jurisdiction. This is what means to build the conception from within.

6.3  A means for local legal orders to establish their interpretation of the public policy exception from within.

The challenges at a local level for interpreting the public policy exception of the New York Convention are shared by multiple jurisdiction. The analysis carried out for the Mexican context in this dissertation could be useful for other jurisdictions to have a clearer idea of their current local context in this matter, which would inform their process of delineating their local interpretation of the public policy exception.

The four factors of language, legal tradition, legal context, and legal culture can be used as a guiding framework for the analysis. Language permits acknowledgement of the problems of translation and helps to clarify the terminology that conforms with the national context and find equivalents in the language of international law. Legal tradition helps to understand some elements that are at the root of some differences, for example, the role of judges within a legal system is informed by the historical developments of a legal tradition. The legal context of private international law reveals the local rules for deciding conflicts of laws that evidence the local approach to international law, as well as the local understanding and approaches to the nature of public policy which are important elements to be considered. Finally, legal culture, one of the most complex factors but one that is very valuable for comprehending more detailed distinctions about a local context, serves to look at elements that influence local actors in their actions and decisions. These factors help to delineate better the local understanding of public policy.

The other part of the analysis included the national legal framework, scholarship, court precedents, a specific case, and interviews with local actors. The combination of these elements provided a more comprehensive idea of the local legal arrangements about the public policy exception. Some of them, like the court’s precedents, required exploration of the wider context in which public order is used in Mexico, beyond the public policy exception. By understanding how
public order is used, interpreted, and applied in Mexico it was possible to understand why cases relating to the public policy exception have been decided the way they were, which contributes to clarifying what is and what is not public order for the public policy exception. By using the perspectives of local actors, with a first-hand approach to the challenges they envision, it gave the analysis the perspective of those who are in practice at that moment. From here, local contexts would be in better position to establish a guideline for a more effective application of the public policy exception and, in the process, incorporate the international standards in ways that resonate with their national context.

6.4 Recommendations for establishing a national guideline for the interpretation of public order in Mexico regarding the public policy exception.

Mexico is a relevant actor in the international arena, it is the 16th largest economy in the world according to the International Monetary Fund and 90% of its trade is under free trade agreements with more than 40 countries. Trade relations are paramount to Mexico—as showed in the growth and dimension of its trade and foreign investment. It has been positioning itself as an arbitration friendly jurisdiction and for this reason it is necessary to pay attention to how the public policy exception is used and interpreted in its national context. After the analysis of the Mexican legal context, the following are some components to be considered for developing a guideline that could be used to define the Mexican approach to the public policy exception.

The amparo trial is the main framework used by the courts to decide on matters that involve public order. It is essential for a foreign party to consider this for understanding how Mexican courts study public order when deciding a case. Court precedents from federal courts addressing the issue of public order for arbitration purposes are emerging which is a promising sign of their interest to develop an interpreting criteria that could serve judges in deciding cases related with arbitration. From these emerging court precedents, it can be observed that public order has been mainly understood as a limit to the principle of party autonomy in the context of contractual relationships.

It became evident from the research that it is necessary to continue emphasizing the difference between ‘public order’ and ‘laws of public order’ understood in a general sense. It is significant to imprint clearly this distinction in the minds of judges and practitioners because
cases in which the argument is based on ‘laws of public order’ should not be ground for applying the public policy exception.

The new Amparo Law made a valuable effort to establish a more comprehensive list of situations that are considered part of the fundamental values of the Mexican legal system by establishing in Article 129 those that violate Mexican public order. This could be used as a starting point to establish a criterion with a high threshold as it will be explained ahead.

Following on what binding court precedents have established, public order is a paramount institution, thus the cases in which the public policy exception is involved should continue to be analyzed on a case by case basis by the judges. Nevertheless, with a clarified approach to the public policy exception they would be better informed to make their decisions. Attending to the dynamic nature of public order, a fixed definition would not be fitting, however it is possible to establish the elements that should be pondered to study public policy in a case involving the nullity or the recognition and enforcement of a foreign arbitral award.

The most conducive way to put the elements and considerations referred to in the preceding paragraphs would be a binding court precedent from the Supreme Court which would become enforceable at a national level. This precedent could bring together all the elements analyzed in this study to provide much needed guidance for judges.

The cases of Infored and COMMISA were two unfortunate cases that as such should be analyzed and learnt from but should not be used to query Mexico as an arbitration friendly jurisdiction. The COMMISA case should be used to underpin the Mexican framework since it opened the discussion about fundamental interpretations of what are considered matters of public order in Mexico. This case evidenced that Mexico continues to work on a trend to be open and fully accepting of arbitration but there are still areas where excessive caution is used, like in the case of contracts with state companies (administrative contracts) or involving ‘sensible’ matters like petroleum and other natural resources. Since this type of contracts are informed mainly by the French approach to public contracts, within this framework is understandable that the sovereign act of the administrative rescission is not arbitrable for being a matter of public order, however, the rest of the effects that it carries should be arbitrable. In this way, private contractors (either national or foreign) would be confident that arbitration is available as an alternative dispute resolution method with all the benefits it carries.
Additionally, it is necessary to establish in the mind of local actors, mainly judges, a high threshold to public order as an exception for the nullity, recognition and enforcement of foreign arbitral awards. This high threshold can be informed by the ILA Resolution considering its 3 elements: a) the fundamental principles of the legal system as established in the Constitution, like equality, equity, justice, legality, constitutional principles, among others; b) laws designed to serve the essential political, social, or economic interest of the state (lois de police), like labour laws, consumer protection, hydrocarbons, among others; and c) the duty of the state to respect its international obligations, like the principle of pacta sunt servanda and the international agreements Mexico has subscribed.

Finally, this detailed approach needs to be accompanied by more training for judges on the international developments regarding arbitration and to apply this cumulative framework in cases in which the public policy is opposed to the recognition and enforcement of a foreign arbitral award. The research shows that in general when judges decide cases, their analysis stays within their national legal framework with little to no consideration of international treaties or other type of international instruments. This has been changing after the 2011 Human Rights Amendment, therefore this time is particularly ripe for more specific training. The training needs to include a comprehensive study of arbitration, its forms, and procedures to contrast them with the perceived formalistic approach of the courts. It needs to include the relevance of arbitration for economic actors and for the promotion of trade and investment, as well as, helping them to recognize the effects of their decisions in a larger context. They are aware of how, pursuant to Mexican legal framework, they are expected to collaborate with arbitral tribunals but it is necessary to expand their awareness of the impact their decisions have beyond the national boundaries of their legal framework. This training needs to include a specific review of the international treaties and conventions applicable to arbitration, the current relevant topics of arbitration, and the expectations and implications of cases involving the public policy exception. Overall, this training could make it possible to permeate nationally a perspective to public order in the context of arbitration that upholds the high threshold that this exception requires.
6.5 Avenues for future research

Looking into the future, the results from this research invite to consider testing the framework used for examining the Mexican legal context to other jurisdictions. The four factors would be applied first to understand the local context. Next, according to the particular characteristics of the jurisdiction examined, choose the local legal elements to be analyzed in detail. It is important to identify the local legal elements according to what is relevant for each legal system. It cannot be a preconceived list of local legal elements because, in order to come from within, the elements chosen should be those that are relevant for the jurisdiction analyzed.

In the examination of the Mexican legal context, the interpretive communities that were interviewed were limited to legal actors involved in the recognition and enforcement of arbitral awards. A potential way to expand this research could be to incorporate other related actors like members of the business community, government officials involved in foreign affairs, and even the general public in order to investigate the implications they see from the application of the public policy exception in their own spheres. Additionally, a specific avenue could be to examine the same legal actors but in a larger sample that could lead to develop more generalized conclusions about Mexican interpretive communities.

Another avenue for further research could be to examine the operation of public policy exceptions established in other international instruments, for example in investment treaties, in major treaties like the Treaty of Lisbon establishing the European Union, or in other treaties of private international law. Are there similar challenges with the local operation of this exception in the context of other international treaties and conventions? Has the more active participation of developing countries in the international arena and the shifting in their roles (in the context of South-South relations) impacted the use of the exception of public policy? Has the public policy exception being used in ‘unexpected’ ways within the context of those treaties or conventions? These are some of the questions that could lead to new knowledge expanding on the results from this study.

Legal Pluralism has been a perspective that greatly influenced the development of this work and many aspects of the personal journey to complete it. If we take advantage of the potential that this framework can offer, it could reframe the conversations among international actors, advance a better understanding among them, and address the tension between global
standards and local contexts to make the former more effective and the latter more resilient. There is potential in using pluralism not only as a descriptive fact but as a framework that opens possibilities by acknowledging and honouring differences, but most importantly by acting upon it.


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Appendices

Appendix A  Article V New York Convention

Article V

1. Recognition and enforcement of the award may be refuse, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

   a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

   b) The party against whom the awards is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

   c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

   d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

   e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refuse if the competent authority in the country where recognition and enforcement is sought finds that:

   a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

   b) The recognition or enforcement of the award would be contrary to the public policy of that country.
Appendix B  Arbitral Institutions in Mexico

A. The International Chamber of Commerce – Mexico 593 (ICC-Mexico) was established in 1985, it gained wide acceptance since the beginning of its operations and is the most resorted arbitral institution in Mexico. It provides arbitration services that follow the ICC rules.

B. The National Chamber of Commerce of Mexico City594 (CANACO) created the Centre for Mediation and Arbitration in the year 2000. It has its own rules of procedure for mediation and arbitration, and has been one of the institutions that highly promotes the use of arbitration in Mexico. In order to make arbitration available to a wider spectrum of businesses and to promote the use of arbitration by small and medium size companies, CANACO created “ABC arbitration” (arbitraje de baja cuantía - arbitration for small claims) which has been successful in offering the benefits of arbitration to those companies.595 CANACO has also established several key alliances with international institutions, bringing important international options to the Mexican business community:596

- CAMCA. It is the Centre for Commercial Arbitration and Mediation for the Americas. It was created by arbitral institutions from Canada, the United States, and Mexico to provide an efficient international forum to solve private commercial disputes for business partners from NAFTA members. CANACO is the Mexican institution that collaborated in its creation and administers arbitration and mediation services according to CAMCA rules.

- CIAC. The Inter-American Commission of Commercial Arbitration was created in 1934 as a result of the VII Conference of the Organization of American States (OEA) and gained relevance after the Panama Convention of 1975. CIAC rules are intended to fill the expectations and needs of the Free Trade Zone of the Americas (ALCA); it offers services such as international arbitration, conciliation

593 International Chamber of Commerce – Mexico, online: ICC Mexico <http://www.iccmex.mx/>.
596 Alianzas (Alliances), online: Centro de Mediación y Arbitraje CANACO <www.arbitrajecanaco.com.mx>.
and training. CANACO is the Mexican section that administers arbitration services according to CIAC rules.

- ICDR. The International Centre for Dispute Resolution is the international branch of the American Arbitration Association (AAA). In 2005, CANACO and the ICDR established an ICDR office in Mexico; according to the agreement national arbitrations will be administered by CANACO and international arbitrations by the ICDR.

- IFCAI. The International Federation of Commercial Arbitral Institutions promotes cooperation among arbitration institutions and the use of the different alternative dispute resolution mechanisms. CANACO is a member of the IFCAI along with the most prestigious international arbitration centers.

C. The Mexican Centre for Arbitration (CAM)\textsuperscript{597} is an arbitration institution created in 1997 as a new option of institutional arbitration. CAM has been mainly oriented towards national (local) arbitration with the purpose of promoting the use of arbitration in the Mexican business community. It has also established important alliances with other international institutions like the Milan Chamber for National and International Arbitration, the Stockholm Chamber of Commerce, the Australian Centre for International Commercial Arbitration, the American Chamber of Commerce of Peru, the European Arbitration Association, and the Madrid Court of Arbitration. It has also participated in relevant programs like the Program for the Strengthening of Alternative Dispute Resolution Methods from the Inter-American Bank of Development and in the project of the US Agency for International Development (USAID) called “The promotion of the business environment and the commercial capacity through legal reforms and the improvement in the administration of justice by the commercial courts in Mexico.”

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