THREE DECADES OF LATIN AMERICAN COMMERCIAL ARBITRATION

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1. INTRODUCTION

At the edge of Panama City, on the Pacific side of the Panama Canal, the "Bridge of the Americas" stands at the crossroads of the Americas. It was in Panama three decades ago that Latin America met a crossroads with respect to the resolution of international disputes through arbitration—and concluded the 1975 Inter-American Convention on International Commercial Arbitration ("Panama Convention").¹

This Essay discusses how the legal framework of international commercial arbitration has evolved during the past three decades. It considers the role of the Panama Convention in principle and in practice, the efficacy of the Panama Convention in light of the ratification of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")² across Latin America, and arbitral precedents in jurisdictions across the region.

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2. HISTORICAL CONTEXT

For the century prior to 1975, the prevailing perspective across the region was reflected in the so-called “Calvo Doctrine.” Bearing the name of an Argentine diplomat, the Calvo Doctrine held, in short, that jurisdiction in international commercial disputes lies within the country in which the investment is located. The Calvo Doctrine generally reflected the reluctance toward arbitration across Latin America.

In this context, Latin American states were slow to ratify the New York Convention. Only three states did so in its first twenty years. In the area of investment arbitration, Latin American states were even slower to ratify the 1966 Convention on the Settlement of Disputes Between States and Nationals of Other States (“ICSID Convention”). Only two did so in its first twenty years.

Against this historical backdrop, the Organization of American States (“OAS”) held its First Specialized Inter-American Conference on Private International Law in the Republic of Panama in 1975. At the conclusion of the Conference, “desirous of concluding a convention on international commercial arbitration,” the states of the OAS promulgated the Panama Convention.

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That enabled, to some extent, the evolutionary emergence of a new era in Latin American dispute resolution related to cross-border commerce and investment. In a 1978 article in the American Journal of International Law, one commentator summarized the state of affairs as follows:

Calvo invented his defense mechanism in an era when Latin America conceived itself to be threatened by the intrusive power and instinct of North America. But the Americas have changed. In the interdependent world of the last quarter of the 20th century, the Calvo doctrine is no longer either a necessary or a satisfactory prescription for the resolution of foreign investment disputes. So the industrial democracies and the institutions of the international economic system have tried a variety of devices to persuade Latin America to give up its Calvo-induced isolation . . . . While Latins have held fast to Calvoism in the abstract, they have, in practice, begun to show some willingness to dilute principle with a dash of self-interest in certain recent foreign investment cases.6

The three decades since the Panama Convention have been marked by an evolutionary expansion in the use of arbitration in Latin America, particularly beginning in the 1990s.

3. THE LEGAL FRAMEWORK FOR COMMERCIAL ARBITRATION IN LATIN AMERICA

The legal framework for international commercial arbitration was largely reconstructed from the ground up over the past three decades—treaty ratification by treaty ratification, law by law, jurisdiction by jurisdiction.

The Panama Convention signaled a step towards the acceptance of international commercial arbitration in Latin America. Negotiated over a series of years, it was envisioned as a regional agreement modeled after the New York Convention, although so few Latin American states had ratified that treaty. A primary objective of the Panama Convention was to remedy perceived deficiencies in the internal arbitration laws of individual

Latin American states by establishing the requirements for valid arbitration agreements, the procedure for the recognition and enforcement of arbitral awards, and other matters related to arbitral procedure. The Panama Convention has now been ratified by a total of seventeen countries, including sixteen Latin American states and the United States.7

The New York Convention has been ratified by nineteen Latin American states and a total of 144 countries worldwide. Overall, the ratification of the New York Convention among Latin American states has followed pace with that of the Panama Convention—by 1995, for example, fifteen Latin American states had ratified the Panama Convention while the New York Convention had been adopted by thirteen states in the region. As discussed below, Brazil notably adopted the New York Convention only in 2002.

Principally in the 1990s, many Latin American countries overhauled their domestic arbitration laws to provide for the type of commercial arbitration contemplated in the Panama and New York Conventions. The changes in Latin American arbitration laws occurred as part of sweeping legal reforms and economic liberalization. Many Latin American states based their domestic arbitration laws in whole or in part on the Model Law on Commercial Arbitration formulated by the United Nations Commission on International Trade Law ("UNCITRAL Model Law").

Some countries have even revised their domestic arbitration laws more than once. Peru, for instance, enacted a new arbitration law in 1996, and another new law in 2008. Indeed, Peru’s 1996 law was already a largely modern statute based on the 1985 UNCITRAL Model Law. Nonetheless, Peru’s most recent arbitration statute entered into force on September 1, 2008. In

Latin American Commercial Arbitration
Treaties and Laws

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particular, the 2008 law builds upon the experience of Peru and other nations in the field of arbitration, and also takes into account the 2006 amendments to the UNCITRAL Model Law.\(^8\)

The evolution of the legal framework for international commercial arbitration in Latin America is set forth in the foregoing table, which is excerpted from the *Compendium of Latin American Arbitration Law*.\(^9\) The *Compendium* tracks the enactment of

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\(^9\) This table is an excerpt of the *Compendium of Latin American Arbitration Law*. See supra note 4. This is based on an analysis of diverse sources and may only be
the Panama and New York Conventions throughout Latin America. The Compendium also notes the year in which each state adopted and/or amended its domestic arbitration law.

In addition to the Panama and New York Conventions, some Latin American states have also ratified other regional conventions and international agreements. At a regional level, certain states have ratified the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards ("Montevideo Convention"),\textsuperscript{10} while the member states of the Mercado Común del Sur (Southern Common Market or "Mercosur") adopted the 1992 Las Leñas Protocol.\textsuperscript{11} The Montevideo Convention provides at Article 1 that it acts as a supplement to the Panama Convention in that it applies "to arbitral awards in all matters not covered by the [Panama Convention]." The Las Leñas Protocol, meanwhile, does not mention the Panama or New York Conventions.

A distinguishing characteristic of arbitration has been the enforcement treaty framework—something lacking as to the enforcement of court judgments across borders. Recently, however, a Latin American state (Mexico) was the first to ratify the Hague Convention on Choice of Court Agreements ("Choice of Court Convention"). Mexico ratified the Convention in September 2007, and it was signed by the United States in January 2009 and by the European Community in April 2009.\textsuperscript{12} The Choice of Court Convention aims to reassure contracting parties that when they agree upon an exclusive court to hear potential business disputes arising between them, the judgments that result from such agreements will be recognized and enforced internationally.


\textsuperscript{11} Mercado Común del Sur, Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters, June 27, 1992.

Previously, there was no overarching international treaty framework for recognition of court judgments that accomplishes this. Instead, states have traditionally enforced each other's judgments based on international comity and reciprocity. As a result, the enforceability of judgments has been varied and uncertain, leading many parties to choose to arbitrate international disputes rather than to take their chances with domestic courts. The Choice of Court Convention seeks to provide certainty as to the enforcement of litigation judgments by requiring contracting states to recognize and enforce judgments given by chosen courts, absent certain exceptions and to the extent that the award does not compensate the injured party for more than actual damages. The adoption of the Choice of Court Convention by additional Latin American states may affect dispute resolution in the region.

4. The Efficacy of the Panama Convention

The Panama Convention shares many key provisions and the principal objective of protecting and promoting international arbitration with the New York Convention. There are key differences between the two conventions. Some of these differences relate to the scope of application and procedural rules of the two conventions. Others relate to the obligation of courts to compel arbitration, and the requirements parties must follow to obtain the recognition and enforcement of arbitral awards. Another difference is the default rule established by Article 3 of the Panama Convention which provides that "[i]n the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration Commission ("IACAC"). This feature of the Panama Convention is discussed further below.

Additionally, a number of issues addressed in the New York Convention are absent from the Panama Convention. Unlike the New York Convention at Article 1, the Panama Convention does not specify the scope of its application—either with respect to the subject matter of the arbitration or the nationality of the parties.

13 See id. arts. 9, 11.
14 See Panama Convention, supra note 1, art. 3.
15 See infra Section 5.
The Panama Convention also lacks the reciprocity provision set out at Article I(3) of the New York Convention enabling states to require that arbitral awards be made in the territory of another contracting state. In addition, the Panama Convention leaves open to broad construction the concept of when arbitration is considered "international." It also does not require the courts of member states to refer parties to arbitration after finding that the parties have signed a valid arbitration agreement. Finally, the Panama Convention does not contain formal requirements for obtaining the recognition and enforcement of a foreign arbitral award similar to those set out at Article IV of the New York Convention—such as the filing of the original or a duly certified copy of the original award and original arbitration agreement, as well as a certified translation if necessary.

The relationship between the Panama Convention and the New York Convention has been a source of some friction as reflected in the comments of commentators such as Professor Albert Jan van den Berg, author of the seminal work on the New York Convention. Two decades ago, he observed in a 1989 article that "[t]he traditional hostility towards ... international arbitration in Latin America appears to be on the wane," and queried whether the conventions are compatible and "can co-exist." After analyzing the differences between the two conventions, Professor van den Berg ultimately concluded that the answer to the compatibility question was "a reserved yes." He further submitted that "[i]n cases of concurrent applicability, no major conflict between both Conventions would seem to arise, except with respect to the applicability of the IACAC Rules. Such conflicts may be resolved by the rule of conflicts of treaties of maximum efficacy."
Observing how the Conventions have been interpreted and applied by arbitral tribunals and local courts, Professor van den Berg remarked on the New York Convention in 1999: "[i]f it ain't broke, don't fix it."21 Following a further decade of precedents, Professor van den Berg remarked in 2008 that the New York Convention "is in need of modernization" and that many of its provisions need to be 'added', existing provisions are 'unclear', 'outdated', and need to be 'revised.'22 He has thus proposed a "Hypothetical Draft" of an amended New York Convention (the "Draft Convention") designed to clarify, simplify and modernize that convention.23

The Draft Convention is of particular interest in light of the distinctions between the Panama and New York Conventions. Among its principal aspects, the Draft Convention seeks to clarify the scope of application of the New York Convention set forth in Article I. As noted above, the Panama Convention lacks such a characteristic.

The Draft Convention proposes to abolish the reciprocity requirement found in Article 1(3) of the New York Convention, and simplifies the formal requirements for the recognition and enforcement of arbitral awards contained in Article IV. These are provisions which the Panama Convention did not have in the first instance. Under Article 2(2)(b) of the Draft Convention, courts can refuse to compel arbitration if they determine there is prima facie no valid arbitration agreement under the law of the country where the award will be made. Additionally, Article 3(4) of the Draft Convention requires that courts act "expeditiously" on a request for enforcement of an arbitral award.


Although it maintains the current grounds for refusing recognition and enforcement found in Article V of the New York Convention, the Draft Convention applies them only in "manifest cases" where the issue was also timely raised in the underlying arbitration. Moreover, the Draft Convention changes the public policy exception found in Article V(2)(b) of the New York Convention (also present in Article 5(2)(b) of the Panama Convention) to require a violation of "international public policy as prevailing in the country where enforcement is sought."24

Finally, the Draft Convention clarifies courts' discretion under New York Convention Article VI to adjourn enforcement actions pending separate annulment proceedings, as well as the parties' ability to seek enforcement of arbitral awards under other agreements or law as provided by New York Convention Article VII.25 Although the Panama Convention contains a similar adjournment provision at Article 6, it does not refer to recognition and enforcement under other agreements.

Although directed specifically at perceived defects in the New York Convention, the Draft Convention carries important implications for the Panama Convention as well. The Draft Convention would in some ways narrow the gap between the two conventions by abolishing or simplifying provisions of the New York Convention that are not found in the Panama Convention, such as the Article I(3) reciprocity provision and the formal requirements of Article IV.

At the same time, because it also addresses issues contained in both agreements, the Draft Convention could widen certain gaps between the two instruments, compounding issues of compatibility and co-existence. Moreover, such considerations about the Panama Convention arise in a context of omens of the return of the Calvo Doctrine, particularly with respect to investment arbitration.26

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24 Id.

25 In particular, Article 7 of the Draft Convention provides that "[i]f an arbitration agreement or arbitral award can be enforced on a legal basis other than this Convention in the country where the agreement or award is invoked, a party seeking enforcement is allowed to rely on such basis." Id. art. 7.

26 With respect to the Panama Convention, see, e.g., Claus von Wobeser, The Influence of the New York Convention in Latin America and on the Inter-American Convention on International Commercial Arbitration, 2 DISP. RES. INT'L.
A fundamental issue, in theory, is which of the two conventions applies in a given enforcement proceeding. With respect to the interrelation between the Panama and New York Conventions, Article VII of the New York Convention provides that:

The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

The Panama Convention does not contain any such compatibility provision. For some, this discrepancy suggests that the Panama Convention should apply in cases of conflict between the two conventions, especially since the Panama Convention is the more focused regional instrument, and was also created after the New York Convention. In other contexts, the agreement that is most favorable to the recognition and enforcement of the arbitral award is preferred.


**New York Convention**, supra note 2, art. VII.

See, e.g., JAN KLEINHEISTERKAMP, INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA 27 (2005) (“There are good reasons in favor of the simple solution of the general rule of conflict of treaties lex specialis derogate generali.”). Specifically, because the New York Convention allows other agreements and addresses local problems, Kleinheisterkamp reasons “[i]f the arbitration is a genuine Inter-American one, the Panama Convention will prevail as lex specialis over the [New York] Convention.” Id.

See, e.g., infra Section 5.2. (discussing Peru’s 2008 arbitration law which follows this approach).
In most cases, the Panama and New York Conventions may provide for the same results in theory. Nonetheless, the cases outlined below demonstrate how the coexistence of two conventions arises in practice of the recognition and enforcement of foreign arbitral awards. This issue is best examined by a comparative law survey, on a country-by-country basis. The survey below is a sample of certain laws and precedents.

5.1. United States

In the United States, the question of which convention governs the recognition and enforcement of arbitral awards is set forth in Section 305 of the Federal Arbitration Act (the "FAA"). Pursuant to Section 305:

When the requirements for application of both the [Panama Convention] and the [New York Convention] are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows: (1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the [Panama Convention] and are member States of the Organization of American States, the [Panama Convention] shall apply. (2) In all other cases the [New York Convention] shall apply.

Section 305 represents an attempt by the Judiciary Committee of the U.S. House of Representatives to provide a uniform procedure for the application of the Panama and New York Conventions by establishing a clear hierarchy. Courts in the United States have recognized the obligations imposed on them by Section 305 in respecting this hierarchy.

32 See, e.g., Banco de Seguros del Estado v. Mutual Marine Offices, Inc., 230 F. Supp. 2d 362, 367, n.4 (S.D.N.Y. 2002), aff'd 344 F.3d 255 (2d Cir. 2003) ("Where the requirements of both the Inter-American Convention and New York Convention are met, the Inter-American Convention governs if 'a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and New York Convention are met, the Inter-American Convention governs if a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and New York Convention are member States of the Organization of American States.'"); Progressive Casualty Ins. v. C.A. Reaseguradora Nacional de Venezuela, 802 F. Supp. 1069, 1074 (S.D.N.Y. 1992), rev'd on other grounds, 991 F.2d...
Such a hierarchy is notably absent from the arbitration statutes of many Latin American countries. In contrast, local courts throughout Latin America tend to determine which convention applies. Indeed, even where the parties have themselves specified which convention should apply, one commentator suggests that “it is ... not certain whether Latin American judges will accept the parties’ explicit choice of preference for one Convention or the other—a choice which is permitted by the implementing U.S. legislation.”

5.2. Peru

Article 74(1) of Peru’s 2008 arbitration law provides that foreign arbitral awards shall be recognized and enforced in accordance with: (a) the New York Convention; (b) the Panama Convention; or (c) any other recognition and enforcement treaties to which Peru is a party. With respect to potential discrepancies among these instruments, Article 74(2) of the new law follows Article 128 of the 1996 law by attempting to enforce foreign arbitral awards to the maximum extent possible, providing that “except where the parties have agreed otherwise, the applicable treaty shall be that most favorable to the party who seeks the recognition and enforcement of the foreign award.”

Under Articles 76 and 77 of the new law, the recognition and enforcement of foreign arbitral awards in Peru is designed as a two-step process where courts first recognize an award in whole or in part and then order its enforcement. Moreover, as with Article 129 of the 1996 law, Article 75 of the new law closely follows the grounds for non-recognition contained in Article 36(1) of the UNCITRAL Model Law and Article 5 of the Panama and New York Conventions.

Once again reflecting a pro-enforcement stance, Article 75 of the new law applies: (1) when there is no applicable

42 (2d Cir. 1993)) (“The New York Convention and the Inter-American Convention both represent current legal and political thinking favoring arbitration as a means of alternative dispute resolution. In § 305 Congress sensibly provided for choosing between the two conventions if both applied to a given contract.”).

KLEINHEISTERKAMP, supra note 28, at 28.

All quotations from Latin American arbitration laws contained in this article are free translations from the Spanish original.
international treaty; or (2) when there is an applicable international treaty but the law itself is more favorable to the party seeking recognition of the foreign arbitral award, taking into account the prescription periods provided under Peruvian law. Similarly - and recognizing that Article VII(1) of the New York Convention provides that it shall not affect the validity of other multilateral or bilateral agreements entered into by contracting states - Article 78 of Peru's new arbitration law goes a step further than the 1996 law in specifically allowing parties to avail themselves of the legal rights most supportive of their arbitration agreements and arbitral awards.

5.3. Chile

Although Chile was one of the first Latin American countries to ratify the New York Convention (in 1975), the country's legal regime for arbitration lagged for years behind those of other countries in the region.35 In 2004, however, Chile enacted a new arbitration law (Law No. 19,971) which is substantially based on the UNCITRAL Model Law.36 Chilean courts have held that the new law governs arbitral procedure with respect to contracts executed prior to its enactment.37

Chile's arbitration law does not expressly regulate the relationship between the statute and the Panama and New York Conventions, nor does it specify a preference for either convention. As a result, Chilean courts themselves determine which instrument prevails in the case of a discrepancy. Nonetheless, Chilean courts have demonstrated their overall respect for the arbitral process by,

35 See, e.g., Carlos Eugenio Jorquiera & Karin Helmlinger, Chile, in INTERNATIONAL ARBITRATION IN LATIN AMERICA 89, 184 (Nigel Blackaby, David Lindsey & Alessandro Spinillo eds., 2002) ("In order for Chile to develop as a possible centre for international arbitration it is critical for it to update its nineteenth century arbitration legislation ... ").

36 See, e.g., KLEINHEISTERKAMP, supra note 28, at 8; Jonathan C. Hamilton et al., Chile: Chilean Appellate Court Rules on Applicability of International Arbitration Law, INT'L DISP. Q. 19 (2007).

among other things, confirming that the role of domestic courts in international arbitration proceedings is limited.\textsuperscript{38}

In 2008, for instance, the Chilean Supreme Court rejected arguments raised in opposition to the recognition and enforcement of an arbitral award rendered in Brazil, finding that the Respondent’s arguments exceeded the scope of its review.\textsuperscript{39} To the contrary, “[t]he Supreme Court stated that the sole purpose of the enforcement proceeding was to verify the compliance of certain minimum requirements related to the respect of public policy, the valid notification to the party against [whom] the award is invoked, the respect to the limits of jurisdiction and the definite character of the decisions to be enforced.”\textsuperscript{40}

5.4. Mexico

Mexico’s arbitration law, contained in Title IV, Book V of the country’s Commercial Code, was enacted in 1993 and largely tracks the UNCITRAL Model Law. Article 1415 of the statute provides that the arbitration law governs “except as provided in international treaties.” In this regard, the Panama and New York Conventions constitute “the Supreme Law of the State” under Article 133 of the Mexican Constitution and—as such—are above Federal legislation in Mexico.\textsuperscript{41}

As in Chile, Mexico’s arbitration law is silent as to the relationship between the statute and the Panama and New York Conventions, and also does not specify a preference for either convention. At the same time, given that Mexico’s arbitration law incorporates the main provisions of both agreements through its

\textsuperscript{38} See, e.g., D’Arcy, Rol No. 865-2000 (Chile).


\textsuperscript{40} Id.

\textsuperscript{41} See Claus von Webeser, \textit{Mexico, in International Arbitration in Latin America, supra} note 35, at 155, 184 (recognizing that international treaties ratified by Mexico, including the Panama and New York Conventions, “are situated above Federal legislation in the country’s legal hierarchy, and they bind both authorities and individuals”). “These treaties are self-executing without further need for implementing legislation.” Id.
adherence to the UNCITRAL Model Law, Mexican courts rarely directly apply the conventions themselves.

Mexican courts have on occasion based their decisions to enforce foreign arbitral awards on the conventions. In the case of *Nordson Corporation v. Industrias Canier SA de CV*, for instance, a U.S. party sought recognition and enforcement in Mexico of an arbitral award rendered under AAA rules. Although enforcement was granted in the first instance, the Mexican party filed an amparo. Affirming the decision of the lower court, the Mexican Sixth Civil Court of the First Circuit based its decision on both the Panama and New York Conventions. In reaching its decision, the Court “held that the grounds under the New York Convention were very restrictive and judges were not allowed to review the merits of the decision contained in the arbitral award.”

5.5. Brazil

In contrast to the foregoing examples, the development of Brazilian law reflects the country’s long-standing reticence towards international commercial arbitration. Brazil ratified the Panama Convention in 1995, but did not enact a domestic arbitration law favorable to international commercial arbitration until the following year. Brazil’s arbitration law does not mention the Panama Convention, and is modeled on the Spanish arbitration law of 1988 and the UNCITRAL Model Law. Although Brazil did not ratify the New York Convention until 2002, Articles 37, 38 and 39 of its 1996 arbitration law closely mirror Articles IV(1) and V of the New York Convention with respect to the recognition and enforcement of foreign arbitral awards. Still, Brazil’s 1996

42 See Conejero Roos, supra note 39.
43 See KLEINHEISTERKAMP, supra note 28, at 8 (“Brazil’s former arbitral regime, which had been contained in the Civil Code of 1916 and then in part repeated and complemented by the Code of Civil Procedure of 1973—especially as interpreted and applied by Brazilian scholars and courts—was one of the most notorious examples of Latin American adversity against arbitration. Since the early 80s, there had been several incentives for modernizing this regime and it was only after fierce lobbying that the new law could be passed in 1996”).
44 Id.
arbitration law remained subject to constitutional challenge until 2001.46

Since the adoption of the New York Convention in 2002, Brazil has increasingly transformed itself into a jurisdiction favorable to international arbitration. Between 1996 and 2004, actions for the recognition and enforcement of foreign arbitral awards in Brazil were heard by the Supremo Tribunal Federal ("STF"), while since 2004 such cases have been heard by the Superior Tribunal de Justiça ("STJ").47 During this time, the STF denied recognition and enforcement in two out of five cases, while the STJ has denied recognition and enforcement in only four out of seventeen cases.48 In both Tribunals, recognition and enforcement were denied primarily on procedural grounds, including: where the Brazilian party was improperly summoned (two cases), where there was no valid written arbitration agreement (three cases), and where the arbitral award had been assigned to a third party which lacked standing to seek recognition and enforcement (one case).49

drafting [Articles 38 and 39 of the Brazilian arbitration law] which, in the end, basically provide that the homologation of foreign arbitral awards may be denied in Brazil in the same circumstances as the ones provided in article V of the New York Convention."); Jonathan C. Hamilton, et al., Brazil: Enforcement of Arbitral Awards, INT’L DISP. Q., available at http://www.whitecase.com/idq/Fall-2007/cal/ (last visited Apr. 09, 2009).


49 Id.
In addition, the STJ has demonstrated at least some willingness to grant recognition and enforcement even where there exist procedural irregularities. For instance, in *L’Aiglon S/A v. Textil União S/A*, the STJ granted the recognition and enforcement of a foreign arbitral award even where the Brazilian party argued that the parties’ arbitration agreement was not properly signed in accordance with Article 4(1) of Brazil’s arbitration law and Article II of the New York Convention. In this case, the STJ found that the Brazilian party had been aware of the defect and did not raise it in the underlying arbitration, and that therefore such argument had been waived. Finally, not unlike Mexico, it has been noted that:

There are already some precedents in which parties have filed oppositions to homologation requests raising arguments related to the merits of the foreign arbitral award and the Supreme Tribunal of Justice has strongly rejected these oppositions, emphasizing that the merits of a foreign award is not subject to review in homologation procedures.

5.6. Argentina

Although Argentina is one of the more active jurisdictions for commercial arbitration in Latin America, its domestic arbitration regime has changed little since the nineteenth century. Indeed,
various attempts to adopt the UNCITRAL Model Law in Argentina have so far been unsuccessful. Moreover, given that the country's arbitration laws predate the ratification of the Panama and New York Conventions, Argentina does not have a statute that specifically regulates the procedures to be followed in cases involving the recognition and enforcement of foreign arbitral awards.

In Argentina, foreign arbitral awards are enforced under international treaties—such as the Panama and New York Conventions—if applicable. Although Argentine courts are bound by these agreements, there is no procedure for resolving discrepancies between the two agreements if the parties themselves have not chosen a convention. In other cases, foreign arbitral awards are enforced under Argentina's National Code of Civil and Commercial Procedure. In all cases, however, enforcement must be sought in the domestic court which would have resolved the dispute had it not been submitted to arbitration.

6. PROMOTING AND PROTECTING AGREEMENTS TO ARBITRATE

As noted above, one unique feature of the Panama Convention vis-à-vis the New York Convention is the default rule established by Article 3. It provides that, "[i]n the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration Commission." On this basis, authors note that where there is an agreement to arbitrate but the absence of express agreement as to procedural matters, the application of the IACAC Rules has been considered mandatory.

may become willing to accept international arbitration clauses providing for arbitration in Argentina.

55 See KLEINHEISTERKAMP, supra note 28, at 6 (attributing the failure of the four attempts since 1990 to introduce the UNCITRAL-Model Law to the lack of interest in the House of Representatives).

56 See Spinillo & Vogelius, supra note 54, at 55-57 (providing an overview of the enforcement of foreign arbitral awards in Argentina).

57 Id.

58 Panama Convention, supra note 1, art. 3.

59 See, e.g., Bowman, supra note 30, at 30-31; Kleinheisterkamp, supra note 28, at 28; Blackaby et al., Overview of Regional Developments, in INTERNATIONAL ARBITRATION IN LATIN AMERICA, supra note 35, at 1, 6 (recognizing that "[the IACAC rules] benefit from a privileged status under the Panama Convention
Courts have recognized an obligation to apply the IACAC Rules. In *Anderra Energy Corp. v. SAPET Dev. Corp.*, the District Court for the Northern District of Texas granted the defendants’ motion to compel arbitration pursuant to the IACAC Rules. The Court arrived at this result by applying Section 303(b) of the FAA, which provides that “[i]n the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held in accordance with Article 3 of the [Panama Convention].” In turn, Article 3 of the Panama Convention provides for arbitration pursuant to the IACAC Rules.

Thus, as noted by one commentator, the default rule contained in Article 3 of the Panama Convention and of the IACAC Rules is relevant to arbitration practitioners advising on arbitration agreements between American parties:

The incorporation by law, in the absence of an express agreement between the parties, of the IACAC Rules into an arbitration agreement subject to the Panama Convention makes it imperative that the parties’ negotiators and counsel are familiar with these rules .... [B]y not incorporating the rules of some other arbitral institution or not expressly negating the application of the IACAC Rules, the parties are effectively choosing, whether they realize it or not, the IACAC Rules to govern resolution of future disputes.

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62 *Bowman*, supra note 30, at 30–31 (internal citations omitted). *See also Kleinheisterkamp*, supra note 28, at 28 (stating that “[a]n important and very peculiar feature of the Panama-Convention which has been labeled [by Peter Schlosser and Philippe Fouchard] as ‘the most inventive and daring innovation,’ is Art. 3.... [I]nventive, since its intention is the internationalization of arbitral proceedings to eliminate the fallback to municipal procedural law and, indeed, the often dreaded national judiciary.... Daring, because it orders the application of these norms as if they were regular law despite having been drafted by a private entity that is not governed by the contracting States”) (internal citations omitted).
Since 2002, the International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association ("AAA") has had an agreement with IACAC to administer IACAC arbitrations. This step was aimed at carrying out the vision of a regional legal framework for arbitration by providing default procedural rules administered by an institution focused on arbitration for the Americas and thus reduce the need for judicial intervention and minimize uncertainty in arbitral proceedings.

7. CONCLUSION

By way of summary, three decades ago, Latin America lacked a comprehensive legal framework for the recognition and enforcement of international arbitral awards. Latin American states have since broadly adopted the Panama and New York Conventions, and new arbitration laws. Latin American jurisprudence with respect to international commercial arbitration continues to evolve. At the same time, two thirds of Latin Americans still distrust their own judiciaries. This portends continued evolution for commercial arbitration in Latin America in the decades ahead.

63 See Luis M. Martinez, Are We There Yet?, in ARBITRATION REVIEW OF THE AMERICAS (2009).

64 See, e.g., Michael F. Hoellering, Inter-American Convention, NEW YORK L.J., Nov. 18, 1986, at 1, 5 ("In the absence of designation by the parties, Article 3 provides that the arbitration rules of the IACAC shall apply. The practical effect of this provision should be to reduce the need for judicial intervention in arbitration proceedings in the forum state and to minimize uncertainty and delay of such proceedings by reason of the parties’ failure to regulate important aspects of the arbitration procedure in their agreements.")


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