

A COMPARISON OF COMMERCIAL ARBITRATION: THE UNITED STATES & LATIN AMERICA

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I. INTRODUCTION

It has been said that the United States and Latin America have historically taken different attitudes toward arbitration.¹ Although there is some truth to this statement, it would be an oversimplification to say that arbitration has always been accepted in the United States and rejected in Latin America. In

¹ See Doak Bishop, *The United States' Perspective Toward International Arbitration with Latin American Parties*, 8 INT'L L. PRACTICUM 63, 63 (1995).

fact, arbitration has not always received favorable treatment in the United States; for most of its history, arbitration was viewed with skepticism and hostility. Nevertheless, there is a significant difference in the way arbitration is currently viewed in the two regions. The reasons for those differences will be the subject of this comment. A variety of factors contribute to the divergent treatment of arbitration, not the least of which are different legal cultures, histories, concerns about national sovereignty, and the role of the state in the administration of justice. Part II of this comment will discuss the history of arbitration in the United States and analyze its current state of development. Part III will proceed with a general description of arbitration in Latin America and conclude with a focus on Brazil, Venezuela, and Mexico.

II. THE DEVELOPMENT OF ARBITRATION IN THE UNITED STATES

A. Common Law

Although arbitration had existed as a form of dispute resolution since colonial times, it was not popular.² The origins of arbitration can be found in English common law and unfortunately, some of the same shortcomings that existed in England were transplanted to the United States.³ The belief that arbitral agreements out courts of jurisdiction was the most crippling problem.⁴ As explained by William Howard in *The Evolution of Contractually Mandated Arbitration*, the consequences of this attitude can be seen in an early sixteenth

² See William M. Howard, *The Evolution of Contractually Mandated Arbitration*, 48 ARB. J. 27, 28 (1993) (noting that before the American Revolution, arbitration was restricted in its application by statute).

³ See Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 351 (1995) (noting that common law commercial arbitration had been practiced in the United States for several hundred years). The history of arbitration prior to its use in England is unclear, but it has been suggested that it has its origins in Roman law. See *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982 n.5 (2d Cir. 1942). This would indicate that there is common ancestry between arbitration in the United States and in Latin America.

⁴ See Howard, *supra* note 2, at 28.

century statute that prohibited agreements barring lawsuits.⁵ Additionally, the sixteenth century court decision known as Vynior's Case established a trend that "arbitration agreements were revocable by either party at any time prior to the award based on the concept that the arbitrator was the agent of both whose authority could be revoked at any time."⁶ This conception of the arbitrator's proved to be the most serious limitation to widespread use of arbitration because it became strong precedent in both England and the United States.⁷ Other explanations for the historical distrust of arbitration are the fear that it is more likely to result in a miscarriage of justice and the public policy argument that the state should maintain a monopoly over the resolution of disputes.⁸

Even with these limitations, arbitration in the United States was an established form of dispute resolution before the American Revolution.⁹ In 1768, the New York Chamber of Commerce created the first permanent board of arbitration in the colonies.¹⁰ Initially, the New York Chamber of Commerce Arbitration Committee dealt solely with claims between merchants, but in 1817 the securities industry adopted a constitution that provided the nation's first comprehensive arbitration clause.¹¹ After the revolution, many states passed statutes permitting the enforcement of arbitral awards, but pre-dispute agreements were not recognized—a manifestation of the anti-arbitration hostility exemplified by the rule in Vynior's case.¹² In 1854, the Supreme Court showed signs of recognizing the importance of arbitration when it held that arbitrators

⁵ *Id.*

⁶ *Id.* at 28–29.

⁷ *See id.* at 27–28 (noting that this precedent was not overturned in the United States and England until the 1850's); *see also* THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION 105 (1989) (explaining that "landmark legislation" was needed to undo the perception that arbitration "amounted to a contractual usurpation of judicial jurisdictional authority").

⁸ Howard, *supra* note 2, at 28.

⁹ *See* Ed Anderson & Roger Haydock, *History of Arbitration as an Alternative to U.S. Litigation*, WEST'S LEGAL NEWS, August 12, 1996.

¹⁰ *Id.*

¹¹ *See id.*

¹² *See* Howard, *supra* note 2, at 27–28.

should be given broad discretion subject to limited judicial review.¹³ However, this holding was never strong precedent, and in 1874, the Supreme Court echoed the common law sentiment by holding that pre-dispute agreements oust courts of jurisdiction and are illegal and void.¹⁴

B. Federal Arbitration Act

In an effort to “overcome centuries of hostility,” a pro-arbitration reform movement formed in New York.¹⁵ The New York Chamber of Commerce and the New York Bar Association joined forces and lobbied the state legislature to pass a law that would make arbitration a viable form of dispute resolution both before and after a dispute arose.¹⁶ The result was the 1920 New York Arbitration Act, which validated pre-dispute arbitration agreements, stayed court proceedings pending arbitration, and prohibited revocation of agreements to arbitrate.¹⁷ Five years later, Congress followed New York’s lead and passed the Federal Arbitration Act (“FAA”) with the purpose of making arbitration agreements valid, irrevocable, and enforceable.¹⁸ The bill passed unanimously in the both House and the Senate.¹⁹ The FAA attempts to put arbitration agreements “upon the same footing as other contracts.”²⁰ It furthers this goal by allowing a party to petition a federal district court to compel arbitration, to appoint an arbitrator if one has not been designated, and to enforce an award.²¹

The FAA limits the grounds for nonenforcement of an arbitral award to those that “exist at law or in equity for the

13 See *Burchell v. Marsh*, 58 U.S. 344, 349–50 (1854).

14 See *Home Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874).

15 Howard, *supra* note 2, at 28; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 29 (1994).

16 See Howard, *supra* note 2, at 28.

17 1920 N.Y. Laws 275 (laws of the 143rd session of the legislature); Howard, *supra* note 2, at 28.

18 See Howard, *supra* note 2, at 28; 9 U.S.C. § 4 (1994).

19 BORN, *supra* note 15, at 30.

20 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974).

21 See 9 U.S.C. §§ 4–5, 9.

revocation of a contract.”²² In this context, courts have recognized defenses such as manifest disregard of the terms of the agreement and manifest disregard of the law.²³ These defenses, however, are construed quite narrowly in order to further the FAA’s twin goals of settling disputes efficiently and avoiding long and expensive litigation.²⁴ Section 10 of the FAA provides courts with five specific grounds on which to vacate an arbitral award.²⁵ An award may be vacated when (a) it was procured by corruption, fraud, or undue means; (b) there was evident partiality or corruption in the arbitrators; (c) the arbitrators were guilty of misconduct in refusing to postpone the hearing for good cause shown, refusing to hear pertinent evidence, or any other misbehavior that prejudices the rights of a party; (d) the arbitrators exceeded their powers; or (e) the time which the agreement required for the award to be made has not expired.²⁶

In 1932, the Supreme Court upheld the constitutionality of the FAA.²⁷ Almost every state has since adopted an arbitration statute patterned after either the FAA or the Uniform Arbitration Act.²⁸ As noted above, Congress passed the FAA without dissent—but not without criticism. Its strong support among the business community raised suspicions that the FAA was a product of “business propagandists,” designed to subvert the public system of courts.²⁹ Some considered the courts to be

22 9 U.S.C. § 2.

23 See *Leed Architectural Prods., Inc. v. United Steelworkers Local 6674*, 916 F.2d 63, 65–66 (2d Cir. 1990); *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 515–16 (2d Cir. 1991); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933–34 (2d Cir. 1986).

24 See *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993); *Barbier v. Shearson Lehman Hutton, Inc.*, 752 F.Supp. 151, 159 (S.D.N.Y. 1990), *aff’d in part, rev’d in part*, 948 F.2d 117 (2d Cir. 1991). The party seeking to avoid judicial confirmation of an award bears the burden of proof and the required showing is very high. See *Barbier*, 752 F. Supp. at 159.

25 9 U.S.C. § 10.

26 See *id.*

27 *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 277–79 (1932).

28 Howard, *supra* note 2, at 29. Although the FAA “does not occupy the entire field” of arbitration, state law is applicable to arbitration agreements and awards only when federal arbitration law does not apply. See BORN, *supra* note 15, at 33.

29 See Howard, *supra* note 2, at 29.

the only legitimate forum for dispute resolution; without it, the “strong could oppress the weak.”³⁰ Critics claimed that in order to protect the public, states should, as a matter of social necessity, provide the only tribunals where disputes can be resolved.³¹ Over time, the benefits of arbitration overshadowed the criticisms, and in 1960, the Supreme Court confirmed the strong public policy for arbitration in labor disputes by holding that any doubt should be resolved in favor of a dispute’s arbitrability.³² Seven years later, the Court further enunciated its pro-arbitration stance in *Prima Paint v. Flood & Conklin Manufacturing Company*.³³ In that case the plaintiff claimed a contract with an arbitration clause was fraudulently induced.³⁴ The court held that when a contract contains an arbitration clause, a court may consider only the issues that pertain to the making and performance of the arbitration agreement.³⁵ This is an example of the separability doctrine, which provides that an arbitration agreement, although part of the contract, is a separate and autonomous agreement.³⁶ The separability doctrine is an important feature in the arbitration process because it allows an arbitration clause to survive even though the underlying contract has expired or become invalid.³⁷ The doctrine has been criticized, however, because arbitration clauses are interrelated with the contracts in which they are located, so that a defect in one implies a defect in the other.³⁸ The separability doctrine is substantially related to the Kompetenz-Kompetenz doctrine that addresses an arbitrator’s

30 *Id.*

31 *See id.*

32 *See* *United Steelworkers v. American Mfg.*, 363 U.S. 564, 568 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 585 (1960); *United Steelworkers v. Enterprise Wheel & Car Co.*, 363 U.S. 583, 595 (1960). Collectively, these cases are known as the Steelworkers Trilogy.

33 388 U.S. 395 (1967).

34 *See id.*

35 *See id.* at 403–04.

36 BORN, *supra* note 15, at 192. “Except where the parties otherwise intend . . . arbitration clauses as a matter of federal law are ‘separable’ from the contracts in which they are embedded . . .” *Prima Paint*, 388 U.S. at 402.

37 *See* BORN, *supra* note 15, at 193.

38 *Id.*

ability to determine its own jurisdiction without court intervention.³⁹ As with separability, Kompetenz-Kompetenz has far-reaching importance for the arbitration process, but the extent of its acceptance in the United States is uncertain.⁴⁰

In the 1980s, the Supreme Court expressed a renewed interest in arbitration as it strengthened its pro-arbitration stance even further.⁴¹ The most significant case of the decade was *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, which held that unless “the agreement to arbitrate resulted from some sort of fraud or overwhelming economic power that would provide grounds ‘for revocation of any contract’ . . . the [FAA] itself provides no basis for disfavoring agreements to arbitrate statutory claims.”⁴² In so holding, the Supreme Court rejected twenty years of precedent for not enforcing arbitration agreements in antitrust claims.⁴³

C. The New York Convention

Mitsubishi is not only significant for domestic arbitration; it also falls under the purview of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁴⁴ The New York Convention was held in 1958 under the auspices of the United Nations for the purpose of addressing the problems faced by parties who submit to arbitration in a transnational context.⁴⁵ It was a successor to the Geneva

39 See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 997 (3rd ed. 1996).

40 At one end of the spectrum, arbitrators can decide their own jurisdiction subject to various levels of judicial review. See *id.* At the other end, arbitrators are vested with the “sole jurisdiction to determine their own jurisdiction” without meaningful judicial review. *Id.* In *First Options of Chicago, Inc. v. Kaplan*, the Supreme Court held that if the parties to an arbitration agreement did not specifically agree to submit arbitrability questions to the arbitrator, then the court must make an independent determination of the issue. 514 U.S. 938, 943 (1995). If there is clear and unmistakable evidence that the parties intended the arbitrator to decide the matter, the court should use a highly deferential standard in reviewing the award. See *id.*

41 See Howard, *supra* note 2, at 31.

42 473 U.S. 614, 627 (1984).

43 Howard, *supra* note 2, at 31–32.

44 9 U.S.C. § 201. The convention is commonly known as the New York Convention.

45 See BORN, *supra* note 15, at 18.

Protocol and Geneva Convention—which were the first and less successful multilateral treaties to address transnational arbitration.⁴⁶ The New York Convention was a great improvement on the Geneva Convention and is widely considered the most important multinational agreement in the field.⁴⁷ As with domestic arbitration, there was reluctance on the part of courts to enforce arbitral awards from other countries.⁴⁸ However, international arbitration had the added drawback of requiring sovereign courts to uphold the decisions of private foreign entities that lack the hierarchical institutions of domestic court systems.⁴⁹ The parties to the New York Convention committed themselves to the advancement of two primary goals: the promotion of arbitration as a viable form of alternative dispute resolution and the unification of national laws relating to the enforcement of arbitral awards.⁵⁰ The New York Convention accomplishes these goals by requiring national courts to recognize and enforce foreign arbitration agreements and awards (subject to certain exceptions) and to refer parties to arbitration when they have committed themselves to do so under a valid arbitration agreement.⁵¹ It also imposes a strong presumption of enforceability on both agreements and awards, subject to the exceptions listed in articles V and VI.⁵² Unlike the Geneva Convention, the New York Convention places the burden to prove the agreement is unenforceable on the party against whom recognition or enforcement is invoked.⁵³

The United States signed the New York Convention in 1970

⁴⁶ *Id.*

⁴⁷ *See id.* (citing U.N. Doc. E/CONF. 26/SR.25 at 2 (1958)) (quoting the President of the United Nations Conference on the Geneva Convention's list of improvements to the Geneva Convention in the New York Convention).

⁴⁸ *See* 9 U.S.C. § 201, interpretive note 1.

⁴⁹ *Cf.* Sharon L. Cloud, *Mitsubishi and the Arbitrability of Antitrust Claims: Did the Supreme Court Throw the Baby Out with the Bathwater?*, 18 *LAW & POL'Y INT'L BUS.* 341, 342 n.5 (1986) (discussing the inappropriateness of arbitration for certain disputes and arguing that arbitrators are sometimes ill-suited to safeguard public interests).

⁵⁰ *See* *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.15 (1974).

⁵¹ *See* 9 U.S.C. § 201.

⁵² *See id.*

⁵³ *See* BORN, *supra* note 15, at 19.

and today there are over 115 signatory nations.⁵⁴ The United States' twelve-year delay in signing the New York Convention has been attributed to the historic distrust of arbitration and a debate over the appropriate scope of federal treaty power.⁵⁵ Other nations, such as the United Kingdom and most of Latin America, did not initially sign the New York Convention either.⁵⁶

There are two restrictions to the New York Convention. Signatories to the New York Convention may restrict its applicability to commercial matters and apply it on a basis of reciprocity.⁵⁷ The United States consented to the New York Convention making both of these reservations.⁵⁸ While the reservations are minor, they are unnecessary restrictions and antithetical to a liberal pro-arbitration policy. The effect of the New York Convention is more directly influenced by the content of national legislation enacting arbitration and its interpretation in national court systems.⁵⁹ As mentioned above, an important aim of the drafters of the New York Convention was to provide uniformity in international arbitration laws.⁶⁰ While its requirements are inherently designed to lead to the enforcement and recognition of arbitration agreements and awards, member countries do have some leeway in interpreting the New York Convention and can and sometimes do have a negative influence on its uniform treatment.⁶¹

In the United States, the interpretation of the New York Convention has generally been pro-enforcement and uniform, but at times court decisions are handed down that violate the

54 See 9 U.S.C. § 201; INTERNATIONAL ADR, TREATIES AND CONVENTIONS, at <http://www.internationaladr.com/tc.htm> (last visited Mar. 18, 2001).

55 See BORN, *supra* note 15, at 19 n.84.

56 See *id.* The reluctance of Latin American countries to sign the New York Convention and commit to international arbitration agreements in general, is discussed in detail in § III, B, *infra*.

57 9 U.S.C. § 201.

58 See Robert S. Matlin, Note, *The Federal Courts and the Enforcement of Foreign Arbitral Awards*, 5 PACE L. REV. 151, 158 (1984).

59 BORN, *supra* note 15, at 20.

60 See 9 U.S.C. § 201.

61 See BORN, *supra* note 15, at 20 (noting that “national courts have performed adequately, but no[t] better, in arriving at uniform interpretations of the Convention”).

spirit, if not the letter, of the Convention.⁶² In *Alghanim & Sons v. Toys "R" Us*, the Second Circuit considered the issue of whether the New York Convention provides the exclusive and explicit means for setting aside arbitral awards.⁶³ *Toys "R" Us* involved an alleged breach of contract by a Kuwaiti franchisee against an American franchisor.⁶⁴ The contract called for arbitration under the rules of the American Arbitration Association.⁶⁵ The arbitrator awarded Alghanim \$46 million, plus interest, for lost profits.⁶⁶ When Alghanim tried to enforce the award in a New York federal district court, Toys "R" Us argued it should be vacated under the FAA because it was in manifest disregard of the law and the terms of the agreement.⁶⁷ The Second Circuit held that the New York Convention applied to the agreement and provided the exclusive means to set aside the arbitral award.⁶⁸ However, under Article V(1)(e) recognition may be refused if the award has been set aside by the competent authority of the country in which, or under the law of which, that award was made.⁶⁹ The Second Circuit went on to hold that the facts in the case did not warrant the defenses of manifest disregard for the terms of the agreement or manifest disregard for the law supplied by case law interpreting the FAA.⁷⁰ Essentially, this means that the Convention *does* provide the exclusive means for nonrecognition of an arbitral award, but when the award was granted in the country where enforcement is sought, the Convention may be supplemented by the country's arbitration law.⁷¹ Regardless of whether or not the drafters of

62 See generally Mohamad Taherzadeh, *International Arbitration and Enforcement in U.S. Courts*, 22 HOUS. J. OF INT'L L. 401 (2000) (arguing that recent Supreme Court decisions have subverted the New York Convention's goal of promoting uniformity by improperly allowing the domestic law of signatory states to supplement defenses to enforcing awards).

63 126 F.3d 15, 19–20 (2d Cir. 1997).

64 *Id.* at 17–18.

65 See *id.* at 18.

66 *Id.*

67 *Id.*

68 See *id.* at 23.

69 See 9 U.S.C. § 201.

70 See *Alghanim*, 126 F.3d at 23.

71 See Taherzadeh, *supra* note 62, at 386.

the New York Convention intended this result, it is obvious that the primary goals of the Convention are not being advanced.⁷²

III. THE DEVELOPMENT OF ARBITRATION IN LATIN AMERICA

A. *The Calvo Doctrine*

In Latin American countries arbitration has been viewed with an even greater degree of distrust than the narrow acceptance and general hostility characteristic of the United States.⁷³ When arbitration has involved foreign parties and Latin American states, the feelings of distrust have escalated to perceptions of an affront to national sovereignty by “colonial” powers.⁷⁴ However, the distrust that these countries have exhibited toward arbitration or foreign intervention in general is not unwarranted. The protectionist policies that developed in Latin American countries during the nineteenth and twentieth centuries can be viewed as a direct result of colonialism and gunboat diplomacy.⁷⁵ One series of events, in particular, strained the relationship between these countries and the United States and Europe. In 1838, and again in 1861, France sent armed

⁷² See *id.* at 401. Although this article focuses on arbitration in the commercial context, the controversy surrounding arbitration agreements in the employment setting indicate that traditional, guarded attitudes remain. This distrust is appropriate when parties do not deal at arm’s length and the agreements attempt to waive employee’s statutory rights. See, e.g., Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A’s—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231 (1996) (discussing compulsory arbitration of statutory employment discrimination claims); see also Mary Williams Walsh, *Court Considers if Employer Can Force Pledge Not to Sue*, N.Y. TIMES, Nov. 3, 2000, at A1.

⁷³ See Alejandro M. Garro, *Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America*, 1 J. INT’L ARB. 293, 294 n.4 (1984).

⁷⁴ See *id.*

⁷⁵ See *id.* “Gunboat diplomacy” refers to the historic use of naval forces as a coercive element to collect public and private debts. Stephen D. Krasner, *Pervasive Not Perverse: Semi-Sovereigns as the Global Norm*, 30 CORNELL INT’L L.J. 651, 657 (1997); see also D.G. Stephens, *The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations*, 29 CAL. W. INT’L. L.J. 283, 285 (1999). For a discussion of protectionist policies in Latin America, see, e.g., THE MACROECONOMICS OF POPULISM IN LATIN AMERICA (Rudiger Dornbusch & Sebastian Edwards eds., 1991).

troops into Mexico to effectuate certain claims of French citizens against the Mexican government.⁷⁶ These transgressions led to the development of the Calvo Doctrine, named for Carlos Calvo, an Argentine diplomat.⁷⁷ In a more general sense, the development of the doctrine has been attributed to the exploitation by large foreign-owned corporations of natural resources located in underdeveloped countries in the Western Hemisphere.⁷⁸ Essentially, the Calvo Doctrine holds that governments have a right to be free of foreign intervention of any sort and aliens are not entitled to rights and privileges that are not held by the nationals of a given country.⁷⁹ Therefore, aliens doing business in a country that adheres to the Calvo Doctrine may seek redress for grievances only before local authorities.⁸⁰ The doctrine led to Calvo Clauses, concise summations of the Calvo Doctrine which were often inserted in constitutions and treaties.⁸¹ Usually Calvo Clauses were required in the terms of contracts that involved foreign parties.⁸²

Today, the popularity of the Calvo Doctrine is on the decline and in many Latin American countries has been negated by treaties and codes permitting alternative forums for lawsuits.⁸³

⁷⁶ Bishop, *supra* note 1, at 63.

⁷⁷ *Id.*

⁷⁸ See Eduardo A. Wiesner, *ANCOM: A New Attitude Toward Foreign Investment?*, 24 U. MIAMI INTER-AM. L. REV. 435, 437 (1993) (noting that the Calvo clause was developed to limit the perceived threats of foreigners to a country's natural resources); see also Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259, 279-81 (1994) (describing foreign investment in infrastructure and natural resources in Mexico during the administration of Porfirio Diaz (1876-1911), which led to economic problems and fueled the Mexican Revolution of 1910).

⁷⁹ *See id.*

⁸⁰ See Lisa C. Thompson, *International Dispute Resolution in the United States and Mexico*, 24 SYRACUSE J. INT'L L. & COM. 1, 27-28 (1997).

⁸¹ *See id.* An example of a Calvo Clause can be found in the Mexican Constitution at article 27, paragraph 1: "El Estado podrá conceder el mismo derecho a los extranjeros, siempre que convengan ante la Secretaría de Relaciones en considerarse como nacionales respecto de dichos bienes y en no invocar por lo mismo la protección de sus gobiernos por lo que se refiere a aquéllos; bajo la pena, en cuanto de faltar al convenio, de perder en beneficio de la Nación los bienes que hubieren adquirido en virtud del mismo." Constitución Política de los Estados Unidos Mexicanos, art. 27.

⁸² See Thompson, *supra* note 80, at 27.

⁸³ *See id.*

In the arbitration context, there are many national codes that permit arbitration of disputes and recognition of domestic and foreign awards.⁸⁴ In fact, Latin American countries do not distinguish between domestic and foreign arbitration in determining the national laws that apply to a certain dispute.⁸⁵ What is lacking, though, is an extensive judicial interpretation of the national arbitration laws governing the enforcement of arbitration agreements and awards.⁸⁶ This absence makes it difficult to predict with an appropriate degree of certainty how a national court will handle a given case.⁸⁷

Other deficiencies that have commonly plagued arbitration in Latin American countries exist in the local arbitration laws themselves. These deficiencies include the “lack of authority of a court to appoint arbitrators and fill vacancies, restriction on the court’s freedom to review findings, lack of specification of the grounds on which awards may be attacked for procedural defects, and lack of time limits for such challenges.”⁸⁸ One of the most onerous requirements that parties attempting to arbitrate in Latin America have faced is that of the *compromiso*. A *compromiso* is a post-dispute agreement to arbitrate that specifies the details of the impending arbitration.⁸⁹ The *compromiso* is the product of the *clausula compromisoria*, the pre-dispute agreement to arbitrate.⁹⁰ The *clausula compromisoria* is an arbitration clause that provides for the arbitration of a future dispute and contemplates an additional

84 See Garro, *supra* note 73, at 293.

85 Horacio A. Grigera-Naon, *Latin America: Overcoming Traditional Hostility Towards Arbitration*, 477 PRAC’ING L. INST. INT’L COMM. ARB.: RECENT DEV. 375, 380 (1988).

86 Garro, *supra* note 73, at 293.

87 See *id.*

88 See *id.* Another common statutory limitation on arbitration is related to the issue of arbitrability. For instance, a statute may prohibit arbitration for disputes arising from areas that a country deems important to national interests. Also arbitration may be excluded as a possibility if a state is a party to the dispute. See Grigera-Naon, *supra* note 85, at 383 (citing as examples of disputes not subject to arbitration those in which the arbitrator would be passing judgment on the exercise of sovereign state power and those affecting or interfering with the state organization, public policy, authority, or sovereignty).

89 See *id.* at 388.

90 See *id.* at 387.

agreement wherein the parties precisely determine the issues in controversy and describes the procedures through which they will be resolved.⁹¹ Under this two-step procedure, arbitration may not be compelled unless the parties make the second agreement, and unfortunately, many recalcitrant parties have taken advantage of the *compromiso* to avoid arbitration.⁹²

B. Multilateral Treaties

Interestingly enough, the Montevideo Convention, the first multilateral convention that dealt with the recognition of arbitration agreements and awards, took place in Uruguay in 1889.⁹³ The Montevideo Convention was the first of its kind, but had little practical effect despite being ratified by six South American countries.⁹⁴ It provided for recognition of judgments and arbitral awards only if certain basic requirements were met.⁹⁵ Furthermore, the Montevideo Convention did not address, and made no attempt to correct, preexisting problems in enforcing arbitration agreements.⁹⁶

The Inter-American Conference on Private International Law, another attempt at improving the treatment of foreign judgments and arbitral awards, proved equally deficient.⁹⁷ Held in Havana in 1928 and commonly known as the Bustamante Code, it was ratified by fifteen Latin American countries, but with crippling reservations.⁹⁸ Five years before, the Geneva Protocol was held and attracted some interest among Latin American countries, but of those that signed, only Brazil ratified the Protocol.⁹⁹ Unfortunately, even for the countries that did

91 *See id.*

92 *See* Garro, *supra* note 73, at 311. It has been argued that this two step procedure is consistent with the comparatively antagonistic nature of arbitration because it gives parties the opportunity to weigh the importance and implications of the disputes and perhaps settle peacefully. *See* Grigera-Naon, *supra* note 85, at 397.

93 *See* Frank E. Nattier, *International Commercial Arbitration in Latin America: Enforcement of Arbitral Agreements and Awards*, 21 TEX. INT'L L.J. 397, 400 (1986).

94 *See id.* at 400.

95 *See id.*

96 *See* Garro, *supra* note 73, at 299–300.

97 *See* Nattier, *supra* note 93, at 400–01.

98 *Id.* at 400–01.

99 *Id.* at 401. The United States did not take part in either the Geneva Protocol or

participate in these conventions, little was contributed to facilitating the enforcement of arbitration agreements and awards because the party seeking enforcement had the burden of proving that the agreements and the awards complied with all the requirements of the conventions.¹⁰⁰

As mentioned above, the New York Convention signified a vast improvement over previous multilateral treaties concerning arbitration. As with the United States, the New York Convention was not initially signed by many Latin American countries.¹⁰¹ However, instead of the federalism issues that existed in the United States, the reluctance of Latin American countries to sign the New York Convention can be attributed solely to the historic distrust of arbitration.¹⁰² Over time, the initial hesitancy to sign the New York Convention has given way to what must be considered a complete turnaround and a growing acceptance of arbitration as a viable form of alternative dispute resolution.¹⁰³ As of January 2000, Brazil, Nicaragua and Honduras were three of only a handful of Latin American countries that had yet to sign the New York Convention.¹⁰⁴ The widespread ratification of the Convention among Latin American countries is indeed a positive development, but there remain areas still in need of reform. The New York Convention does not apply to domestic arbitration, which remains governed by the law of the forum and is still subject to the requisite *compromiso*.¹⁰⁵ However, Article II of the New York Convention does require all signatories to unify their internal laws with respect to international arbitration.¹⁰⁶ Paragraph three mandates that any party invoking a valid arbitration agreement

the Geneva Convention because they affected rights “jealously guarded by the states.” *Id.*

100 Nattier, *supra* note 93, at 401.

101 *See id.* at 402. As of 1973, Mexico and Ecuador were the only Latin American nations to sign the Convention. *Id.*

102 *See* Bishop, *supra* note 1, at 63.

103 *See* Grigera-Naon, *supra* note 85, at 377; Bishop, *supra* note 1, at 65.

104 *See* Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT’L L. 697, 719 n.80 (1999).

105 Grigera-Naon, *supra* note 85, at 392.

106 *Id.* at 393.

be allowed to obtain from the intervening court *automatic* referral to arbitration of the dispute.¹⁰⁷ However, the referring court must do so under the domestic laws of its jurisdiction, and individual countries maintain the discretion to require *compromisos*.¹⁰⁸

Another significant development that arose in the area of international arbitration was the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules.¹⁰⁹ The rules were specifically designed for use in *ad hoc* arbitration proceedings and at the time of their promulgation in 1976 were the first of their kind.¹¹⁰ They were designed to produce a predictable and stable procedural framework for international arbitration without interfering with the characteristic informal and flexible arbitration atmosphere.¹¹¹ The rules were drafted with common law and civil law jurisdictions in mind, as well as capital-exporting and capital-importing countries.¹¹² Within months of their adoption, the UNCITRAL Arbitration Rules attracted worldwide attention and were eventually approved by several international arbitration agencies.¹¹³

In 1975, the Inter-America Convention on International Commercial Arbitration met in Panama, representing a major collaborative effort in the field of international arbitration by most Latin American countries and the United States.¹¹⁴ Also known as the Panama Convention, it was created solely for countries in the Western Hemisphere and was similar to the New York Convention.¹¹⁵ In fact, many articles of the Panama Convention were copied almost *verbatim* from the New York Convention.¹¹⁶ For instance, the Convention provides for the

107 See 9 U.S.C. § 201.

108 Grigera-Naon, *supra* note 85, at 393.

109 *Report of the United Nations Commission on International Trade Law*, 40 U.N. GAOR Supp. (No. 17), Annex I, U.N. Doc. A/40/17 (1985), reprinted in I.L.M. 1302 (1985).

110 BORN, *supra* note 15, at 38–39.

111 *Id.* at 39.

112 *Id.*

113 ISAAK I. DORE, *ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS* 77 (1986).

114 See BORN, *supra* note 15, at 20–21.

115 See *id.*

116 See Pedro Menocal, *We'll Do It For You Any Time: Recognition and*

general enforcement of arbitration agreements and awards, subject to exceptions similar to those in the New York Convention.¹¹⁷ The Panama Convention introduced an interesting innovation: when parties to an arbitration agreement have not selected procedural rules, the rules of the Inter-American Commercial Arbitration Commission will govern by default.¹¹⁸ The Commission's rules are almost identical to the UNCITRAL arbitration rules.¹¹⁹ Less desirably, the Panama Convention does not address the problem of enforcing the arbitration agreement if one of the parties institutes judicial proceedings in violation of its contractual commitments.¹²⁰ In addition, the Panama Convention does not include any provision on the scope of judicial intervention in arbitration proceedings.¹²¹ Nor does the Convention provide for the arbitration tribunal to rule on its own jurisdiction.¹²² This is inapposite to the widely accepted doctrine of Kompetenz-Kompetenz and can only be explained by a reluctance of the participating countries to grant arbitration tribunals powers that have traditionally been reserved for national courts.¹²³

C. *An Individualized Analysis of Three Representative Arbitration Laws*

As with other multilateral agreements and treaties, the effectiveness of the arbitration conventions depend on their interpretation and application by national legislatures and courts. For this reason, and to provide a general overview of the

Enforcement of Foreign Arbitral Awards and Contracts in the United States, 11 ST. THOMAS L. REV. 317, 322 & n.28 (1999) (providing as an example of this fact Article V(2) of the New York Convention and Article 5(2) of the Panama Convention, which only differ by one word).

117 *See id.* (noting that the agreements are subject to the laws of the state, and that they cannot be contrary to public order).

118 *Id.*

119 *See* DORE, *supra* note 113, at 77 (noting that the use of the UNCITRAL arbitration rules by the Inter-American Commercial Arbitration Commission is further evidence of the rules' flexibility and appeal to arbitral institutions).

120 Garro, *supra* note 73, at 303.

121 *Id.*

122 *Id.*

123 *See* BORN, *supra* note 15, at 54–55.

current state of domestic commercial arbitration, the following sections survey the arbitration laws of three Latin American countries.

1. *Brazil*

Brazil has been one of the Latin American countries most hostile to arbitration.¹²⁴ Arbitration is not part of the Brazilian legal tradition and therefore has never been a common method of dispute resolution.¹²⁵ However, arbitration has been a fixture, albeit unused, in Brazil's procedural law since the beginning of Portuguese settlement in 1500.¹²⁶ It has been asserted that the lack of records of arbitration during the colonial period stems from the Portuguese tradition of relying solely on the state for resolution of legal issues rather than looking for out-of-court alternatives.¹²⁷ After Brazil proclaimed independence in 1822, a more receptive attitude toward arbitration seemed to develop as laws were passed that mandated the use of arbitration for commercial disputes.¹²⁸ However, the favorable stance toward arbitration was short-lived; the law requiring this procedure for certain cases was repealed by Decree No. 3.900 in 1867.¹²⁹ In addition to repealing the mandatory arbitration law, Decree No. 3.900 also established that an arbitration clause regarding future litigation is a mere promise without moral obligation.¹³⁰ This meant that a pre-dispute arbitration clause was unenforceable. Such an agreement should be distinguished from the *compromiso*, which provides specifically for settlement of an

124 See Horacio Falcão, *Recognition and Enforcement of Foreign Arbitral Awards: A New Chapter in Brazilian Arbitration History*, 8 AM. REV. INT'L ARB. 367, 391 (1997).

125 Sergio Bermudes & Dr. Carlos Lins, *The Future for Arbitration in Brazil and in Latin America*, THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION 125 (Martin Hunter et al. eds., 1995).

126 *Id.*

127 *Id.* at 126.

128 See Falcão, *supra* note 124, at 367 (recognizing Brazil's reversal of anti-arbitration attitudes that began in the mid-19th century with the passage of articles 294 and 348 of the Commercial Code and article 411 of ordinance 737).

129 See Falcão, *supra* note 124, at 369.

130 Andre Emrich, *The Evolving Nature of Arbitration in Brazil*, 13 MEALEY'S INT'L ARB. REP. 20 (1998).

existing dispute by arbitration.¹³¹ The *compromiso* must contain several elements, “on pain of nullity.”¹³² They include: (1) the names, professions, and addresses of the parties; (2) the names, professions, and addresses of the arbitrators, and those of their alternates; (3) a detailed description of the subject matter of the dispute, including the value; and (4) a statement about the responsibility for paying fees of experts and costs of the arbitration proceeding.¹³³ The unenforceability of pre-dispute agreements to arbitrate is an aspect of Brazilian law that has plagued arbitration until recent times. In 1957 the federal supreme court of Brazil ruled that an agreement to arbitrate “creates an obligation to do something,’ namely, execute a *compromiso* . . . and failure to do so ‘will give rise to civil liability.’”¹³⁴ However, a pre-dispute agreement to arbitrate would not be enough on its own to preclude interference by the courts, and refusal to arbitrate would simply enable the opponent to obtain indemnity for losses and damages, which are extremely difficult to assess.¹³⁵

Discrimination against foreign arbitral awards and claims against their legitimacy resulted in no foreign award being confirmed until 1940.¹³⁶ In 1923, Brazil became the only Latin American country to sign and ratify the Geneva Protocol on Arbitration Clauses.¹³⁷ The ratification was a commendable attempt at reform and it provided an exception to the general rule that pre-dispute agreements to arbitrate cannot be specifically enforced.¹³⁸ Article 1 of the Protocol provides in pertinent part:

- (1) Each of the Contracting States recognizes the validity of an agreement whether relating to existing or

131 Nattier, *supra* note 93, at 414. It should be pointed out that this was the rule that prevailed in the United States until 1920. *Id.* at 414 n.77.

132 *Id.* at 415.

133 *Id.*

134 Bermudes, *supra* note 125, at 129 (quoting *Bueromaschinen Export v. Insubra*, 38 R.T.J. 121 (S.T.F. 1957)).

135 *See id.* at 130–31.

136 Falcão, *supra* note 124, at 369.

137 Garro, *supra* note 73, at 300.

138 *See id.* (stating that the Geneva Protocol recognized the validity of both pre-dispute and post-dispute agreements to arbitrate).

future differences . . . by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract

(4) The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies . . . shall refer the parties on the application of either of them to the decision of the arbitrators.¹³⁹

Brazil's ratification of the Geneva Protocol would seem to illustrate a progressive attitude toward arbitration especially in light of the fact that several industrialized nations, including the United States, declined to do so, but unfortunately Brazil's participation in the Protocol had no practical effect on improving the status of arbitration.¹⁴⁰ There is no record of a court decision quoting the Geneva Protocol and the country's isolationist stance continued into the 1990s.¹⁴¹

Another impediment to arbitration in Brazil was the requirement that arbitral awards be ratified by a Brazilian court.¹⁴² The process is known as homologation or ratification and once an arbitration decision was brought before the court, a ten-day deadline began for the court to hear the parties and ratify the award.¹⁴³ The award would be deemed null if: 1) the *compromiso* was null; 2) a decision was granted outside the time limits of the *compromiso* or beyond the timetable established by the parties; 3) the entire dispute was not settled; 4) arbitrators had not been appointed according to law or contract; 5) the arbitrators based their decision on equitable principles with the permission of the parties; or 6) the *compromiso* did not meet certain legal requirements.¹⁴⁴ Foreign arbitral awards were burdened with the added requirement that ratification occur in

139 Nattier, *supra* note 93, at 414 (quoting article 1 of the Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 161).

140 See Falcão, *supra* note 124, at 369–71 (noting that the Civil Procedure Code of 1939 substantially preempted the Protocol, only seven years after it was ratified). Further evidence of Brazil's isolationist stance against arbitration can be seen in its refusal to sign the New York Convention. *Id.* at 368.

141 See *id.* at 369–71.

142 Bermudes, *supra* note 125, at 131.

143 *Id.* See Falcão, *supra* note 124, at 372.

144 *Id.*

the country where the award originated.¹⁴⁵ It has been pointed out that if the laws of the originating state do not require such a ratification, there is no reason to expect it.¹⁴⁶ In addition, the constitution provides that ratification of foreign arbitral awards be carried out by the federal supreme court, and the chief justice alone is vested with the power to grant ratification.¹⁴⁷ If the ratification of an award is opposed, the chief justice must bring the matter before the court *en banc*.¹⁴⁸ During a twenty-five year period, the supreme court ratified only three foreign arbitral awards.¹⁴⁹

Recently, Brazil has made great strides towards harmonizing its arbitration laws with those other countries. On May 9, 1996, Brazil signed and ratified the Panama Convention.¹⁵⁰ Brazil's acquiescence was enhanced by a corresponding amendment to its internal arbitration law by the passage of Arbitration Act, Law 9.307 ("1996 Law").¹⁵¹ The law provides a definite improvement for the codified legal support of arbitration agreements and awards as well as very specific instructions about how arbitration is to be carried out.¹⁵² The most outstanding feature of the law is in article 3, which disposes of the requirement of a *compromiso* for an enforceable arbitration agreement.¹⁵³

The 1996 Law states that a *clausula compromisoria*, or a pre-dispute agreement to arbitrate, can, on its own, form a valid

145 *See id.*

146 *See id.*

147 *Id.* at 131 n.15.

148 *See id.*

149 *See Nattier, supra* note 93, at 418.

150 Falcão, *supra* note 124, at 371. As of November 17, 1999 the Panama Convention had been ratified or acceded by the following countries: Argentina, Bolivia, Brazil, Chile, Columbia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States of America, Uruguay, and Venezuela. Deborah Holland, *Drafting a Dispute Resolution Provision in International Commercial Contracts*, 7 TULSA J. COMP. & INT'L L. 451, 479 n.260 (2000).

151 *See* Falcão, *supra* note 124, at 371 (stating that on September 23, 1996, Brazil enacted Statute 9307, de 23 de setembro de 1996, D.O.U. de 24.09.1996).

152 Paul E. Mason, *New Law Adds Teeth to Arbitration Clauses*, LATIN AM. L. & BUS. REP., March 31, 1997, at 12.

153 *Id.*

legal basis for arbitration.¹⁵⁴ As mentioned above, a recalcitrant party could thus avoid arbitration by simply refusing to execute a *compromiso*.¹⁵⁵ Under the new law, this evasive technique can be avoided by having a court execute a *compromiso* for an unwilling party.¹⁵⁶ The 1996 Law also provides detailed information about the required procedures for the selection of arbitrators.¹⁵⁷ The specific nature of these provisions can be explained by the influence of the civil law tradition, where codes and regulations fill many of the openings which in common law systems are reserved for the negotiation of the parties.¹⁵⁸ Corresponding arbitration laws in the United States, for example, do not specify how arbitrators are chosen, and instead leave the selection to the parties.¹⁵⁹ The most promising development for foreign awards is found in article 35 of the 1996 Law which dispenses with the requirement that a foreign arbitral award be ratified in the country from which the award originated.¹⁶⁰ This improvement promises to expedite the process for enforcing foreign awards.¹⁶¹

After the 1996 Law was enacted, it came under attack from certain Brazilian judges because they claimed it was an unconstitutional violation of the right to access the judicial process.¹⁶² Article 5 of the federal constitution states, "the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power."¹⁶³ The arguments against the constitutionality of the new law have been largely dismissed because the constitution merely guarantees access to the courts—it does not require litigation to be the only form of

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 Mason, *supra* note 152, at 12.

159 *Id.*

160 *See id.* at 13.

161 *See id.*

162 Cristina Schwansee Romano, *The 1996 Brazilian Commercial Arbitration Law*, 5 ANN. SURV. INT'L & COMP. L. 27, 34 (Spring 1999).

163 *C.f.* art. 5, XXXV (stating "a lei não excluirá da apreciação do Poder Judiciário lesão ou ameaça a direito.").

dispute resolution.¹⁶⁴ The court reasoned that if parties wish to invoke the right to pursue an out-of-court resolution, the constitution is not violated and the 1996 Law provides effective means for settling their disputes through arbitration.¹⁶⁵ In addition, parties have the added protection of articles 32 and 33 that ensure the right to seek judicial review of an award when the arbitration has been tainted with fraud or corruption.¹⁶⁶

2. Venezuela

While Brazil's recent efforts in enacting pro-arbitration measures illustrate a promising new chapter in its history, lawmakers in Venezuela have taken the opposite approach. Like most Latin American countries, Venezuela has had a generally unfavorable attitude toward arbitration.¹⁶⁷ Venezuela's reluctance to accept arbitration can be explained by a heightened sensitivity to "foreign intervention" stemming from the early twentieth century when foreign gunboats bombarded Venezuelan ports to enforce debt claims.¹⁶⁸ The 1975 Venezuelan Code of Civil Procedure provided that "Venezuelan jurisdiction cannot be waived by agreement in favor of a foreign jurisdiction or arbitrators who decide abroad, except for cases involving controversies regarding obligations between foreigners or between a foreigner and a Venezuelan not domiciled in the country."¹⁶⁹ Fortunately, the adoption of the Panama Convention in 1985 forced the Venezuelan legislature to amend the law so that foreign arbitral awards could be recognized.¹⁷⁰ The current law provides for enforcement of foreign awards as long as the contested issue does not concern real estate located in

164 *See id.* at 34-35.

165 *See id.*

166 *See id.* at 44.

167 Thomas L. Hughes, *Venezuela: Calvo Clause Revisited*, *LATIN AM. L. & BUS. REP.*, August 31, 1999, at 2.

168 *See id.*

169 *Id.*

170 *See Hughes, supra* note 167, at 2. Venezuela is also a signatory to the New York Convention, having ratified it in 1994. James O. Rodner, *Arbitration in Venezuela*, *ICC INT'L CT. OF ARB. BULL.*, December 1996, at 101.

Venezuela.¹⁷¹ In such cases, Venezuelan jurisdiction cannot be waived in favor of a foreign court or arbitrators.¹⁷² However, there is nothing preventing the resolution of these kinds of disputes by arbitrators located in Venezuela.

Not surprisingly, the resolution of real estate contests is subject to the exclusive jurisdiction of local courts or arbitrators.¹⁷³ Other disputes that fall under exclusive jurisdiction include bankruptcy cases and contracts cases in which there is a public interest.¹⁷⁴ The converse of exclusive jurisdiction is the requirement of arbitrability. Although they are similar concepts, arbitrability actually refers to the legal limits on the possibility of submitting disputes particular arbitration.¹⁷⁵ In Venezuela, matters that cannot be submitted to arbitration include family disputes such as separation, capacity, and divorce and matters concerning public policy.¹⁷⁶ If a foreign award involves the resolution of these matters, judicial recognition and enforcement is precluded.¹⁷⁷

In 1999, two new developments in Venezuela's arbitration law occurred that will have a significant impact on the ability of parties to arbitrate and, therefore, the attractiveness of the country to foreign investors.¹⁷⁸ First, on August 17, 1999 (three and a half years after oral arguments), the Venezuelan supreme court rendered a decision regarding the availability of arbitration in disputes arising in the petroleum industry.¹⁷⁹ The case concerned the validity of certain clauses in the Congressional Accord of July 4, 1995, which opened the

171 Hughes, *supra* note 167, at 2.

172 *See id.*

173 *See* Rodner, *supra* note 170, at 93 (noting also that in bankruptcy proceedings, domestic arbitration is possible if the submission is approved by a judge).

174 *See id.*

175 *Id.* at 93. In Venezuela arbitrability is a matter of public policy outside the control of private parties. *Id.*

176 *See* Código Procedimiento Civil art. 608 ("Controversies can be submitted to one or more arbitrators in an odd number, before or during trial, as long as the dispute does not relate to questions of civil state, divorce, separation or any other matter in which a settlement among the parties cannot be completed").

177 *See id.*

178 *See* Hughes, *supra* note 167, at 2.

179 *Id.*

petroleum sector to foreign participation on a profit-sharing basis with the state owned oil company Petroleos de Venezuela (PdVSA).¹⁸⁰ The Accord contained a clause providing that certain disputes arising under profit-sharing agreements could be submitted to arbitration and that the arbitration could occur outside Venezuela under the International Chamber of Commerce procedural rules.¹⁸¹ A group of citizens challenged the accord, claiming that it was unconstitutional.¹⁸² Article 127 in Venezuela's 1961 constitution, which was in effect until December 1999, stated:

In contracts of public interest, *if not inconsistent in accordance with the nature of the same*, there is to be considered to be incorporated, even when not expressly stated, a clause whereby any doubts or controversies which could arise with respect to such contracts and which cannot be amicably settled by the parties, shall be decided by the competent courts of the Republic, in accordance with its laws, without for any reason or cause giving origin to foreign claims.¹⁸³

The plaintiffs argued that the exception clause (in italics) referred to contracts between two sovereign states and did not include contracts of public interest covered by article 5 of the Venezuelan Hydrocarbons Law.¹⁸⁴ In its holding, the supreme court conceded that contracts with PdVSA are admittedly of public interest, but that because of their industrial and commercial nature, they fall within the exception in article 127.¹⁸⁵ Dissenting Judge Hildegard Rincón de Sanso argued that

180 *Id.*

181 *See id.* (explaining that the clause provided "the manner of resolving controversies in matters not under the jurisdiction of the Control Committee and which could not be settled by agreement among the parties would be arbitration, which will be carried out in accordance with the rules of the International Chamber of Commerce in effect at the time of signing the Agreement").

182 *See id.*

183 *See Hughes, supra* note 167, at 2 (emphasis added). The new Venezuelan constitution was approved on December 15, 1999. *See Political Shake-up Dissolves Congress, Supreme Court*, HOU. CHRON., Dec. 24, 1999, available at 1999 WL 2421676, at A1.

184 *Hughes, supra* note 167, at 2.

185 *See id.*

the contracts in question were of such importance to the public interest that she would require them to be subject to the jurisdiction of the Venezuelan courts.¹⁸⁶ However, she admitted that the arbitration clause contained in the Congressional Accord arose not only from concerns about the lack of impartiality in Venezuelan courts, but also from the delay in rendering decisions.¹⁸⁷ Additionally, she focused on the fact that the court's present decision was almost four years in the making.¹⁸⁸

The government expressed much dissatisfaction with the ruling and stressed that the decision was not final.¹⁸⁹ Members of the Constitutional Committee of the Constituent Assembly, charged with drafting the constitution submitted to and approved by voters in December 1999, considered removing the exception language located in article 127 of the constitution.¹⁹⁰ Fortunately, the new constitution retained the exception language,¹⁹¹ but the danger for foreign investors was not over because, in addition to drafting a new constitution, the Constituent Assembly proposed that the congress and supreme court be dissolved.¹⁹² On December 15, 1999, with the approval of the new constitution, the congress and supreme court were automatically eliminated and the Constituent Assembly, largely under the control of President Hugo Chavez, created replacement bodies.¹⁹³ The new 21 member "mini-congress" was in power until March 2000, when voters elected legislators to the new unicameral National Assembly.¹⁹⁴ Members of the interim

186 *See id.*

187 *Id.*

188 *See Hughes, supra* note 167, at 2.

189 *See id.*

190 *See New Venezuelan Constitution May Eliminate Arbitration, LATIN AM. ENERGY ALERT*, Sept. 6, 1999, available at 1999 WL 10292805 (noting that the move was spearheaded by the Assembly's vice-president Luis Vallenilla, a long-time opponent of Venezuela's efforts to attract foreign investment to the oil industry).

191 Constitución de la República Bolivariana de Venezuela, art. 151 (1999) (stating "en los contratos de interés público, si no fuere improcedente de acuerdo con la naturaleza de los mismos," trans. *supra* note 18 and accompanying text).

192 *See Political Shakeup, supra* note 183, at A1.

193 *Id.*

194 *Id.*

congress were made up mostly of President Chavez's own nationalistic political coalition.¹⁹⁵ The Assembly also appointed members to the new Supreme Tribunal of Justice, which replaced the supreme court.¹⁹⁶

Even though the new constitution retained the exception language of the former article 127, the future of arbitration does not look promising. The August 1999 decision of the former supreme court is in jeopardy, as the new court's interpretation of the constitution is more likely to be anti-arbitration. Foreign investors started to respond even before these new developments actually took place, and many companies in the oil industry are currently attempting to withdraw from the country.¹⁹⁷ The significance of these developments outside of the oil industry is difficult to predict. Venezuela is still a signatory to both the New York and Panama Conventions and must comply with their terms.¹⁹⁸ However, according to the Panama Convention, Venezuela is not required to enforce a foreign arbitral award if the subject matter of the dispute is one which, according to local law, cannot be submitted to arbitration.¹⁹⁹

3. Mexico

Mexico's attitude toward arbitration is one of the least restrictive in Latin America.²⁰⁰ Like most of Latin America, it has historically been unreceptive to arbitration—especially when arbitration that takes place outside of the country must be enforced domestically.²⁰¹ At the same time, however, Mexico has

195 *Id.*

196 *Id.*

197 See *Constitutional Reform May Accelerate Exodus from Venezuela*, LATIN AM. ENERGY ALERT, Dec. 24, 1999, available at 1999 WL 10292918.

198 See Rodner, *supra* note 170, at 91–92.

199 *Cf. id.* at 93 (noting that there are certain matters that can be submitted to arbitration, but only to domestic arbitration). The issue of arbitrability, which is heavily couched in the terms of public policy, therefore becomes central to *all* foreign arbitral awards. Unfortunately, the direction currently being taken by the Venezuelan government suggests that the country's internal law will not treat arbitration favorably.

200 See Nattier, *supra* note 93, at 420 (acknowledging that Mexican courts do recognize and give effect to arbitration clauses).

201 See *id.* at 399 (noting difficulties in enforcing foreign agreements to arbitrate and awards in Latin America).

shown a willingness to promote alternative forms of dispute resolution such as mediation and negotiation.²⁰² One reason that arbitration did not receive much attention from disputants is that the commercial laws dealing with such issues were written so that arbitration would not be a viable form of conflict resolution.²⁰³ This was an intentional action on the part of lawmakers, and the underlying reason is that in the past Mexico had “painful experiences when the arbitral awards rendered against it were enforced by military interventions or not recognized by the state counterpart when issued in its favor.”²⁰⁴ Mexico, after all, was the birthplace of the Calvo Doctrine. Carlos Calvo was prompted to create the theory as a result of armed French interventions in 1838 and 1861.²⁰⁵

In Mexico, substantive arbitration law is governed by the federal Commercial Code.²⁰⁶ Unlike the United States, Mexico prohibits state legislatures from passing substantive arbitration laws.²⁰⁷ On the other hand, Mexican states have a role in determining procedural arbitration law since procedural matters are governed by a mixture of both federal and state law.²⁰⁸ With substantive arbitration being a federal matter, and Mexico being of the monistic legal tradition,²⁰⁹ its participation in the New York and Panama Conventions had the potential to produce

202 See Margarita Treviño Balli and David S. Coale, *Recent Reforms to Mexican Arbitration Law: Is Constitutionality Achievable?*, 30 TEX. INT'L L.J. 535, 539 (1995) (stating that Mexico has a long history of promoting mediation and arbitration).

203 *Id.*

204 Raphael E. Echeverria & Jose L. Siqueiros, *Arbitration in Latin America*, in ARBITRATION IN SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES INVOLVING THE FAR EAST AND ARBITRATION IN COMBINED TRANSPORTATION 81, 82–83 (Pieter Sanders ed., 1989).

205 See Bishop, *supra* note 1, at 63.

206 See Balli and Cole, *supra* note 202, at 537. Cód. COM., arts. 1415–63.

207 See Balli and Cole, *supra* note 202, at 537.

208 See *id.* at 538.

209 See Jorge Cicero, *International Law in Mexican Courts*, 30 VAND J. TRANSNAT'L L. 1035, 1046 (1997). Monism refers to the automatic incorporation of international obligations into domestic law. Marley S. Weiss, *Proceedings of the Seminar on International Treaties and Constitutional Systems in the United States, Mexico, and Canada: Laboring in the Shadow of Regional Integration*, 22 MD. J. INT'L L. & TRADE 185, 204 (1999).

positive change.²¹⁰ As always, the success of the conventions depended on the effectiveness of the country's internal arbitration laws. In Mexico, this involves the Commercial Code, which was enacted in 1890, and while it has been amended extensively, remains in effect to this day.²¹¹ In 1989, Mexico amended the code to specifically provide for both domestic and international arbitration.²¹² This change was a positive attempt at reform, but significant problems arose. For example, article 1415 of the amended code recognized the right of parties to arbitrate their disputes as long as all parties involved were merchants and could agree on a *clausula compromisoria*.²¹³ The change produced instant criticism and was subsequently amended to allow all parties to arbitrate regardless of whether or not they were merchants.²¹⁴ Article 1417 required parties to specify the subject matters on which they could arbitrate.²¹⁵ This proposal was criticized because it contradicted the idea that arbitration clauses should be general, in keeping with its flexible nature.²¹⁶ Fortunately, the legislators conformed the law to international standards by removing the limiting language.²¹⁷ In 1993, lawmakers decided to amend the arbitration laws again because they realized that the piecemeal reforms of the 1989 laws were not enough to conform to international standards.²¹⁸ The 1993 changes were patterned after the UNCITRAL arbitration rules and made vast improvements in the areas of enforceability of arbitration clauses, the scope of arbitrators' jurisdiction, the recognition of foreign awards, and the selection of arbitrators.²¹⁹

210 See Balli and Cole, *supra* note 202, at 536 (placing arbitration in the context of the gradual exposure of Mexico to the world economy, which began in the mid-1970s).

211 See *id.* at 537 n.15.

212 See *id.* at 542.

213 See *id.*

214 See *id.*

215 *Id.*

216 Balli and Coale, *supra* note 202, at 542-43.

217 See *id.*

218 See Thompson, *supra* note 80, at 27 (stating that Mexico radically revamped its commercial arbitration law to conform to international standards by defining enforceability of arbitration clauses).

219 *Id.* at 27-28.

Another indication of Mexico's new pro-arbitration stance is that it does not treat awards from countries that are not signatories to the New York or Panama Conventions differently than awards from countries that are signatories.²²⁰ Also, unlike most Latin American countries (and even the United States), Mexican courts do not consider reciprocity when deciding whether to enforce foreign arbitral awards.²²¹ In addition, the North American Free Trade Agreement ("NAFTA") is having a positive influence on arbitration in Mexico. While there are no provisions in the agreement for arbitration between private parties, it does contain mechanisms for arbitration of trade law disputes, investors' claims against governments, and disputes between the NAFTA governments.²²² These mechanisms will be instrumental in further harmonizing arbitration procedures in the United States, Mexico and Canada, and will create a more widespread "culture of arbitration."²²³

IV. CONCLUSION

The foregoing survey of Brazilian, Venezuelan, and Mexican arbitration law illustrates the different experiences of individual Latin American countries and the directions they are taking. The ratification by most Latin American countries of the New York and Panama Conventions is evidence of a willingness to reduce the limitations on the enforcement of arbitral awards and advance the promotion of arbitration in general. Although there have been promising developments, there is room for improvement in both the United States and Latin America.

The impetus for change should be particularly strong in Latin America, where the availability of impartial and efficient forums has added significance for domestic disputants and

²²⁰ *Id.* at 35.

²²¹ See 9 U.S.C. § 201, n.29 (2000) (the footnotes at the end of the section describe the reservations made by the different contracting states).

²²² See James H. Carter, *NAFTA: How It Has Transformed Dispute Resolution in Canada, Mexico and the United States*, DISP. RESOL. MAG., Spring 1998, at 19–20. The arbitration provisions in NAFTA signify a bold step for Mexico considering the government's previous experiences with arbitration and transgressions against its sovereignty. See Echeverria and Siqueiros, *supra* note 204, at 82–3.

²²³ See Carter, *supra* note 222, at 19.

foreign investors alike. The latest developments in Venezuela seem to suggest that the country is resuming an overly nationalistic posture against arbitration and foreign investment in general. It remains to be seen whether the new laws in that country are merely token reforms being used to support empty political rhetoric, or meaningful attempts to promote arbitration. In Brazil, the recent signing of the Panama Convention may signal a new era of acceptance and mutual cooperation in the area of arbitration. Its refusal to sign the New York Convention is the most conspicuous missing element in its arbitration laws. Mexico's efforts to modernize its arbitration laws have been extremely effective in producing a business-friendly, pro-arbitration environment.

In the United States, the popularity of arbitration is approaching that of litigation. Unfortunately, arbitration is becoming more like litigation as it becomes increasingly hostile and inefficient. Another area in need of improvement is the treatment of foreign arbitral awards and agreement under the New York Convention.

While the popularity of arbitration in the United States is greater than in Latin America, historically there has been hostility toward arbitration in both regions. However, this does not imply that Latin American countries are merely at an earlier stage of development than the United States. Such a notion would be too simplistic and would overlook the unique history of each country. A more realistic appraisal would recognize that arbitration in these countries has developed in different environments. Knowledge of the historical and cultural milieu of each country is essential for a comprehensive understanding of domestic and international arbitration.

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