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Arbitration in Latin America: Overcoming Traditional Hostility (An Update)

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I. INTRODUCTION

The way in which Latin America views arbitration has changed dramatically during the last ten years. This is shown, *inter alia*, through the ratification by many Latin American countries of both the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] and the 1975 Panama Inter-American Convention on International Commercial Arbitration.[2] This change is further evidenced by recent developments in the Andean Pact[3] and Colombia;[4] new Brazilian draft legislation on commercial arbitration;[5] and legislative changes in Peru,[6] Mexico, and Venezuela.[7] The fact that these changes have not gone unnoticed is evidenced by the widespread use of arbitral clauses in contracts to which Latin American private and public persons or entities are a party. The old idea that Latin American countries are hostile to arbitration would seem, therefore, no longer true. In fact, it is more accurate to say that Latin America as a whole is sympathetic to arbitration. Nevertheless, many of the present rules applicable to arbitration still need to be adapted to this new trend. The purpose of this Article is to analyze the present state of Latin American laws on arbitration in order to assess

1. Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 [hereinafter New York Convention].

2. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 339 [hereinafter Panama Convention].

3. See *infra* notes 50-52 and accompanying text.

4. *See* new Decree 2279 of 1989, entirely modifying the law governing arbitration and *infra* note 47 and accompanying text. *But see*, *infra* note 164.

5. *See infra* note 87 and accompanying text.

6. CÓDIGO PROCEDIMIENTOS CIVILES [CÓD. PROC. CIV.] arts. 1906-1922 (Peru); Legislative Decree No. 295 of July 24, 1984.

7. The new provisions regarding arbitration in the Mexican Commercial Code were introduced in 1989. *See infra* note 10. As to Venezuela, see New Procedural Code, Gaceta Oficial [G.O.] No. 3970 Extraordinario of Mar. 13, 1987 (as reformed) (original text at G.O. No. 3694 Extraordinario of Jan. 22, 1986).

the areas where legislative change is advisable.

Arbitration in Latin America must be studied from two different vantage points: (1) the legal provisions in Latin American countries regarding commercial arbitration and (2) the legal provisions in Latin American countries which govern the recognition and enforcement of arbitral awards rendered abroad.

II. Regulations of Commercial Arbitration in Latin America

In Latin America there is no distinction between the rules that govern domestic arbitration and those that control international arbitration. In this regard, Latin American laws on arbitration resemble other recent arbitral legislation such as the Netherlands 1986 Arbitration Act,[8] which does not discriminate between local and international arbitrations. In Paraguay,[9] Mexico,[10] and Colombia,[11] however, arbitral legislation contained in the procedural codes does not apply when there exists an international treaty or convention. This is an exception to the normal practice of applying domestic legislation to arbitration, either domestic or international. These countries ratified the 1975 Panama Inter-American Convention on International Commercial Arbitration. Arbitrations taking place in such countries are thus governed by the arbitral rules of the Inter-American Arbitration Commission unless the parties to the arbitration have stipulated otherwise.[12] Latin American doctrinal scholars have stressed, however, the need to draw a distinction between cases subject to domestic procedural rules and those which should not fall within the scope of these rules due to their international nature.[13] Often, this is considered a conse-

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8. Netherlands Arbitration Act of July 2, 1986, 4 Int'l Com. Arb. release 87-1 (Jan. 1987). P. Sanders & A. van den Berg, The Netherlands Arbitration Act of 1986 11-52 (1987); van den Berg, *Report on the Netherlands*, 13 Y.B. Com. Arb. 3 (1987).

9. Código Procesal Civil [Cód. Proc. Civ.] art. 784 (Para.). Requiring that "except for the provisions of international treaties," the arbitral tribunal must sit in Paraguay, must be composed of Paraguayan residents, and the award must be rendered in Paraguay. *See generally* Ahrens & Samtleben, *Schiedsgerichitsbarkeit in Paraguay*, 9 Recht der Internationalen Wirtschaft [R.I.W.] 721-26 (1990).

10. This principle is explicitly set out at New Article 1421, Mexican Commercial Code, Decreto por el que se Reforma, Adiciona y Deroga Diversas Disposiciones del Código de Commercio, Diario Oficial [D.O.], Jan. 3, 1989, at 3-9.

11. Decree 2279 of 1989, art. 48 (Colom.)[hereinafter Decree 2279].

12. *See* Panama Convention, *supra* note 2, at art. 3. However, the outcome is doubtful when there is conflict between the public policy of the national law applicable to the arbitration and the Arbitral Rules of the Inter-American Arbitral Commission.

13. *See* Grigera Naón, *El Arbitraje Comercial Internacional en America Latina*, 4

quence of the ratification of international conventions on arbitration by the country at issue.[14]

A. Legal and Equity Arbitration

Latin American countries, following the Continental Law tradition, distinguish between "legal" arbitrators (*de jure* arbitrators) and "equity arbitrators" or "amiable compositeurs" (*ex aequo et bono* arbitrators).[15] The decisions of "legal" arbitrators are strictly grounded on existing law. If a choice-of-law problem arises, they apply the private international law of the country in which the arbitral panel is sitting. Nevertheless, national legal systems may contemplate the use by arbitral tribunals of special conflict-of-laws rules. For instance, according to the Mexican Commercial Code, arbitrators shall apply the law chosen by the parties, unless such election is invalid for public policy reasons. If there is no choice-of-

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REVISTA DEL DERECHO INDUSTRIAL [REV. DER. INDUS.] 1-21 (1980).

14. As to *Uruguay*: R. SANTOS BELANDRO, ARBITRAJE COMERCIAL INTERNACIONAL 293 (1988). As to *Chile*: León, *Arbitraje Comercial en Chile*, in EL ARBITRAJE EN EL DERECHO LATINOAMERICANO Y ESPAÑOL (Liber Amicorum en Homenaje a L. Kos Rabcewicz Zubkowski) 199-203 (1989) [hereinafter Liber Amicorum Zubkowski]. As to *Colombia*: Monroy Cabra, *El arbitraje internacional y el Derecho Colombiano*, in Liber Amicorum Zubkowski, *supra*, at 240-42. As to *Honduras*: León Gómez, *Ejecución de la Sentencia Arbitral en Honduras*, in Liber Amicorum Zubkowski, *supra*, at 349-350 (pointing out that prohibitions on both the state and state entities to submit to arbitration under article 63 of the Ley del Presupuesto General de Ingresos y Egresos of 1988 would not apply to international arbitrations within the context of international conventions ratified by Honduras, such as the 1975 Panama Inter-American Convention).

15. Grigera Naón, *Report on Argentina*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1-2 (Supp. III 1985); Marotta Rangel, *Report on Brazil*, in 3 Y.B. COM. ARB. 31, 41 (1978); In *Colombia*, arbitrators may decide according to the strict rules of law (árbitros de derecho) and *ex aequo et bono* ("en conciencia.") Under Colombian law, the "amigable componedor" (another type of arbitrator) does not exactly perform arbitral functions. He is normally called to resolve quality disputes through decisions which have the force of a contract between the parties, but are deprived of procedural effects. Decree 2279, *supra* note 11, art. 6, at 49-52. Díaz Rubio, *Report on Colombia*, 3 Y.B. COM. ARB. 58, 65 (1978). In *Ecuador*, arbitrators acting under institutional arbitral rules only decide as *ex aequo et bono* adjudicators. Ley de Arbitraje Comercial art. 15, Decree No. 735, RO No. 90, Oct. 28, 1963. In Ecuador, *ad hoc* arbitrators may decide either according to strict legal rules or *ex aequo et bono*. Jiménez Salazar, *Report on Ecuador*, 3 Y.B. COM. ARB. 76, 84, 89 (1978); C. LARREATEGUI, CONTRIBUCIÓN AL ESTUDIO DEL ARBITRAJE PRIVADO 95-96 (1982). *Mexico* also contemplates "legal" and "equity" arbitrators. Briseño Sierra, *Report on Mexico*, in 3 Y.B. COM. ARB. 94, 102 (1978). The same is true in *Peru*. CÓD. PROC. CIV. art. 568 (Peru). *Bolivia*: (CÓDIGO DE PROCEDIMIENTOS CIVIL [CÓD PROC. CIV.] arts. 712, 739 (Bol.) *Uruguay*: D. BARRIOS DE ANGELIS, EL JUICIO ARBITRAL 186 (1956); Samtleben, *Schiedsgerichtsbarkeit in Uruguay*, 34 RIW 107, 108 (1978). *Venezuela*: Parra Aranguren, *Report on Venezuela*, 3 Y.B. COM. ARB. 133, 135 (1978); F. GABALDÓN, EL ARBITRAJE EN EL CÓDIGO DE PROCEDIMIENTO CIVIL 59-60 (1987).

law provision or one is deemed invalid, the arbitrators shall determine the law to be applied to the dispute by taking into account the characteristics and contacts of the dispute.[16] In countries which have ratified the 1975 Panama Inter-American Convention on International Commercial Arbitration, arbitral tribunals hearing international commercial disputes must observe, unless otherwise agreed by the parties, the conflict-of-laws rules encapsulated in article 33 of the Rules of the Inter-American Arbitration Commission.[17] In principle, legal arbitrators must observe the procedural rules contemplated for normal court proceedings. This requirement may be waived only if specific procedural provisions governing arbitration are applicable, or if the parties decide otherwise. Awards of legal arbitrators may be reviewed; however, the parties are allowed to waive their right to appeal at the moment they submit the terms of reference to the arbitrators (compromiso). It is debatable whether this waiver is possible upon signing of the arbitral agreement.[18]

In the following circumstances, recourse to set aside the award may not be waived: when the arbitrator decides on points not submitted to arbitration, when the award is made beyond the deadline agreed by the parties, or when the arbitrator makes an essential procedural mistake. The various Latin American countries differ in the way they deal with these situations.[19]

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16. CÓD. COM. art. 1426 (Mex.). For a discussion of this provision, see my forthcoming article, *Arbitration in Latin America With Special Regard to Mexico and Colombia*, 4 JAHRBUCH FÜR DIE PRAXIS DER SCHIEDSGERICHTSBARKEIT (1990).

17. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, art. 3, Organization of American States T.S. No. 42. This provision follows closely article 28 of the UNCITRAL Arbitration Rules. However, as to possible limitations on the application of such rules derived from the public policy of the law governing the arbitration, see *infra* note 101 and corresponding text.

18. For a discussion on the compromiso or specific submission of an existing dispute, required even if there is already an arbitral agreement, see *infra notes* 75-105 and corresponding text.

In *Argentina*, however, the current opinion is that the parties may deal in advance with the arbitral agreement and procedural matters concerning any arbitration thereunder. L. PALACIO, 9 DERECHO PROCESAL CIVIL 49 (1988). Thus, though article 758 of the National Code of Civil and Commercial Procedure authorizes waiver of the means of appeal against an arbitral award at the compromiso, it should not be read as preventing such a waiver at the prior stage of executing the arbitral agreement. CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] art. 758 (Argen.).

19. In *Argentina*, article 760 of the National Code of Civil and Commercial Procedure applies to legal arbitrators and also states that the right to ask the arbitral tribunal to clarify an obscure point in the award cannot be waived. CÓD. PROC. CIV. Y COM. art. 760 (Argen.).

In *Brazil*, article 1100 of the Procedural Code, mentions the following grounds for setting aside: (i) the nullity of the submission agreement; (ii) the failure to decide all points

Equity arbitrators are not bound to apply the strict rule of

submitted to the arbitral decision; (iii) the designation of arbitrators in a way incompatible with legal or contractual rules; or (iv) the rendering of an *ex aequo et bono* decision when the arbitrators have not been authorized to do so in the compromiso. CÓDIGO DO PROCESSO CIVIL [C.P.C.] art. 1100 (Braz.). The means for setting aside are not introduced against the award itself but against the Brazilian Court decision which "homologated" or confirmed the award. Marotta Rangel, *supra* note 15, at 43. Awards are not subject to appeal unless the parties provide otherwise. CÓDIGO COMERCIAL [C.Co.] art. 1041 (Braz.). However, the means for setting aside under article 1100 of the Procedural Code cannot be waived. C.P.C. art. 1100 (Braz.).

In *Chile*, violation of certain formal requirements, such as making an award beyond the scope of the compromiso, may be corrected by introducing a recourse of cassation. Appeal is also possible with respect to arbitral awards but it may be waived. However, recourse of cassation concerning the substance is not waivable with respect to the awards of "equity arbitrators," unless express stipulation of the parties allows for the filing of an appeal with another arbitral tribunal. Equity awards are also free from appeal. CÓDIGO ORGANICO DE TRIBUNALES [CÓD ORG. TRIB.] art. 239 (Chile). Abuses and mistakes of the arbitrators may also be corrected through "recurso de queja." Eyzaguirre Echeverría, *Report on Chile*, 3 Y.B. COM. ARB. 45, 56 (1978).

In *Colombia*, no appeal of an arbitral award is possible, though the award may be corrected in the case of obscurity by the arbitral tribunal. *See* Decree 2279, *supra* note 11, art. 36. Setting aside the award is possible in the following cases: (a) if the arbitral agreement is null and void; (b) if the arbitral tribunal's constitution is vitiated; (c) if the defendant has not received personal notice of the initiation of arbitral proceedings; (d) if no opportunity was available in the course of arbitral proceedings for producing evidence or to allege on the evidence produced; (e) if the award is made after expiration of the deadline therefor; (f) if the award was made *ex aequo et bono* when it should have been made in accordance with the law; (g) if the award shows clerical errors or contradictory decisions; (h) if the award decides issues not subject to arbitration or is made *extra petita*; or (i) if the award fails to decide issues submitted to arbitration; and the court decision regarding the setting aside of the award may be further subject to cassation before the Colombian Supreme Court when, *inter alia*, it infringes a substantive law provision, it is not congruous with the facts, pleadings, or defenses alleged or raised by the parties or which the judge should have taken into account *ex officio*, or contains contradictory reasoning or rulings. *Id.* arts. 38-41; CÓD. PROC. CIV. art. 368 (Colom.). In exceptional cases, such as when arbitration proceedings are vitiated by fraud, a special extraordinary means of recourse for revising the award is available within two years after the date the award became enforceable. Decree 2279, *supra* note 11, art. 41; CÓD. PROC. CIV. arts. 380-381 (Colom.).

In *Ecuador*, arbitral awards rendered in arbitrations within the framework of the Chambers of Commerce are not subject to appeal or action to set aside. Nevertheless, they may be clarified or corrected by the arbitral tribunal if so requested by any of the parties within three days of the date they are made. Ley de Arbitraje Comercial art. 17. Doctrinal opinions criticize this solution and contend that a means for setting aside the award should be available. C. LARREATEGUI, *supra* note 15, at 192-93. *Ad hoc* arbitration is subject to appeal and setting aside. While means of appeal may be waived, the action for setting aside (i) on account of nullity of the submission or compromiso; (ii) because the award was made beyond the terms of the submission or not all the arbitrators took part in the making of the award; (iii) because the award was made after the expiration of the deadline therefore; or (iv) because the jurisdiction of the arbitrators has ceased, cannot be waived or excluded. Jiménez Salazar, *supra* note 15, at 86-93.

In *Mexico*, appeals of the award are not excluded by the arbitration agreement. CÓDIGO FEDERAL DE PROCEDIMIENTOS CIVILES [C.F.P.C] art. 619 (Mex.); CÓD. COM. art. 1432 (Mex.). An award may be set aside if it violates public policy. Briseño Sierra, *supra note* 15, at 104.

law. Instead, they must decide the dispute in an equitable manner based on their notions of justice. They may disregard imperative norms and need not show allegiance to abstract rules in finding a solution to the case. However, they cannot ignore or fail to apply both public policy principles and norms which protect the interests of the community.[20]

Generally, equitable awards are not subject to any means of recourse. Nevertheless, they may be set aside if they were based on matters not submitted to arbitration, or if the decision was handed down after the agreed upon deadline expired.[21] Some countries do

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In *Paraguay*, an arbitral award from "legal" arbitrators is subject to the same right of appeal as ordinary court decisions. However, the parties may waive this right. Nevertheless, if an award was made beyond the deadline it cannot be waived or the formal requirements have not been complied with. CÓD PROC. CIV. arts. 813-815 (Para.).

In *Peru*, awards from "legal" arbitrators are appealable, unless the means of recourse have been waived at the compromiso. CÓD. PROC. CIV. art. 570 (Peru). The appeal cannot be waived if the award was made beyond the deadline, decided on matters not defined in the compromiso, if the award holds contradictory decisions, or if it involves substantial procedural errors. *Id.* art. 571; *cf.*, U. MONTOYA ALBERTI, EL ARBITRAJE COMERCIAL 117-21 (1988).

In *Bolivia*, an award from "legal" arbitrators is subject to the same means of recourse contemplated for court decisions but may be waived at the compromiso. CÓD. PROC. CIV. art. 231 (Bol.). However, the means of recourse to obtain a clarification of the award, to allege that it was pronounced on matters not contemplated in the submission, was given after the deadline or decided matters not submitted to the arbitral jurisdiction, or introduced because the arbitral tribunal committed an essential procedural error, cannot be excluded by the will of the parties. CÓD. PROC. CIV. art. 733 (Bol.).

In *Uruguay*, arbitral awards can be set aside if pronounced after expiration of the deadline, when dealing with issues not submitted to arbitration, or because the arbitrator refused to accept the production of evidence offered by the parties. CÓD. PROC. CIV. art. 570 (Uru.).

In *Venezuela*, legal arbitral awards may be subject to appeal *only* if the parties specifically provided at the compromiso that the award may be subject to appeal. Equitable awards are not subject to appeal. However, both equitable and "legal" awards may be set aside if pronounced as a result of a null and void compromiso, if the award contains contradictions preventing its enforcement, if it does not resolve all the disputed issues contained in the compromiso, if it resolves issues not contemplated therein, or if essential procedural errors have been committed in the course of arbitral proceedings. CÓD. PROC. CIV. arts. 624, 626 (Venez.); F. GABALDÓN, *supra* note 15, at 118-46.

A general perusal of Latin American legislations indicates that both an appeal and action to set aside an award may be introduced in regard to a final award, but not with respect to interim or preliminary decision or other decision of the arbitral tribunal not terminating arbitral proceedings. As to *Venezuela*, see F. GABALDÓN, *supra*, note 15, at 77. As to *Argentina*, see 9 L. PALACIO, *supra* note 18, at 126-27, 152. As to *Paraguay*, see CÓD. PROC. CIV. art. 813 (Para.).

20. Grigera Naón, *El Arbitraje Comercial Internacional en America Latina*, 4 REV. DER. INDUS. 1, 5-6 (1980).

21. *Argentina*: CÓD. PROC. CIV. Y COM. art. 771 (Argen.). In Argentina, the setting aside of an equitable arbitral award may not be obtained by pleading that the award reaches an unjust solution to the case. Judgment of July 24, 1959, Cámara Nacional de Apelaciones en la Comercial de la Capital Federal, Argen., 96 L.L. 282. *Bolivia*: CÓD. PROC. CIV. art. 745 (Bol.). In *Peru*, the same means of recourse that may be raised against a legal award can

not distinguish between the grounds available for setting aside legal as opposed to equitable arbitral awards.[22] Many countries simply establish that identical grounds are available for both types of arbitration.

According to the legislation and case law of most Latin American countries, a legal or equitable arbitral award may be reversed when contrary to public policy. This is achieved through a special means of recourse available against an otherwise final court decision which upheld the validity of a vitiated arbitral award. In the case of Argentina, this special means of recourse is to be filed with the Supreme Court of Justice.[23] In Mexico, it is embodied in the *Writ of Amparo*. This writ is available when the violation involves essential due process guarantees that can be directly raised against an arbitral award rendered by court-appointed arbitrators.[24] The *Writ of Amparo* can also be raised against the decision to set aside an award. In the case of Colombia, the *recurso extraordinario de revisión* can be directly raised against the arbitral award in the superior court of the judicial circuit where the arbitral tribunal is located. This extraordinary means of recourse may also be raised with the Colombian Supreme Court, if it is addressed against a superior court sentence which decided on the means of recourse to set aside the award.[25]

In some Latin American countries, unless the parties have otherwise provided, it is presumed that arbitrators shall decide as "amiable compositeurs."[26] Chile accepts a third category of "mixed" arbitrators, who are placed half-way between legal and equitable arbitration. Under Chilean law, mixed arbitrators are not bound by the procedural rules applicable to court proceedings; however, the substance of their award must follow the strict rules

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also be used against an equitable award. They cannot, however, be waived by the parties. CÓD. PROC. art. 573 (Peru).

22. This appears to be the case in *Brazil, Colombia, Uruguay, Venezuela,* and *Mexico.* For *Ecuador,* this applies to *ad hoc* arbitration.

23. Law 48, art. 14; Judgment of Apr. 24, 1990, Cámara Nacional en lo Comercial "D," Argen. ___ E.D. 2-3, advance sheet (April 24, 1990).

24. C.P.D.F. art. 635; CÓDIGO CIVIL PARA EL DISTRITO FEDERAL [C.C.D.F.] arts. 8 and 1830 (Mex.); Hoagland, *Modification of Mexican Arbitration Law,* 7 J. INT'L ARB. 91, 97 (1990).

25. *See* Decree 2279, *supra* note 11, art. 41. For further detail on this means of recourse, see *supra* note 19 and accompanying text.

26. *Argentina*: CÓD. PROC. CIV. Y COM. art. 766 (Argen.). *Bolivia*: CÓD. PROC. CIV. art. 739 (Bol.). *Ecuador:* CÓDIGO PROCESAL CIVIL [CÓD. PROC. CIV.] art. 1016 (Ecuador) (as to *ad hoc* arbitration); *see also* Jiménez Salazar, *supra* note 15, at 90. *Uruguay*: CÓD. PROC. CIV. art. 534 (Uru.). *Venezuela*: CÓD. PROC. CIV. art. 618(3) (Venez.).

of law. Mixed arbitrators are empowered, like equitable arbitrators, to shape the arbitral procedure at their discretion. Nevertheless, they must decide the dispute as legal arbitrators would.[27]

B. Arbitration and State Parties

As a rule, matters which may not be subject to compromise or settlement may not be submitted to arbitration.[28] This rule applies to family law questions (*e.g.*, personal status, affiliation, divorce, and inheritance), which are not fundamentally concerned with patrimonial aspects, and to certain areas where private adjudication would not be advisable for public policy reasons. The latter category does not seem to preclude a state entity, or the state itself, from becoming a party to local or international arbitration proceedings. However, the state or a state entity will most likely be prevented from submitting to arbitration (local or foreign) if the arbitrator would be passing judgment on the exercise of sovereign state power or if his decision would interfere with public organization of the state, public policy, or state authority.[29] These restric-

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27. R. EYZAGUIRRE ECHEVERRÍA, EL ARBITRAJE COMERCIAL EN LA LEGISLACIÓN CHILENA Y SU REGULACIÓN INTERNACIONAL 21 (1981) [hereinafter ARBITRAJE COMERCIAL].

28. *Argentina*: CÓD. PROC. CIV. Y COM. art. 737 (Argen.). *Bolivia*: CÓD. PROC. CIV. art. 712 (Bol.). *Brazil*: C.P.C. arts. 1072, 1094 (Braz.). *Colombia*: Decree 2279, *supra* note 11. In *Colombia*, matters concerning patents and trademarks may not be submitted to arbitration. Díaz Rubio, *supra* note 15, at 60. In *Peru*, matters relating to personal status and capacity, property belonging to the state, municipalities, and public or state entities, and matters affecting general morality are not subject to arbitration. State entities may submit to arbitration disputes concerning such property if authorized by the government through "Resolución Suprema." They may also submit their contracts to arbitration with prior knowledge of the "Contraloría General de la República." CÓD. CIV. art. 1913 (Peru); CÓD. PROC. CIV. art. 549 (Peru). In general, penal disputes, bankruptcy proceedings, and matters which cannot be subject to a compromise or settlement by the parties cannot be submitted to arbitration under Peruvian law. Montoya Alberti, *supra* note 19, at 52-56. *Chile* excludes from arbitration the division of matrimonial property, support obligations, and all cases where the Attorney General is to be heard and matters between the guardian and the person subject to guardianship. Labor relations, criminal matters, and disputes involving jurisdiction and competence are also excluded from arbitration. CÓD. ORG. TRIB. art. 229 (Chile); Eyzaquirre Echeverría, *supra* note 19, at 47-48. *Ecuador* accepts arbitration under the Ley de Arbitraje Comercial, solely referring to arbitration under the Chambers of Commerce, on all commercial matters excepting trademarks, bankruptcy, and dissolution of a partnership or company. The general rule, however, is that only matters which cannot be compromised cannot be arbitrated. Jiménez Salazar, *supra* note 15, at 79; C. LARREATEGUI M., *supra* note 15, at 85-86. In *Mexico*, no arbitration is possible in family law, personal status, inheritance, and criminal matters. Briseño Sierra, *supra* note 15, at 97.

29. *Argentina*: M. MARIENHOFF, III-A TRATADO DE DERECHO ADMINISTRATIVO 602 (1983); Argentine Supreme Court of Justice, *Cia. Italo Argentina de Electricidad*, Fallos 178-293; R. Bullrich, *La Naturaleza Jurídica de la Concesion de Servicios Publicos y la Jurisdicción*

tions may also preclude arbitration in the field of administrative contracts, to the extent the arbitral tribunal would be entitled to restrain the exercise of the state's power to unilaterally modify or terminate the contractual relationship, or to otherwise affect state sovereignty or authority. Notwithstanding the foregoing, arbitration of factual issues, such as the assessment of the amount of indemnity to be paid to a private party in case of breach, seems possible in regard to administrative contracts.[30]

Competente para Interpretar sus Cláusulas, 51 J.A. 17, 22, 23, 41-42 (1935); Cámara Federal de la Capital, *Gobierno Nacional v. Puerto de San Nicolás (S.A.)*, 1946-II J.A. 154-55 (Deciding, in a domestic case, that issues concerning an expropriation responding to public interest reasons cannot be submitted to arbitration); Supreme Court of Justice, *Schmidt, F.H. (S.A.) (empresa constructora) v. Prov. de San Juan*, 1938-63 J.A. 368-74 (rejecting, in domestic case, the jurisdiction of arbitrators to decide the validity of a provincial state contract when the validity depends on the constitutionality of the provincial law authorizing such contract); Cámara Federal de la Capital, *Cía del Dock Sud de Bs. As. Ltda. v. Gobierno Nacional*, 1943-IV J.A. 606-08 (preventing an arbitral tribunal from deciding on the validity of a governmental decree that instructed the private contractor to leave a free area for public use at both sides of the channel built under the concession agreement). *Chile*: ARBITRAJE COMERCIAL, *supra* note 27, at 334-37. *Brazil*: On November 14, 1973, the Supreme Federal Tribunal, in its *Organizacao Lage* decision, held that the federal state may submit to arbitration with the exception of transactions where it acts as a public (sovereign) authority. This exception is based on the principle that sovereign powers may not be subject to compromise and are therefore excluded from arbitration. Marotta Rangel, *supra* note 15, at 34; de Magalhaes, *Do Estado na Arbitragem Privada*, in ARBITRAGEM COMERCIAL 76-81 (J.C. de Magalhaes & L.O. Baptista eds. 1986). In *Paraguay*, CÓDIGO PROCESAL CIVIL art. 774 excludes from arbitration disputes relating to public or municipal property or for any reason requiring the intervention of the public attorney (Ministerio Fiscal). *Peru*: With the exception of international loans or international treaties the Peruvian state or state enterprises organized under Peruvian public law are allowed to submit to arbitral tribunals sitting in Peru. This excludes arbitration abroad. CONSTITUCION POLITICA DEL PERU art. 136; Aramburu Menchaca, *International Commercial Arbitration in the Andean Pact*, in THE ART OF ARBITRATION, LIBER AMICORUM 31 (P. Sanders ed. 1982). However, state enterprises organized under private law rules may submit to foreign arbitration. U. MONTOYA ALBERTI, *supra* note 19, at 74-78. *Uruguay* excludes from arbitration disputes to which the public attorney (ministerio fiscal) must be a party. CÓD. PROC. CIV. art. 550 (Uru.). *Venezuela* excludes foreign arbitration with respect to contracts of public interest. G. Parra Aranguren, *supra* note 15, at 137. Though arbitration might be possible with regard to administrative contracts, the governing arbitral rules should be necessarily those contemplated in the Venezuelan Procedural Code, and this would exclude arbitration under the rules of the ICC. C. LARREATEGUI, *supra*, note 15, at 83. Article 2 of Código de Procedimiento Civil excludes the possibility of agreeing on the jurisdiction of foreign courts or of arbitrators sitting abroad in regard to disputes concerning immovables located in the territory of Venezuela or on matters affecting public policy or public morality. According to the Introductory Remarks (Exposición de Motivos) to the Código de Procedimiento Civil, only choice of forum stipulations excluding the existing jurisdiction of Venezuelan Courts with respect to disputes between foreigners or between a foreigner and a Venezuelan national not domiciled in Venezuela would be compatible with Venezuelan public policy. R. HENRÍQUEZ LA ROCHE, COMENTARIOS AL NUEVO CÓDIGO DE PROCEDIMIENTO CIVIL 3 (1988).

30. *Argentina*: M. MARIENHOFF, *supra* note 29, at 602-03; Grigera Naón, *El Estado y el Arbitraje Internacional Con Particulares*, II-III REVISTA JURIDICA DE BUENOS AIRES 127-64

1. Foreign Arbitration and International State Contracts

The issues discussed above are also relevant in the area of foreign arbitration. For example, consider the arbitrator sitting abroad who may believe he/she is entitled to ignore the laws of the state which is a party to the administrative contract. Since these laws regulate such things as the conditions under which the state may validly contract, the powers of the state vis-á-vis the private party, and the conditions under which such powers may be unilaterally exercised, it is unlikely that an arbitral clause empowering a foreign arbitral tribunal to adjudicate such issues would be recognized.[31]

(1989). At present, the Argentine state oil company YPF (Yacimientos Petroliferos Fiscales) accepts submission to arbitration of any technical disputes arising out of service contracts with private parties for hydrocarbon exploration and development in Argentina. "Technical disputes" are understood as those whose resolution substantially depends on the determination of facts or circumstances related to a specific art or profession. Here, the parties choose a single arbitrator, and in case of disagreement, each party selects one arbitrator and the arbitrators so designated appoint the third arbitrator. If they fail to select a third arbitrator, one is appointed by the President of the Argentine Supreme Court. The arbitrators must be technically qualified to resolve the dispute and make their decision *ex aequo et bono*. The award is not subject to appeal. If the place of arbitration is not designated in the arbitration agreement, it is established at the compromiso. The arbitration will be governed by the rules set out at the Argentine National Code of Civil and Commercial Procedure. *See* Model Contract for the Exploration and subsequent Exploitation of Hydrocarbons, art. 18.3, DECRETO 623, 47-C ANALES DE LEGISLACIÓN ARGENTINA [A.D.L.A.] 2273 (Argen.); DECRETO 1443, 45-C A.D.L.A. 2080 (Argen.).

31. In *Argentina*, it is also held that arbitral clauses in state contracts (providing for arbitration in Argentina or abroad) are not valid if the disputed issue is governed by (i) federal laws (including laws of general economic, financial, institutional, or political interest and laws concerning national services or activities, enacted pursuant to article 67 of the Argentine Constitution, but excluding general legislation and codes made by Congress under article 67(11)), L. PALACIO, 2 DERECHO PROCESAL CIVIL 477-79, (1979); (ii) Argentine Constitutional provisions; or (iii) international treaties, because in such cases Argentine federal courts would have exclusive jurisdiction under article 100 of the Argentine Constitution. J.M. GONDRA, JURISDICCIÓN FEDERAL 25-30 (1944); G. BIDART CAMPOS, EL DERECHO CONSTITUCIONAL DEL PODER 365-67 (1967); G. BIDART CAMPOS, MANUAL DE DERECHO CONSTITUCIONAL ARGENTINO 795-96 (1980). However, the power of federal courts to exclude arbitration with respect to state contracts only exists when the claim is centrally grounded on constitutional law, federal law, or treaty provisions. D. LASCANO, JURISDICCION Y COMPETENCIA 353-56 (1941).

A delicate issue arises whenever a state, having entered into an arbitral agreement, challenges its validity on the ground that it was made in violation of its public laws. Article 177 (2), chapter 12 of the new Swiss Federal law of Private International Law expressly denies a state or a state entity the power to invoke its national legislation before the arbitrator or the courts under such a scenario. Though this provision explicitly refers to the case where the state or a state entity claims lack of capacity or the non-arbitrability of the dispute under its own laws, it may also be read as encompassing instances where the state alleges that the public official or body participating in the execution of the arbitral agree-

In so far as a foreign arbitrator could refuse to apply, as indicated above, public laws to essential issues affecting state sovereignty, it is unlikely that foreign arbitration of a state contract can be, or has been, used in Bolivia,[32] Argentina,[33] Peru,[34] Brazil,[35]

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ment was not empowered to do so under the state's public laws. Gaillard, *A Foreign View of the New Swiss Law on International Arbitration*, 4 ARB. INT'L 25 (1988). Literally speaking, the state cannot allege a manifest violation of its constitutional laws in the making of an arbitral agreement, if it affects an obviously non-arbitrable area or if it was obtained through criminal conduct punishable under the state's penal laws. It is submitted that an unqualified application of this provision is more likely to discourage than to favor arbitration. Taking the example of the Argentine administrative law, it is clear that the capacity and power of the state to enter into legal transactions or to issue administrative acts is exclusively governed by Argentine public law. An action of a public official or public body beyond the scope of its powers, or in violation of such law's administrative or constitutional provisions, is not valid. This rule recognizes certain exceptions if the lack of validity results from the failure to comply with internal administrative procedures unknown to the other party, or if the defects of the challenged state act are merely formal in nature. Since the doctrine of estoppel is also accepted in Argentina, even invalid acts to which the state is a party might be exceptionally upheld if, after weighing the public and private interests at stake, it is concluded that the former are not considerably damaged. H. MAIRAL, LA DOCTRINA DE LOS PROPIOS ACTOS Y LA ADMINISTRACION PUBLICA 52-61, 77-82 (1988). Nonetheless, the new Swiss legislation, which rejects, *ab initio*, the application of state laws challenging the arbitral agreement, also dismisses the fundamental state law conceptions aimed at striking a reasonable balance between the public and private interests involved. Because the application of public laws in this regard may not be contracted out by the state, the state will regard foreign arbitration with suspicion unless the state is reasonably assured that the arbitral tribunal will take these principles into account when ruling on its own competence.

32. For example, article 13 of the contract for the sale of gas between Gas del Estado (Argentina) and Yacimientos Petroliferos Fiscales Bolivianos (Bolivia) dated July 23, 1968 provides for *ad hoc* arbitration under rules to be chosen by the parties at the "compromiso." The seat of the arbitration will be also established in the "compromiso." In case of a disagreement between the arbitrators chosen by each party, a third arbitrator will be designated by one of the following officials in descending order of priority: (1) the President of Petróleos Mexicanos (Pemex); (2) the President of the French Petroleum Institute; or (3) the President of the American Arbitration Association (if the appointing authority ranking before in the sequence indicated above fails to make such designation).

33. Naón & Samtleben, *Schiedsgerichtsbarkeit in Argentinien*, 10 RIW 721-31 (1983).

34. Aramburu Menchaca, *Report on Perú*, 3 Y.B. COM. ARB. 120-21 (1978); Montoya Alberti, *Arbitration, Foreign Law and Jurisdiction in International Loan Agreements in Some Countries of Latin America*, in ARBITRATION IN SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES INVOLVING THE FAR EAST AND ARBITRATION IN COMBINED TRANSPORTATION 99-110 (P. Sanders ed. 1988). Peruvian public and private entities agreed with Japanese corporations in order to finance the development of oil resources in Perú and the sale of Peruvian oil to Japan. Agreements on Development and Supply of Petroleum, Aug. 28, 1974, Japan-Peru, 15 I.L.M. 1245. Article XVII of the contract for the sale of petroleum, provides that all ensuing disputes will be resolved under ICC arbitration in London. It is also stipulated that the third arbitrator, which is appointed by the ICC court of arbitration, cannot be Japanese or Peruvian nor have financial interests in oil operations.

35. Samtleben, *Arbitration in Brazil*, 18 U. MIAMI INTER-AM. L. REV. 1, 12 (1986); Strenger, *International Arbitration: Doctrine and Practice in Brazil*, 5 J. INT'L ARB. 44 (1988); J. DE MAGALHAES, DO ESTADO NA ARBITRAGEM PRIVADA 65-72, 106-17 (1988).

Mexico,[36] Chile,[37] Uruguay,[38] and Venezuela.[39] In these countries, arbitration has been used in the context of international contracts to which the state or a state entity is a party. These contracts may involve financing, insurance, equipment, or commodity acquisition and sale. In addition, Peru has recently modified its constitution to allow arbitration clauses in international loan agreements to which Peru or its state entities are parties.[40] In Ecuador, the constitution prohibits the state or state entities from agreeing to foreign arbitration. The state is also forbidden from submitting to the jurisdiction of foreign courts in cases involving contracts to which the state is a party, or where the public interest is concerned. These provisions, however, have been interpreted as being inapplicable to contracts concluded outside of Ecuador.[41] In Panama, decentralized state entities may submit "jure gestionis" transactions to arbitration. The central state may submit to arbitration with the approval of the President, the Cabinet, and the Solicitor of the National Treasury (Procurador General de la Nación). If these requirements are fulfilled, the state is entitled to submit to international arbitration disputes of patrimonial nature with foreign parties arising out of international transactions.[42]

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36. Briseño Sierra, *supra* note 15, at 97.

37. Article 1, Decree-Law No. 2349 of October 13, 1978. Chilean law declares the validity of certain clauses inserted in international contracts to which the state or a public entity is a party. These principally concern commercial or financial transactions or operations. Article 1(2) includes within the authorized clauses arbitral agreements which provide for arbitration abroad. DIARIO OFICIAL DE LA REPUBLICA DE CHILE [D.O.] No. 30.201, Oct. 28, 1978, at 4057-60; 1 REV. DER. INDUS. 449 (1979); ARBITRAJE COMERCIAL, supra note 27, at 316-17, 322, 326-27.

38. C. LARREATEGUI, *supra* note 15, at 82.

39. Article 127 of the Constitution of Venezuela provides Venezuelan courts with exclusive jurisdiction in all public interest agreements made by the government with foreign entities, except where inappropriate given the nature of the contract. LA CONSTITUCIÓN DE 1961 art. 127 (Venez.). A 1974 Attorney General opinion indicated that loan agreements are private contracts not encompassed by article 127. 4 LEAVY, THE CALVO DOCTRINE IN LATIN AMERICAN LOANS 31, 34 (1985).

40. CONSTITUCIÓN POLITICA DEL PERU art. 136. For a discussion of the situation in Latin American countries, see generally, Samtleben, *Cláusulas de Jurisdicción y Legislación Aplicable en los Contratos de Endeudamiento Externo de los Estados Latinoamericanos*, 21 VERFASSUNG UND RECHT IN UBERSEE (LAW AND POL. IN AFRICA AND LATIN AMERICA) 305-26 (1988).

41. Jiménez Salazar, *supra* note 15, at 79. Article 16 of the Constitution of Ecuador provides that contracts executed in Ecuador between the state or state entities and foreign parties must be subject to the jurisdiction of national courts. As a consequence, submission to a foreign jurisdiction, including arbitral tribunals, would be possible only if the contract were executed abroad. LA CONSTITUCIÓN POLITICA DE 1978 art. 16 (Ecuador); C. LARREATEGUI, *supra* note 15, at 78-79.

42. Boutín, *De la Teoría de la Doble Personalidad del Estado y el Arbitraje Interna-*

Legislation in Chile,[43] Colombia,[44] Brazil,[45] and Argentina[46] expressly allows the state to submit international loan agreements to arbitration abroad. In some cases (as in Colombia), legislation only allows this possibility when the loan contract is performed abroad.[47] In Argentina, it is required that the loan agreement be an

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cional en el Nuevo Código Judicial Panameño, in Liber Amicorum Zubkowski, *supra* note 14, at 459-72.

43. ARBITRAJE COMERCIAL, *supra* note 27. The state or public entities need an authorization from the President of the Republic (through a decree of the Ministry of Economy) to agree on an international arbitration clause. This authorization does not apply to the Central Bank of Chile or to the State Bank of Chile. Samtleben, *Schiedsgerichtsbarkeit in Chile*, 29 RIW 167, 171 n.69 (1983) [hereinafter *Schiedsgerichtsbarkeit*].

44. Colombian Decree 222 of Feb. 2, 1983 art. 229. *See* English text at 2 News and Notes of the Institute for Transnational Arbitration 3 (1987).

45. Le No. 1518, 15 LEX 510 (Brazil); Decreto Le No. 1.312, 38 LEX 564 (Braz.); de Magalhaes, *supra* note 29, at 79; Samtleben, *supra* note 35, at 12. In international loan agreements to which Brazil is a party, the Brazilian government usually submits itself to foreign arbitration. The panel is composed of three arbitrators, one selected by each party and the third by the arbitrators already designated. If there is no agreement about the third's designation, the appointment is made by the President of the World Bank. If the latter fails to do so, the designation is made by the President or any Vice-President of the Chartered Institute of Arbitrators in London. The third arbitrator must be "a practicing member of the bar of the state of New York." Though this is obviously an *ad hoc* arbitration device, arbitral proceedings compatible with the loan agreement are governed by articles 41-43 (powers of the arbitral tribunal, applicable law, powers to collect evidence), article 45 (*ex parte* arbitral proceedings), and articles 47-48 (interim measures of protection, arbitral award) of the ICSID Convention. Arbitrators decide according to the chosen law, New York law, and not as amiable compositeurs. Actually, Brazil accepts arbitration clauses in its international loan transactions because the submission to a foreign state court is considered a submission to a foreign sovereignty preciuded by the public policy reservation incorporated in article 17 of the Preliminary Law to the Brazilian Civil Code. Ruiz del Río, *Arbitration Clauses in International Loans*, 4 J. INT'L ARB. 45, 56-58 (1987). *See also* Clare, *Enforcement of the Arbitration Clause in Brazilian Loan Agreements*, INT'L FIN. L. REV., Nov. 1982, at 18-23.

46. Article 7 of Law 20548 (reforming article 48 of Law 16432) authorizes Argentina to accept foreign arbitration clauses inserted in international loan agreements. Ley 20.548, 33D A.D.L.A. 3657. The existence of a special law granting this type of authorization with regard to contracts of *jure gestionis* nature is explained by the existence of an old decree of December 15, 1933. That decree forbids all state instrumentalities to enter into local or foreign arbitration clauses both in private and administrative state contracts. Also, certain Supreme Court decisions require that the submission to arbitration by the state be authorized through a specific law. Judgment of November 1942, C.J.N., 194 Fallos 155. However, other Supreme Court decisions have held that the executive branch may authorize, through a decree, the insertion of an arbitral clause in a contract to which the state is a party. Bidart Campos, *La Jurisdicción Federal*, 18 E.D. 511, 525; *see Cia Italo*, 178 Fallos at 293.

47. A recent Colombia Supreme Court decision upheld the constitutionality of this provision, *see supra* note 44. Corte Suprema de Justicia (Sala Plena), Expediente No. 1463, *Jorge Quintero Aguirre, Demanda de Inconstitucionalidad contra el Artículo 239, Decreto Ley 222 de 1983* decision of October 20, 1986. *See* 2 News and Notes from the Institute of Transnational Arbitration 1, 3 (1987); Pechota, *Developments in Foreign and Comparative Laws*, 25 COLUM. J. TRANSNAT'L L. 777, 783-84 (1987). A prior decision in March 1986 had

international transaction.[48] The governing principle in most Latin American countries appears to be that if the state contracts as a private person (*jure gestionis*), foreign arbitration is possible.

2. Foreign Adjudication and Public Policy Concerns

Certain issues have been traditionally excluded from foreign adjudication—not just from foreign arbitration—because it is felt that the public interest is closely concerned. An example of this is found in Andean Pact Decision 24, article 51, which excluded foreign investment and foreign transfer of technology contracts from the jurisdiction of foreign courts, arbitral tribunals, and from the application of foreign laws.[49] However, Decision 24 has recently been superseded by Decision 220 of May 11, 1987, which does not

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declared article 3 of Legislative Decree 3614 of 1985 unconstitutional. This decree had allowed the enforcement of loan agreements (granted after the eruption of the volcano "del Ruiz") to be controlled by the law and jurisdiction chosen by the parties. Leavy, *Court Puts Foreign Loans in Danger*, INT'L FIN. L. REV. 7-8 (1986). In its new decision, the Colombian Supreme Court clearly states that contrary to Decree 3614 (which permitted the performance of foreign loan agreements in Colombia to be subjected to foreign courts or arbitrators) article 229 of Decree 222 only allows such forum and choice-of-law stipulations when performance is to take place abroad. The court finds this perfectly compatible with articles 10 and 16 of the Colombian Constitution, which only require the exclusive application of Colombian laws to foreigners located in Colombia and with the 1889 and 1940 Montevideo Treaties, in which Colombia participated in the drafting (Colombia also acceded in 1933 to the 1889 Treaty). Currently, a loan will be considered to be performed in the country where the funds are disbursed and repaid. Montoya Alberti, *supra* note 34, at 104-106. However, since only matters related to *performance* of loan agreements are referred to by Decree 222, all matters related to *execution* of the international loan agreement, including its validity and the capacity of the parties to contract, cannot be subject to foreign arbitration. This outcome has been criticized. *See* Leavy, *Governing Law and Foreign Loans: Colombia's Supreme Court Decides*, 4 INTER-AMERICAN LEGAL MATERIALS [INTER-AM. L.M.] 163-78 (1988).

48. CÓD PROC. CIV Y COM. art. 1 (Argen.). This is also true in *Chile*. *See* ARBITRAJE COMERCIAL, *supra* note 27, at 322-23.

49. Decision 24: Andean Foreign Investment Code, Codified Text of Nov. 30, 1976, 16 I.L.M. 138-53 (1977). The Members of the Andean Pact are Bolivia, Ecuador, Peru, Venezuela, and Colombia. Chile is no longer a member. However, investment contracts entered into under the rules of the Foreign Investment Statute (Decreto Ley 600, D.O. No. 28.901 of July 13, 1974, *reprinted in* Colección Textos Legales No. 13, at 154) cannot be subject to foreign arbitration (Decreto Ley 2349 art. 7(1), D.O. No. 30.201 of Oct. 28, 1978, *reprinted in* Colección Textos Legales No. 56, at 220). The same is true in the case of concession contracts concerning public property or property affected to the public use. *Id.* art. 7(2). Other Chilean laws exclude certain contracts from foreign arbitration and foreign court jurisdiction. This is the case of article 13 of Decree Law 1089 on Oil Contracts, Decreto Ley 1089, D.O. No. 29.199 of July 9, 1975, *reprinted in* Colección Textos Legales No. 25, at 176, and article 10 of Decree Law 1557 on Contracts Concerning Natural Atomic Materials, Decreto Ley 1557, D.O. No. 29.572 of Sept. 30, 1976, *reprinted in* Colección Textos Legales No. 35, at 57. The general principle is that these contracts directly involve national sovereignty and the exercise of sovereign powers. ARBITRAJE COMERCIAL, *supra* note 27, at 334-37.

have an equivalent provision.[50] Article 34 of new Decision 220 leaves each member country free to choose, under its own domestic legislation, the dispute resolution mechanism applicable to foreign investment and foreign technology contracts. Thus, the Andean Pact legal framework no longer prevents its members from agreeing to foreign arbitration in these areas, and now, the issue is entirely left to their municipal laws.[51]

Latin American countries have traditionally felt that the laws which control crucial areas such as foreign investment, industrial promotion, trademark, antitrust legislation, as well as natural resources and strategic activities, should not be left to the decision of foreign courts or arbitrators.[52] A careful appraisal of the majority

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50. Decision 220, La Comisión del Acuerdo de Cartagena, 26/27 REV. DER. INDUS. 503 (1987). Esquirol, *Foreign Investment: Revision of the Andean Foreign Investment Code*, 29 HARV. INT'L L.J. 169-77 (1988); E. MURPHY, JR., THE QUIET REVOLUTION IN ANDEAN FOREIGN INVESTMENT LAWS, INTERNATIONAL BUSINESS IN 1989 10.1-.20 (C. Holgren ed. 1989).

51. Actually, article 51 of Decision 24 excluded foreign adjudication and arbitration with respect to foreign investment and technology contracts even if the host state is not a party to the transaction. In a number of Latin American countries, where foreign investment is concerned, foreign arbitral and foreign forum clauses are excluded with respect to certain state contracts or in transactions concerning the state's sovereign powers or authority. *See supra* notes 29, 31, 37, 39, 41, 49 and accompanying text. In Colombia, for instance, article 74 of Decree 222, *supra* note 44, providing that contracts to which the state or a state entity is a party are governed by Colombian law and subject to the jurisdiction of Colombian courts. *See* Roffe, *Calvo y su Vigencia en América Latina*, 17 REV. DER. INDUS. 353, 362-67, 376 (1984). The reference back to national laws by article 34 of new Decision 220 most likely means that in the absence of an international treaty, foreign arbitration will not be possible in investment matters where the host state is a party or state sovereignty is affected. Foreign arbitrations between a private party of the host state and a foreign party will not necessarily be invalid in investment disputes.

In other matters, such as technology contracts, however the result might not be the same. Article 16 (f) of Resolution 005-81-EFC/35 of the National Commission on Foreign Investment and Technology (CONITE), 24 Peru, Oct. 28, 1981, excludes foreign law stipulations and foreign court or arbitral clauses also from technology transactions between private parties. 4 REV. DER. INDUS. 180, 183 (1982). Under article 2(g) of Resolution 283 of the Ministry of Industry, Commerce, and Integration of *Ecuador*, any dispute growing out of a foreign technology contract must be submitted to the laws and courts of Ecuador through a specific contractual provision. 2 REV. DER. INDUS. 205-08 (1980).

Nevertheless, in other Latin American countries, such as *Argentina*, foreign arbitral or court clauses in foreign technology contracts are not prohibited. Law 22426, 3 REV. DER. INDUS. 224-27 (1981). In *Mexico*, foreign arbitral clauses in technology contracts are allowed provided that the arbitrator applies Mexican law: Law on the Control and Registration of the Transfer of Technology and the use and Exploitation of Patents and Trademarks, 4 REV. DER. INDUS. 169, 172 (1982).

52. Grigera Naón, *supra* note 15, at 8-10. For instance, article 19 of the Mining Code of *Uruguay* provides that any contract conferring mining rights must be subject to the laws and jurisdiction of Uruguay and any contrary clause is null and void. DIARIO OFICIAL DE LA REPÚBLICA ORIENTAL DEL URUGUAY [D.O.] No. 21175, Feb. 16, 1982 (Uru.), at 677-78. Nevertheless, some Latin American countries have signed or ratified the World Bank ICSID Con-

of Latin American legislations reveals, however, that these limitations do not connote a general rejection of arbitration in these areas, but only a delimitation on a case-by-case basis of matters which can be arbitrated. Caution is exercised because these issues are considered non-arbitrable on account of specific political, institutional, or economic reasons, particularly, when the state is involved in the transaction. Nevertheless, even this cautious attitude is now in the process of being substantially revised.

3. Arbitration and Foreign Investment

In this particular area, recent developments indicate an increasingly positive attitude regarding international commercial arbitration and foreign investment. Before specifically reviewing them, it seems useful to consider the attitude that prevailed until recently.

In Argentina, for instance, the inability to arbitrate foreign investment questions applied only to certain matters, such as the access of foreign investment to certain strategic areas or the availability of foreign exchange for profit remittance and capital repatriation. These matters involve the relationship between the state and the foreign investor and would thus fall under the exclusive jurisdiction of Argentine federal courts pursuant to Article 100 of the Argentine Constitution.[53] Nevertheless, other aspects related to foreign investment (such as joint ventures which channel the private investment) could always be subject to foreign arbitration if certain conditions set out in Argentine procedural law had been met.[54]

Latin American countries have been willing to accept arbitration in investment matters to the extent that it did not force arbitration of issues which touch upon the exercise of the host state's sovereign rights. This willingness can be seen in agreements between the United States and a number of Latin American countries to allow United States investment to qualify for investment insurance program under the Overseas Private Investment Corpo-

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vention. *Argentina, Bolivia, Chile, El Salvador, and Haiti* have signed the convention; *Costa Rica, Ecuador, Honduras,* and *Paraguay* have ratified the convention.

53. CONSTITUCIÓN DE LA NACIÓN ARGENTINA art. 100.

54. *See supra* notes 28-31 and corresponding text and *infra* note 147 and corresponding text. Grigera Naón, *Arbitraje Comercial Internacional Solucion de Controversias en Materia de Inversiones Extranjeras,* 48 REV. COL. AB. B.A. 39-43 (1988).

ration (OPIC). These agreements authorize the United States government to subrogate the claims of an insured private investor who has been affected by an expropriatory action. Under these agreements, disputes between the United States government and the host state arising from those claims are to be resolved through arbitration. However, only matters involving public international law may be submitted to arbitration thereunder. In addition, arbitration is only possible after exhaustion of remedies before the courts of the host state.[55] The agreement with Brazil clearly states: (i) that matters remaining within the internal jurisdiction of a sovereign state are not arbitrable; and (ii) that claims arising out of expropriation of property belonging to foreign private investors do not present questions of public international law, unless local remedies of the host state have been exhausted *and* there has been a denial of justice. Furthermore, the Brazilian government has declared that a mere adverse resolution by Brazilian courts against a private investor is not a denial of justice; only actions or omissions barring access to justice or delaying adjudication in violation of applicable Brazilian procedural law will qualify as such.[56]

A similar attitude vis-á-vis international jurisdictions has been evidenced by other Latin American countries, which arguably reflects their attitude toward international arbitration regarding the

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55. H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 546 (1986) (addressing agreements signed with Brazil and Ecuador).

56. H. STEINER & D. VAGTS, *supra* note 55, at 546-47. *Argentina* signed an Investment Guarantee Agreement with the United States which took force on May 22, 1961. Ley 15.803, 21-A. A.D.L.A. 15 (1961). This was later reformed through a Protocol executed by both countries on June 5, 1963. Protocol to Investment Guarantee Agreement, June 5, 1963, United States-Argentina, 2 I.L.M. 776. The Protocol allows the U.S. Government to prosecute the claims of insured U.S. investors against Argentina. Any such claims may be submitted to negotiations between both governments only after (i) exhaustion of local remedies before Argentine courts and (ii) in the opinion of the U.S. Government, a denial of justice has resulted. However, only public international law issues related to expropriatory action, war, or civil war may be subject to negotiations and arbitration. Matters of internal jurisdiction are excluded from such negotiations and arbitration, including any question governed by the Argentine Constitution or the laws of Argentina regarding the reasons, opportunity, or legal character of an expropriation; and any final decision from Argentine courts on any matter contemplated in the Constitution or the laws of Argentina. Any claim concerning the treatment of property belonging to foreign investors is not of public international law nature unless exhaustion of local remedies has taken place and a denial of justice occurred. *Id.* art. 3(b). Only the governments of the U.S. and Argentina may be parties to the arbitral proceedings. Each party shall designate an arbitrator. The chosen arbitrator will choose a chairman, who must not be a national of either country. If there is no agreement on the name of the chairman, he/she will be designated by the Secretary of the Permanent Court of Arbitration at The Hague. *Id.* art. 3(c).

same issues.[57]

Notwithstanding the above, Latin American countries are gradually moving away from positions favoring the exclusive jurisdiction of national courts with respect to foreign investment disputes propounded by the Calvo Doctrine.[58] At present, Latin American countries are showing an enhanced willingness to submit this type of dispute to international commercial arbitration. The reasons for this are several. On one hand, Latin American leaders seem to be persuaded that in order to overcome the unprecedented poverty of the region, it is necessary to favor Latin American free market economies that are not only fully interconnected regionally, but also globally integrated with the world economy.[59] To attain this end, it would be necessary to eliminate obstacles to free enterprise and to create a favorable climate for attracting foreign investment.

International commercial arbitration would be an important part of the general package aimed at enhancing the security and predictability required by foreign investors. Probably, it is also felt, in view of the reduced standard of living, and heavy debt burden of Latin American countries,[60] that they simply do not have sufficient bargaining power to insist on the exclusive jurisdiction of their courts without jeopardizing foreign investment.

This new attitude in Latin America regarding foreign investment and international commercial arbitration is also in part related to President George Bush's Enterprise for the Americas Initiative, aimed at creating a free trade zone in the Americas, fostering

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57. For instance, upon ratifying the Interamerican Costa Rica Convention on Human Rights of November 22, 1969, the Argentine Government made a reservation as to the scope of the jurisdiction of the Interamerican Court of Human Rights. After stating that the Argentine Government would interpret the Convention in light of the principles and provisions of the Argentine Constitution, it declared in an Annex that article 21 of the Convention, establishing that nobody may be deprived of his or her property without just compensation, and reasons of public or social interest, should not be interpreted as allowing the review by international tribunals of those matters concerning the Argentine Government's political economic policies, court decisions on the meaning of public or social interest, or just compensation. E.J. Hardoy, *El Tratado de San José de Costa Rica*, 48 REV. COL. AB. B.A. 93-103 (1988).

58. *See* Siqueiros, *Arbitral Autonomy and National Sovereign Authority in Latin America*, in LEX MERCATORIA AND ARBITRATION 183-93 (T. Carbonneau ed. 1990).

59. Peña, *La Integracion Latinoamericana en el Decenio de 1990: Tiene aun Sentido?*, INTEGRACION LATINOAMERICANA, Aug. 1990, at 36-40; Barbosa, *Diez Años de ALADI: Lecciones y Perspectivas*, INTEGRACION LATINOAMERICANA, Sept. 1990, at 24-28.

60. *See* Hurtado, *Aspectos politicos de la integracion latinoamericana*, INTEGRACION LATINOAMERICANA, Jan.-Feb. 1990, at 3-8.

foreign investment, and reducing the foreign debt burden of Latin American countries.[61] In several Latin American countries it is felt that adequate means for the international resolution of investment disputes, including international commercial arbitration, should be put in place as a part of a Latin American response to President Bush's initiative.

A significant step in this direction is the growing Latin American participation in the Convention establishing the Multilateral Investment Guarantee Agency (MIGA).[62] Annex II of the Convention provides for arbitration to resolve investment disputes between the host country and the Agency.[63] Since the Agency is subrogated to the rights and claims of the private investor, a private claim by a foreign investor, normally subject to the jurisdiction of the courts of the host state under the Calvo doctrine, is "elevated" to the level of an international claim subject to international arbitration.

Another expression of this unprecedented trend is the growing participation of Latin American countries in bilateral investment treaties with developed countries in which international arbitration is the chosen means of dispute resolution. It is significant that this development is taking place at the same time that the International Court of Justice,[64] in the process of resolving a dispute re-

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61. United States Remarks on the Enterprise for the Americas Initiative, June 27, 1990 and Sept. 14, 1990, 29 I.L.M. 1566.

62. Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, 24 I.L.M. 1598 [hereinafter MIGA]. On September 17, 1990, the Argentine president ratified the Convention establishing the Multilateral Investment Guarantee Agency (MIGA) on the basis of powers previously conferred by the Argentine Congress under article 19 of Law 23.697. BOLETIN OFFICIAL [B.O.] No. 26.989, Oct. 16, 1990. Argentina, however, has not yet completed all membership requirements. This Convention has already been signed or ratified by Bolivia, Brazil, Colombia, El Salvador, Nicaragua, Peru, Chile, and Ecuador, though only the last two countries have completed all membership requirements.

63. MIGA, *supra* note 62, Annex II, art. 4; *see generally* I. SHIHATA, MIGA AND FOREIGN INVESTMENT 257-92 (1988).

64. Elettronica Sicula (Elsi), (U.S. v. Italy), 1989 I.C.J. 15 (July 20, 1989). *See* Note, *Protezione Diplomatica delle Societa e Degli Azionisti e Trattato di Amicizia Italia-Stati Uniti: Il Caso Raytheon-Elsi Dinnanzi alla Corte Internazionale di Giustizia*, 4 DIRITTO DEL COMMERCIO INTERNAZIONALE 385-93 (1990); Note, *International Court of Justice-diplomatic protection-U.S.-Italian Treaty of Friendship, Commerce and Navigation*, 84 AM. J. INT'L L. 249 (1990); Note, 4 FOREIGN INVESTMENT L.J. 320-29 (1989); Jeancolas, *L'Arrêt Elettronica Sicula S.P.A. (Elsi) du 20 juillet 1989*, 94 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [REV. GÉN. DR. INT'L PUB.] 701 (1990); Adler, *The Exhaustion of the Local Remedies Rule After the International Court of Justice's Decision in Elsi*, 39 I.C.L.Q. 641-53 (1990); Seidl-Hohenveldern, *Elsi and Badger: The Two Raytheon Cases*, 26 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 261 (1990).

garding a bilateral treaty, has gone well beyond the limits permitted by the treaty itself and seems to have departed from the rule established in Barcelona Traction.[65] This rule excludes from diplomatic protection the controlling shareholders of a company incorporated in the host state where the foreign investment is located.[66] It is significant that, for many, that part of the Barcelona Traction ruling was considered to be an expression of the Calvo Doctrine.[67]

For instance, Argentina is negotiating, has signed, or is in the process of signing and ratifying a number of bilateral foreign investment treaties[68] providing for dispute resolution between the foreign investor and the Argentine State, especially for important issues such as expropriation, nationalization or foreign exchange restrictions. The treaties call for ICSID arbitration if both parties have ratified the 1965 ICSID Convention or arbitration under ICSID's Additional Facility arbitration rules if they have not, or for ad-hoc arbitration under UNCITRAL's arbitration rules.

According to these treaties, the arbitrators are to decide disputes submitted to them according to certain guidelines: The laws of the host country including conflict-of-laws rules, the provisions of the relevant investment treaty, the specific agreements made with the investor concerned, and the principles of public international law. The treaties provide for "adequate," "effective," and sometimes "prompt" compensation in case of expropriation or nationalization. Even though the treaties require the exhaustion of local remedies before permitting arbitration, arbitration may in any event be resorted to if the dispute has not been resolved locally within 18 months from the date the investor's claim was filed. No provision is made as to the seat of the arbitral tribunal. Uruguay has also become a party to similar bilateral investment treaties.[69]

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65. Stern, *La Protection Diplomatique des Investissements Internationaux*, 117 JOURNAL DU DROIT INTERNATIONAL [J.D.I.] 897, 934-35 (1990).

66. Barcelona Traction, Light and Power Company (Belg. v. Spain) 1970 I.C.J. 3 (Feb. 5, 1970).

67. Barberis, *Carlos Calvo*, 2 HAGUE Y.B. INT'L L. 41, 46 (1989).

68. The Argentine Minister of Foreign Affairs has signed the following bilateral foreign investment treaties—not yet approved by the Argentine Congress: with Great Britain (December 11, 1990), with the Belgian—Luxembourg Economic Union (June 28, 1990), with Italy (May 22, 1990) and with the Federal Republic of Germany (April 9, 1991). Negotiation and finalization of similar treaties with other countries, including the Federal Republic of Germany and the United States, is presently under way. Information and texts supplied by the Treaty Department of the Argentine Ministry of Foreign Affairs.

69. One example is the Bilateral Investment Treaty of May 4, 1987 between Uruguay

At least in the case of Argentina, these agreements appear to be an abrupt departure from previous legal precedent and diplomatic tradition.[70] Though it is too early to assess the final legal impact—in view of the public and constitutional law issues involved— these agreements should be seen as a frank and confident gesture towards international arbitration as well as the means of developing an international foreign host state and private investor interest.

There remain uncertainty and controverted views on the "lex fori" of international arbitrators. This is especially true in certain vital areas such as the standards and measures of compensation in cases of nationalization or expropriation[71] and the application of international mandatory rules of national origin.[72] Nevertheless, the change in attitude of Latin American countries favoring international arbitration is by itself an important concession in favor of private adjudication not subject to, or largely free from, state control. Such a concession is all the more significant in that it involves issues of vital national interests in a time when international arbitral tribunals lack settled legal principles to apply to foreign investment in weakened and changing economies.[73] Furthermore, all

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and the Federal Republic of Germany, article XI. DIARIO DE SESIONES DE LA CAMARA DE REPRESENTANTES, Apr. 4, 1990, at 85-89.

70. *See supra* notes 29-31, 56-57 and accompanying text.

71. *See* Westberg, *Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal*, 5 FOREIGN INVESTMENT L.J. 256 (1990); Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 1988 BRIT. Y.B. INT'L L. 49 (1989); Mendelson, *The United Kingdom Nationalization Cases and the European Convention of Human Rights*, 1986 BRIT. Y.B. INT'L L. 33 (1987).

72. *See* von Mehren, *Arbitration Between States and Foreign Enterprises: The Significance of the Institute of International Law's Santiago de Compostela Resolution*, 5 FOREIGN INVESTMENT L.J. 54 (1990); El-Kosheri & Riad, *The Law Governing a New Generation of Petroleum Agreements: Changes in the Arbitration Process*, 1 FOREIGN INVESTMENT L.J. 257 (1986); Grigera Naón, *The Applicability of Transnational Rules in International Commercial Arbitration*, Preliminary Report (Civil Law Countries), International Law Association Queensland Conference 2-12 (1990). The principle of boundless party autonomy within the context of international commercial arbitration is still a matter of serious objections in Latin America. For discussions on the topic, see GARRO, ARBITRAJE COMERCIAL Y LABORAL EN CENTRAL AMERICA 161-65 (1990). On the problems of uncertainty and unpredictability if arbitrators are allowed to choose the applicable law, see Wengler, *L'Evolution Moderne du Droit International Privé et la Prévisibilité du Droit Applicable*, 79 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [R.C.D.I.P] 657, 671-73 (1990).

73. On the dilemmas posed by international commercial arbitration to sovereign states and to the safeguarding of notions of justice, see Vagts, *Dispute-Resolution Mechanisms in International Business*, 203 RECUEIL DES COURS 13, 86-88 (1987-III); Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration* 63 TUL. L. REV. 647 (1989).

this is happening in an area in which legal and political traditions and valid sovereignty concerns make it particularly difficult to break new ground. Proponents of international arbitration should seize this historical moment and respond to the challenge by helping to fashion an international investment law adequately responsive to the sovereign, social, and economic interests of the host state. This aim would be difficult to attain without arbitral panels comprised of arbitrators from underdeveloped and developing nations.[74] Otherwise, Latin America's increasingly favorable attitude toward the arbitration of foreign investment disputes might vanish as soon as the region overcomes its economic difficulties.

C. The Agreement to Arbitrate and the Compromiso

Latin American procedural laws normally contemplate both the arbitral agreement ("cláusula compromisoria")[75] and the "compromiso." The arbitral agreement results in a decision by the parties to submit future disputes to arbitration and the "compromiso" refers to the specific submission to arbitration of an already existing dispute.

The "compromiso" is actually a contract between the parties and the arbitrators (the latter should also sign it or implicitly abide by it by accepting their designation as arbitrators thereunder) where the names of the arbitrators, the matters submitted to arbitration, and the circumstances causing the dispute (including the different positions of the parties) are set out in full. The "compromiso" can also establish a penalty against the party unwilling to comply with the arbitral proceedings. In the "compromiso," the parties may also determine any other aspect concerning the arbitration, including the procedural rules governing the arbitral

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74. Shihata, *The Institute of International Law's Resolution on Arbitration between States and Foreign Enterprises — A Comment*, 5 FOREIGN INVESTMENT L.J. 65, 67-68 (1990).

75. *Argentina*: CÓD. PROC. CIV. Y COM. art. 736 (Argen.). *Bolivia*: CÓD. COM. art 1479; CÓD. PROC. CIV. arts. 712, 739 (Bol.). *Brazil*: Baptista, CLAUSULA COMPROMISSORIA E COMPROMISO, in ARBITRAGEM COMERCIAL 31-42 (J.C. de Magalhaes & L.O. Baptista eds. 1986). *Chile*: Though not mentioned in black-letter law, it is admitted by authorities and in practice. Eyzaguirre Echeverría, *supra* note 19, at 46. *Ecuador*: It is admitted within the framework of arbitral rules for the Chambers of Commerce. Jiménez Salazar, *supra* note 15, at 78. *Colombia*: It is also admitted. Díaz Rubio, *supra* note 15, at 58-59. *México*: It is also admitted. Briseño Sierra, *supra* note 15, at 96; CÓD. COM. art. 1415 (Mex.). *Peru*: CÓD. PROC. CIV. arts. 713-716 (Peru). *Venezuela*: CÓD. PROC. CIV. art. 608 (Venez.); Samtleben, *Schiedsklauseln in Peru and Venezuela*, 22 RIW 20-23 (1987) [hereinafter *Schiedsklauseln*].

proceeding.[76]

The execution of the "compromiso" is the first step in arbitral proceedings. In fact, the "compromiso" is external to arbitral proceedings. It is a preliminary, but vital stage, which is carried out by the parties before the arbitrators have accepted their designation as such. A plaintiff may not file a complaint prior to the "compromiso," unless it has been so agreed or imposed by the arbitral institutional rules chosen by the parties.[77] The description in the "compromiso" of the controversy, the opposing position of each party, and the points subject to arbitral decision is the arbitral

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76. *Argentina:* CÓD. PROC. CIV. Y COM. arts. 739-741 (Argen.) (must be in writing). *Bolivia*: CÓD. PROC. CIV. arts. 713-715 (Bol.) (in writing). However, Civil Code article 1481 establishes that the arbitral agreement made through public deed implies the exclusion by the parties of court proceedings for resolving their dispute. *Brazil*: C.C. arts. 1037-1040, C.P.C arts. 1072-1077 (Braz.) (in writing). *Chile*: CÓD. ORG. TRIB. art. 234 (chile) (in writing). *Ecuador*: (in writing in the case of arbitration before the Chamber of Commerce (Ley de Arbitraje Comercial art. 5)). In *ad hoc* arbitration, it must have been extended in a public instrument or an instrument acknowledged before a public authority. CÓD. PROC. CIV. art. 1014-15 (Ecuador). Jiménez Salazar, *supra* note 15, at 78. *Colombia*: Decree 2279, *supra* note 11, art. 3 (in writing). Díaz Rubio, *supra* note 15, at 59. *Honduras*: CÓD. PROC. art. 850 (Hond.) (by public deed). *Mexico*: C.F.P.C. arts. 220, 611 (in writing). Nevertheless, articles 1052(I) and 1053(IX) of the old text of the Commercial Code have been used to argue that the arbitral agreement must be incorporated into a public instrument, and there is a Supreme Court decision to this effect. Sem. Jud. Fed., Suplemento de 1933, at 852; Briseño Sierra, *supra* note 15, at 96. Nevertheless, after the modifications introduced into the Commercial Code, *see supra* note 10, there is no doubt that though the arbitration agreement must be in writing, it need not be notarized. CÓD. COM. art. 1417 (Mex.). *See also* 2 J.L. SIQUEIROS, LA NUEVA REGULACIÓN DEL ARBITRAJE EN EL CÓDIGO DE COMERCIO, EL FORO 157, 158, 166 (1989); Hoagland, *Modifications of Mexican Arbitration Law*, 7 J. INT'L ARB. 91, 94 (1990). *Paraguay*: CÓD. PROC. CIV. art. 777 (Para.)(written or by private instrument). *Peru*: CÓD. CIV. art. 1910 (Peru)(in writing); CÓD. PROC. CIV. art. 552 (Peru)(requiring that it be incorporated into a public deed) is no longer applicable; Montoya Alberti, *supra* note 19, at 56. *Uruguay*: CÓD. PROC. CIV. art. 540 (Uru.)(by public instrument). *Venezuela*: CÓD. PROC. CIV. art. 608 (Venez.)(must be made by "authentic" act); *Schiedsklauseln*, *supra* note 75, at 22. Authentic act would include both a public document originally made before and registered with a notary public or public official or a private document acknowledged before a public official or notary public. F. Gabaldón, *supra* note 15, at 51-56.

77. In *Argentina*, articles 34-37 of the Arbitral Rules of the Arbitral Tribunal of the Buenos Aires Stock Exchange establish that the compromiso is drawn up after the claim, the answers to the claim and the counterclaims (if any) have been filed. However, this Arbitral Tribunal acts *ex aequo et bono*, and therefore is not bound by strict procedural rules, including those requiring the drawing up of a compromiso in lieu of having claim, answer, and counterclaim. In *Venezuela*, this possibility has been ruled out by doctrinal opinions. The claim, counterclaim, and answer thereto are not allowed before or after the compromiso, and the parties cannot change this situation. F. GABALDÓN, *supra* note 15, at 65-66. However, in *Peru*, according to article 1 of the Arbitral Rules of the Lima Chamber of Commerce, arbitral proceedings are started by a compromiso extended before notary public. Thereafter, the parties are authorized under articles 9-10 to submit in writing their claims and respective answers.

equivalent of a claim, response, and counterclaim. In the arbitral context, however, they are merged into a single document, and signed by all the parties, including the arbitrators.[78]

With the exception of Mexico, Paraguay, Colombia, and Ecuador in case of institutional arbitration under the rules of local or foreign chambers of commerce, execution of a "compromiso" is required even if there is already an arbitral agreement between the parties.[79] As a result, in most Latin American countries, an arbitral agreement inserted in a contract is not operative until the "compromiso" has been signed and a specific dispute has arisen. If any party refuses to sign, or no agreement is reached on any of the points to be covered by it (including the designation of the arbitrators), most Latin American legislations allow any party to resort to specific performance, and have the competent state court execute the "compromiso" on behalf of the reluctant party. In such case, the arbitration will proceed and the award will be binding on the party not signing the "compromiso."[80] However, even in countries requiring the "compromiso," it is not necessary (with the exception of Brazil) to wait for the execution of the "compromiso" to obtain a stay for matters falling within the scope of an existing arbitral agreement. A stay of court proceedings may be accomplished

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78. L. PALACIO, *supra* note 18, at 112.

79. *Mexico*: Briseño Sierra, *supra* note 15, at 96. In view of the existence of different opinions on whether a compromiso is required, Sierra recommends that it be executed as a precautionary measure. However, this recommendation is no longer applicable in view of the recent reform of the Mexican Commercial Code which excludes any reference to the compromiso and provides that the arbitral agreement determines by itself the stay of court proceedings on the same subject matter submitted to arbitration. CÓD. COM. arts. 1415, 1427 (Mex.). *Ecuador*: Ley de Arbitraje Comercial arts. 1, 6; CÓD. PROC. CIV. art. 1015 (Ecuador); Jiménez Salazar, *supra* note 15, at 78-79.

80. *See* C. LARREATEGUI, *supra* note 15, at 45-63. *Argentina*: CÓD. PROC. CIV. Y COM. art. 742 (Argen.). *Bolivia*: CÓD. PROC. CIV. art. 716 (Bol.). Though there is no specific provision in this sense, this is also the situation in *Chile*. Eyzaguirre Echeverría, *supra* note 19, at 46-48, 52. *Ecuador*: *see* Jiménez Salazar, *supra*, note 15, at 79-80, 83. The same situation exists in *Panama*. CÓD. PROC. arts. 1421-1426 (Pan.). *Honduras*: *see* León, *Ejecucion de la sentencia arbitral en Honduras*, in Liber Amicorum Zubkowski, *supra* note 14, at 354. *Peru*: CÓD. PROC. CIV. art. 556 (Peru). *Venezuela*: CÓD. PROC. CIV. arts. 610(2), 611-614 (Venez.); *Schiedsklauseln*, *supra* note 75, at 22. This means that, with the sole exception of *Brazil*, the existence of an arbitral agreement allows any party thereto to uphold it by raising the defense of incompetence or lack of jurisdiction in order to bar court proceedings started by the other party on the same subject which falls under the arbitral agreement. In countries (except Brazil) where a compromiso is required, this may be done simultaneously with the request addressed to a competent court to have the compromiso executed through specific performance. On the situation in *Argentina*, see A. FAHRI & A. FAHRI, LA CLÁUSULA COMPROMISORIA 67-69 (1945); L. PALACIO, *supra* note 18, at 52; H. ALSINA, 8 TRATADO TEORICO PRÁCTICO DE DERECHO PROCESAL CIVIL Y COMERCIAL 30 (1965).

merely by raising the existence of the arbitral agreement as a defense.[81] However, the "compromiso" is still required prior to commencing arbitral proceedings against the party who resorted to the courts in order to sidestep the arbitration.

There is an apparent similarity between this system and the ICC Rules that require the parties to agree on terms of reference. These usually include the same points normally contemplated in the "compromiso."[82] The terms of reference are executed after the arbitrators have been designated and the parties have unilaterally set forth their claims and counterclaims through separate presentations submitted to the arbitral tribunal.[83] If any of the parties fails to sign the terms of reference, the ICC Court of Arbitration, after giving its approval to the terms of reference, will order the arbitral proceedings to continue, ultimately having binding effects on the recalcitrant party.[84]

On the other hand, under most Latin American legislations, an independent claim to obtain the issuance of the "compromiso" has to be filed with a state court. This claim may be answered and objected to by the respondent. When making his decision, the judge might be forced to hear evidence in order to determine what issues are to be included in the "compromiso" and the way to phrase the different terms and claims of the parties. Needless to say, the procedure might become lengthy and cumbersome.[85]

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81. *Argentina*: L. PALACIO, *supra* note 18, at 52. *Chile*: P. AYLWIN AZOCAR, EL JUICIO ARBITRAL 321-23 (1958). This was the solution in *Mexico* even before the recent modification of its Commercial Code eliminating the compromiso C.F.P.C. art. 620 (Mex.). The word compromiso indistinctly refers to the specific submission and to the "clausula compromisoria." Of course, under the new provisions of the Mexican Commercial Code which do not require execution of a compromiso in addition to the arbitral agreement, the mere existence of the latter, if raised as a defense, will suffice to obtain the stay of court proceedings in a dispute falling within the scope of the arbitral agreement. CÓD. COM. arts. 1418, 1427 (Mex.). *Santo Domingo*: Campillo, *El Arbitraje en Santo Domingo*, in Liber Amicorum Zubkowski, *supra* note 14, at 556, 557-69. *Panama*: CÓDIGO JUDICIAL art. 1414 (Pan.). This also seems to be the solution in *Guatemala*, though article 276 of the Procedural Code is less clear than its Panamanian counterpart. Chacón Corado, *La Conciliación y el Arbitraje como Instrumentos para la Solución de Conflictos en Guatemala*, in Liber Amicorum Zubkowski, *supra* note 14, at 331, 343-44.

82. *Rules of Conciliation and Arbitration of the International Chamber of Commerce*, 1988 I.C.C. art. 13(1).

83. *Id.* arts. 3-5.

84. *Id.* art. 13(2).

85. Garro, *Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America*, 1 J. INT'L. ARB. 293, 315 (1984); de Trazegnies, *Los Conceptos y las Cosas: Vicisitudes Peruanas de la Clausula Compromisoria y del Compromiso Arbitral*, in Liber Amicorum Zubkowski, *supra* note 14, at 543-54. In *Argentina*, the interested party

There are certain Latin American countries which do not allow specific performance for execution of the "compromiso" when one of the parties fails to sign it. However, after recent Venezuelan legislation, which allows the execution of the "compromiso" through specific performance, Brazil is the last significant example. Brazil holds only the party who refuses to sign the submission liable for damages.[86] Although draft legislation has been proposed in

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submits its claim before the competent court which would have decided the dispute if there had not been an arbitral clause. This claim is transmitted to the other party, who answers it. The court will immediately call for a hearing to have the compromiso executed by the parties. If the recalcitrant party does not show up, the court will have the compromiso drawn up according to the draft submitted by the plaintiff. If the other party opposes the execution of the compromiso, the judge will decide this point after short proceedings ("trámite de los incidentes"), or preferably a single hearing with reduced opportunity to produce evidence. CÓD. PROC. CIV. Y COM. arts. 175-185 (Argen.). Nevertheless, the court may only accept evidence concerning the existence of the arbitral clause and any dispute between the parties within its scope. The interested party must also set out the specific points on which the arbitral decision must be made. The court is not allowed to decide on the substance of the dispute. If both circumstances are present, the court will reject the objections raised by the recalcitrant party and will approve the compromiso. Judgment of Apr. 7, 1967, Camára Segunda de Apelaciones en lo Civil y Comercial de la Plata, Argen., 129 L.L. 607; Judgment of Dec. 22, 1952, Cám. Nac. Apel. en lo Comercial, Cap. Fed. Sala 'B', Argen., 1953-II J.A. 233-35; Judgment of Mar. 4, 1949, Cámara 1 de Apelación La Plata, Sala I, Argen., 1948-II J.A. 278-80. If the parties do not agree on the points to be submitted to arbitration, the court will also decide this issue and approve the points to be included in the compromiso. The decision of the court on any of the above issues is subject to appeal. L. PALACIO, *supra* note 18, at 72-79. In a recent decision, the Argentine National Commercial Court of Appeals (Cámara Nacional de Apelaciónes en lo Comercial) determined that within the context of an entirely domestic commercial dispute, the fact that the parties have agreed on the arbitration of the ICC does not mean that the ICC's International Court of Arbitration will supersede the Argentine courts' final determination concerning the incorporation of contested issues in the compromiso or the terms of reference in case of discrepancy between the parties. Perez Companc S.A. and Bridas S.A. v. Ecofisa S.A. and Petrofisa S.A., 6 INT'L ARB. REP. A-1 to A-10 (1991).

In *Venezuela*, the procedure to have the compromiso executed is more complex. If one of the parties questions the validity of the arbitral agreement, a period of 15 days to offer evidence on that issue is provided before the court is asked to decide the specific performance request. Within five days of the expiration of this period, the court will decide on the validity of the arbitral agreement. This decision is subject to appeal. CÓD. PROC. CIV. art. 611 (Venez.). After the validity of the arbitral agreement is declared, a procedure to establish the substance of the compromiso is opened. In cases where the recalcitrant party is absent, the issues to be arbitrated under the compromiso will be those proposed by the party present. In case of disagreement on the issues, the court will decide. *Id.* arts. 613-614; González, *El Proceso Arbitral en el Código de Procedimiento Civil Venezolano de 1987*, in Liber Amicorum Zubkowski, *supra* note 14, at 621. In *Uruguay*, the procedure for obtaining the execution of the compromiso through specific performance is similar to that of Argentina. CÓD. PROC. CIV. arts. 535-538, 548 (Uru.); D. BARRIOS DE ANGELIS, *supra* note 15, at 385-87, 390-93.

86. L.O. Baptista, *supra* note 75, at 38; de Magalhaes, *A Clausula Arbitral nos Contratos Internacionais*, in ARBITRAGEM COMERCIAL, *supra* note 29, at 65 [hereinafter *Clausula Arbitral*]; M.O.F. FIGUEIREDO SANTOS, O COMERCIO EXTERNO E A ARBITRAGEM 66 (1986).

Brazil to resolve this and other problems,[87] there is still opposition to this sort of change.[88] Nevertheless, there are doctrinal opinions contending that specific performance is generally available whenever the arbitral clause is inserted in an international contract. Since Brazil is a party to the 1923 Geneva Protocol on International Commercial Arbitration,[89] which acknowledges the recognition and effectiveness of arbitration clauses, specific performance of the "compromiso" and the designation of the arbitrators should be available if the Protocol is applicable to the case.[90] In the case of Ecuador, although specific performance of the arbitral clause would not be possible in *ad hoc* arbitration cases, it is clearly available under the rules governing institutional arbitration within the context of local or foreign chambers of commerce.

D. Prospects for Elimination of the Compromiso

Many believe that Latin American countries should follow the lead of other countries (such as France) and eliminate the "compromiso" from their procedural codes. This might diminish the opportunity for chicanery aimed at barring arbitral proceedings. Also, it is more consistent with the idea that arbitrators should be allowed, within certain limits, to decide on their own jurisdiction. For example, before making the "compromiso," the court must determine whether there is a dispute falling within the scope of the arbitral agreement which implies that the court is deciding on the arbitrators' jurisdiction. If the "compromiso" were not required, the plaintiff would transmit its claim, and the names of proposed arbitrators to the other party, who would in its turn answer the claim, propose its arbitrators, and submit its counterclaim. The

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87. Pre-draft law on Arbitration, Diario Oficial da Uniao [D.O.U.], Feb. 27, 1987, Secao 1, at 2909. Article 5 allows specific performance of the arbitral agreement. Articles 21-26 govern the specific performance proceedings. *See* Pestalozzi, *Arbitration and its new prospects in Brazil*, 4 J. INT'L ARB. 131-40 (1987). According to the different Draft Law prepared by the Brazilian Ministry of Justice, article 267 (VII) of the Brazilian Procedural Code is reformed so that even without a compromiso, the commencement of arbitral proceedings brings about a stay of any court proceedings regarding a dispute which falls within the scope of the arbitration agreement. Gabinete do Ministro, Portaria No. 298-A, June 20, 1988.

88. Ramos Pereira, *O Juizo Arbitral e o Projecto de lei Sobre Arbitragem*, 283 Revista Forense 455-58 (1983).

89. Protocol on Arbitration Clauses, Sept. 24, 1923, 27-28 L.N.T.S. 157.

90. *Clausula Arbitral*, *supra* note 86, at 65-68. *But see* Strenger, *supra* note 35, at 46-47. On the other hand Brazilian courts do not seem to be inclined to take into account the provisions of the 1923 Geneva Protocol. *See* Samtleben, *Aktuelle Fragen der internationalen Handelsschiedsgerichtsbarkeit in Brasilien*, 10 RIW 769-70 (1989).

court intervenes only in cases where the parties disagree on the third arbitrator or one of the parties fails to appoint its own arbitrator. Under this process it is up to the appointed arbitrators, and not the court, to decide if there is a dispute and whether it is encompassed within the arbitral clause.

It has been suggested that the ratification of either the 1958 New York Convention or of the 1975 Panama Convention would change legislation in Latin American countries regarding the "compromiso." This belief comes from the fact that both Conventions grant automatic effectiveness to the arbitral agreement, without requiring that a specific submission be made for each dispute.[91]

1. The New York Convention

The New York Convention only applies to international arbitrations or arbitrations held in a foreign state. Such state must be a party to the Convention if the first reservation under article I(3) has been made. An arbitration held or to be held in the forum may also be considered "international" for this purpose if it concerns a foreign national or an international transaction.[92] Therefore, "local" arbitrations held in the forum will be governed exclusively by the law of the forum and subject to the forum's "compromiso" requirements irrespective of such forum's ratification of the New York Convention.

There is no doubt that Article II of the New York Convention is a uniform law provision. It unifies the internal laws of all countries ratifying the Convention with respect to international arbitrations held abroad. Under paragraph 3 of Article II of the Convention, any party invoking a valid arbitral agreement within the context of an international arbitration must obtain automatic referral of the dispute to arbitration.[93]

Nevertheless, nothing in its text suggests that the referral cannot be made in accordance with the legislation of the ratifying country where the arbitral agreement was invoked, if arbitration is to take place in such country. In fact, Article II of the New York Convention grants mandatory force to the arbitral agreement understood both as "clause compromissoire" (submission of future

91. van den Berg, *L'Arbitrage Commercial en Amérique Latine*, 2 REV. ARB. 123, 137-41 (1979).

92. van den Berg, *The New York Arbitration Convention of 1958*, 56-71 (1981).

93. *Id.*

disputes) and as "compromiso" (submission of existing disputes); but it does not regulate the way in which local legislation will render compulsory effects to arbitral agreements.[94] The procedure for specific performance is a matter left to each national legislation. It may be required that the parties first draw up a "compromiso," and if any of them fails to do so, a court will do it on behalf of the recalcitrant party and thereafter refer the dispute to the arbitral tribunal.

It should not be assumed that article II of the 1958 New York Convention does not "leave room" for the "compromiso."[95] This article only provides in paragraph 3 that if an arbitral agreement exists and meets the requirements generally set out in Article II, the courts must, at the request of any of the parties, refer the parties to arbitration. Any court proceedings relating to a dispute which falls within the scope of the arbitral clause must be stayed.

As previously indicated,[96] in the majority of Latin American countries which require a "compromiso," its very existence, (*i.e.*, the fact that a "compromiso" has actually been executed by the parties or through court intervention) is not necessary for obtaining the stay of court proceedings. A stay can be obtained by raising the existence of a valid arbitral clause. This was true even before such countries ratified the 1958 New York Convention.

The preclusive effects of an arbitral agreement with respect to existing or intended court proceedings should be differentiated from the similar, but by no means identical, issue of specific performance of the arbitral agreement. Specific performance may surface against the backdrop of at least two different scenarios: (i) once the stay of court proceedings regarding a matter subject to arbitration has been obtained, the party wishing arbitration to proceed seeks court support for overcoming the other party's resistance to the commencement of the arbitration (e.g., the designation of arbitrators) or (ii) where no court proceedings have been commenced but the resistance or passive attitude of the recalcitrant party makes it necessary to resort to court support to get the arbitration under way.

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94. *Id.*

95. van den Berg, *The New York Convention 1958 and the Panama Convention 1975: Redundancy or Compatibility?*, 5 ARB. INT'L 214, 217 n. 9 (1989) (the author manifests his disagreement with my views on this topic as expressed in the previous version of the present article published at 5 ARB. INT'L 137 (1989)).

96. *See supra* note 81 and accompanying text.

The 1958 New York Convention does not address these issues and, therefore, each member country is free to introduce and maintain the procedural rules of its choice concerning the specific performance of the arbitral clause (*e.g.*, obtaining the commencement and regular development of arbitral proceedings, irrespective of the opposition or passive attitude of the recalcitrant party). As a result, countries are free to decide that arbitral proceedings may not commence before a "compromiso" has been made, indicating, among other things, the names of the arbitrators and the controverted issues.

The spirit of the 1958 New York Convention is violated if a party can make a conscious effort not to sign the "compromiso" rendering the arbitral agreement inoperative. This is not the predominant situation in Latin America today. With the exception of Brazil, specific performance of the "compromiso" may always be obtained through court intervention. In other words, specific performance of the arbitral agreement is obtained through the specific performance of the "compromiso," and this is perfectly compatible with both the 1958 New York and the 1975 Panama Conventions.

Strictly speaking, the attitude of a Latin American country that upholds the "compromiso" will be different depending on whether Article II is invoked to obtain referral of the dispute to arbitration in the forum or abroad. In the first case, that country's local legislation requiring that a "compromiso" be drawn up prior to arbitration, through specific performance if necessary, will apply. This reflects the private international law principle that formal aspects of arbitration are governed by the law of the country where the act or procedural activity (arbitral proceedings) is performed (*lex loci actus*).

It is also conceivable, however, that the courts of the Latin American country which ratified the 1958 New York Convention will not hold international arbitrations to the same mandatory rules reserved for entirely local or domestic arbitrations. In light of this reasoning, courts might conclude that the "compromiso" is not required for international arbitrations held in the forum, although it will remain imperative for entirely domestic arbitrations.[97] However, this outcome is not imposed by the 1958 New York Convention. It depends solely on the attitude of municipal legislation and

97. Grigera Naón, *Public Policy and International Commercial Arbitration: The Argentine Perspective*, 3 J. INT'L ARB. 7-27 (1986).

courts, and in fact, may be adopted even without signing the 1958 New York Convention. On the contrary, if the arbitration ordered by the national court applying Article II of the 1958 New York Convention is to take place abroad, the need for a "compromiso" will be exclusively determined by the law of the foreign country where the arbitration takes place.

2. The Panama Convention

Similar distinctions can be drawn with respect to analogous provisions in Article 1 of the Panama Convention on International Commercial Arbitration. It must be noted, however, that this provision only establishes the validity of arbitral agreements. It does not provide for the referral of the dispute to the arbitrators as does Article II of the 1958 New York Convention. Therefore, it remains unclear whether this provision will have the effect of allowing enforcement through specific performance of arbitral agreements. Moreover, it is still uncertain whether upon the ratification of this Convention, countries not allowing specific performance of arbitral agreements will see their legislation changed. Indeed, the reasonable interpretation is that specific performance would be permitted.[98] These and other shortcomings of this Convention are perhaps the consequences of the excessively "hasty and unorthodox" procedure observed in its approval, without "major study and consideration of the problems involved."[99]

Another interpretation is based on the fact that Article 3 of the Panama Convention provides that the arbitration will be governed by the Arbitral Rules of the Interamerican Commission on Commercial Arbitration absent any contrary decision by the parties. Since these Rules do not require the execution of a "compromiso" their application pursuant to article 3 of the Panama Convention could render the latter unnecessary.[100]

It may be also inferred from the fact that Article 21 of these Rules authorizes arbitrators to decide on their own jurisdiction (even if the validity or existence of the arbitral agreement has been challenged) that they implicitly exclude the "compromiso." Certainly, it is difficult to reconcile such broad arbitral powers with

98. van den Berg, *supra* note 91, at 138-39.

99. G. PARRA ARANGUREN, CODIFICACION DEL DERECHO INTERNACIONAL PRIVADO EN AMERICA 309, 313, 333 (1982).

100. van den Berg, *supra* note 91, at 140-41.

the need for a court-enforced "compromiso." This, because it is unlikely that the courts would take such action without first deciding on the validity and existence of the arbitral agreement on which the claim for specific performance is based.

It is doubtful, however, that the Rules, originally addressed only to the parties and the arbitrators, would bring about the derogation of the existing mandatory rules of the member countries which are also addressed to the courts. The original text of Article 3 of the Convention, suggested by the Interamerican Law Committee, provided that the Rules would apply only in so far as they do not infringe upon the public policy of the country where the arbitration took place. This provision was not adopted. Nevertheless, it may be adduced that the Rules can not be applied in violation of fundamental procedural principles or mechanisms of such country. This may be concluded in view of Article 1(2) of the Rules themselves which provides that the latter cannot prevail over mandatory rules of the law applicable to the arbitration.[101]

3. Advantages of the Compromiso

The fact that the Panama Convention refers to the Rules does not necessarily displace the application of the mandatory rules of procedure in the country where the arbitral proceeding takes place. The mandatory rules require the execution of a "compromiso" unless, as suggested before, the courts of such country decide, on case by case basis that the "compromiso" is not required for an interna-

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101. Actas y Documentos de la Conferencia Especializada Interamericana sobre Derecho Internacional Privado, 2 O.E.A. (Ser. k, 21.1) 213, 214 (1975). An additional reason is that these Rules and their modifications are not drafted or approved by the state party to the 1975 Panama Convention but by the Inter-American Commission on Commercial Arbitration, which functions within the framework of the Organization of American States. The Rules in force when the Convention was made were replaced by new Rules of January 1, 1978. Although, upon ratifying the Convention, any country may introduce a reservation stating that it only accepts the rules in force on the date of ratification and any successive changes expressly accepted by it, it is difficult to admit even in the absence of such reservation that the Rules, present or future, may derogate from procedural rules of the member country based on public policy considerations of the forum. Section 306 of H.R. 4314 introduces a new Chapter 3 into Title 9 of the U.S. Code in order to implement this Convention. It came into effect upon the entry into force of the Convention with respect to the United States. *See infra* note 167. It provides that the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in article 3 of the Convention shall be those promulgated by the Commission on July 1, 1988, and that the Secretary of State may prescribe that future modifications or amendments of the rules introduced by the Commission become effective with respect to the United States for the purposes of new Chapter 3, Title 9, of the U.S. Code. H.R. 4314, 101st Cong., 2d Sess. §306, 136 CONG. REC. 3106 (1990).

tional arbitration within its jurisdiction.

The elimination of the "compromiso" and the maintenance of the claim and answer to the claim and counterclaim, bring arbitration closer to the adversarial process that normally takes place before state courts. Indeed, this seems to fit with the present state of arbitral adjudication. It is increasingly felt that arbitration is a "fight oriented" proceeding like normal adversarial adjudication, rather than a means of facilitating the peaceful settlement of disputes or an adequate mechanism for inducing the parties to reach compromise and leave aside short-sighted antagonisms. The parties involved in arbitration are no longer seeking a compromise or settlement but want to wage a war with the adversary culminating in all-out victory.[102]

The "compromiso" promotes the idea that arbitration requires a more cooperative attitude by the parties and a less antagonistic approach to the resolution of their disputes. It compels the parties to sit together, face-to-face, in order to determine, and record in writing, the controversial issues and the arguments on which their respective positions are based. This step also allows the parties to weigh the nature, importance, and implications (economic or otherwise) of the dispute. It thus affords an unparalleled opportunity to assess their respective chances of success before first blood has been shed.

The "compromiso" stands for the principle that arbitration is not, at its inception, an all-out declaration of war. By signing the arbitral agreement, the parties jointly participate in the drafting of a document (the "compromiso"), in the course of which initially antagonistic attitudes may abate and, as a result, a peaceful settlement of the dispute may be reached before arbitral proceedings have really started. This exercise is an appropriate way of forcing the parties to make a sober evaluation and comparison of their respective positions and claims. It allows a precise determination of the real points of conflict. The process of making the "compromiso" might thus facilitate the termination of the dispute through negotiations, based on a realistic appraisal of reciprocal strengths and weaknesses, before arbitration and its ensuing expense begins.

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102. Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, in LIBER AMICORUM FOR LORD WILBERFORCE 149, 181 (1987); Grigera Naón, *International Commercial Arbitration: Realities and Perspectives*, 5 J. INT'L ARB. 5-7 (1988).

This is consistent with the alleged aims of arbitration, if one does not view it entirely as an adversarial process. Indeed, the alternative dispute resolution (ADR) movement in the United States tries to induce the parties to participate in proceedings not necessarily leading to a final and binding decision susceptible to compulsory enforcement. In the course of such proceedings, the parties learn more about the true nature, justification, and prospects of real success of their respective claims. As a result, they may realistically conclude that settlement is the best way of resolving their differences or that no real, substantial conflict exists.[103]

In addition, according to certain opinions, the "compromiso" is surrounded with certain formalities for fear that errors or omissions in determining certain basic aspects of the arbitral procedure might lead to an unjust or biased decision. It is a last pause for reflection and evaluation, in face of the concrete dispute, where the parties may still take precautions in shaping their private adjudicatory process, already beyond the protective reach of natural judges.[104] Also, by eliminating from the outset the possibility of introducing separate claims and counterclaims and the raising of questions or defenses not expressly included in the "compromiso" (once it has been executed), the "compromiso" is supposed to contribute decisively to the swiftness of arbitral proceedings. For instance, if an issue is not contemplated in the "compromiso" as one to be resolved, the parties may not introduce it once the "compromiso" has been executed. The "compromiso" forces the parties to establish their arguments and positions in both substantial and procedural matters from the outset.[105]

If, due to the foregoing reasons, Latin American legislators are to maintain the "compromiso," it is vital to improve substantially the way in which it is regulated. One such improvement to consider is allowing a party whose opponent is recalcitrant toward the "compromiso," to resort to the courts for having the "compromiso" extended after both parties have been heard on the existance and validity of an arbitral agreement. The court should limit itself to ascertaining whether a valid arbitral agreement exists between the

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103. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668-82 (1986); Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1 (1987).

104. A. FARHI & A. FARHI, *supra* note 80, at 17.

105. L. PALACIO, *supra* note 18; Gabaldón, *supra* note 15, at 77; Grigera Naón, *La Ley Modelo sobre Arbitraje Comercial Internacional y el Derecho Argentino*, 31 L.L. 5 (1989).

parties (without exploring whether there is an existing dispute falling within its scope) and immediately call for a hearing where both parties can establish their positions concerning the substance or signature of the "compromiso." After that, even if the recalcitrant party has not appeared, the court should issue a final and binding decision, not subject to any appeal or review, determining the substance and text of the "compromiso" and designating the arbitrator corresponding to the recalcitrant party, along with the third arbitrator, if necessary. If the existence of a dispute falling within the scope of the arbitral agreement is questioned, such a matter should be included in the "compromiso" as one of the issues submitted to the arbitrators. A better alternative (though probably more expensive since it makes the payment of arbitral fees inevitable) is to allow the court to designate the arbitrators according to the terms of the arbitral agreement (if the parties fail to do so) and refer all matters to them concerning the drawing up of the "compromiso" once convinced that a valid arbitral agreement exists.

E. Nationality of Arbitrators

Few Latin American statutes require that all arbitrators be nationals of the forum country.[106] In some cases, restrictions apply only to legal arbitration and not to equitable arbitration or amiable composition.[107] The reason for that often stems from the fact that legal arbitrators are lawyers entitled to practice in the forum and must be nationals of the country where the arbitral tribunal is sitting.[108] Thus, the nationality requirement would only apply to arbitrations held within the territory of a specific country and has no extra-territorial public policy effect vis-á-vis arbitrations taking place abroad to which nationals or domiciliaries of such countries are parties. On the other hand, in some countries (such as Ecuador) having the nationality requirement even for equitable adjudication, it is accepted that the requirement will not apply if the arbitration is subject to foreign institutional arbitration rules (for

106. *Colombia*: Díaz Rubio, *supra* note 15, at 60. When the dispute concerns Colombians, with respect to contracts to be performed in Colombia, see Decree 2279, *supra* note 11, art. 9. *Ecuador*: Decree No. 735 art. 3 of Oct. 23, 1963, *reprinted in Ecuadorian Law on Commercial Arbitration*, 1 WORLD ARB. REP. 1533 (1987). This is also a requirement under the general procedural laws of Ecuador. C. LARREATEGUI, *supra* note 15, at 96.

107. *Chile*: Eyzaguirre Echeverría, *supra* note 19, at 48. *Venezuela*: *See* González, *supra* note 85, at 624.

108. ARBITRAJE COMERCIAL, *supra* note 27, at 44-45 (indicating that this requirement, existing in Chile, has no practical application).

example the ICC Rules).[109] It must be stated that this requirement will not apply to international arbitrations held in countries parties to the 1975 Panama Convention since Article 2 expressly provides that arbitrators may be either nationals or foreigners.

F. Leave to Enforce and Means of Recourse

With the exception of Brazil[110]and Mexico[111] leave from a local court is not needed to enforce an arbitral award. In some countries, a formal filing before a notary public, a court, or a court official is required merely as a formality. It does not open the possibility of review or the setting aside of the award.[112] As a rule, the arbitral award may be enforced from the moment it has been rendered. In other countries, such as Argentina, courts have established that even if an action has been filed to set aside a legal or equitable award on procedural grounds, enforcement of the award is neither precluded nor suspended.[113]

Under non-treaty law in Argentina, an action to set aside an award because it was beyond the scope of the arbitral agreement, because the time for making it expired, or because of a substantial procedural error is considered an extraordinary means of recourse. The courts have held that the enforcement of the award is not suspended while this means of recourse is pending. The situation differs in the case of an ordinary appeal filed against the award and specifically aimed at reviewing it on the merits. This type of appeal would suspend the award. However, such an appeal is not available in most cases because it may be waived in *de jure* or legal arbitra-

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109. Jiménez Salazar, *supra* note 15, at 80 (using the ICC Rules as an example).

110. CÓDIGO CIVIL [C.C.] art. 1045 (Braz.).

111. Hoagland, *supra* note 24, at 97.

112. *Colombia*: Decree 2279, *supra* note 11, art. 35; Díaz Rubio, *supra* note 15, at 65. *Ecuador*: Jiménez Salazar, *supra* note 15, at 84-85. *Paraguay*: CÓD. PROC. CIV. art. 811 (Para.).

113. *See generally* CÓD. PROC. CIV. Y COM. arts. 758, 760, 771 (Argen.); N. Gowland, IMPUGNACIÓN DEL LAUDO ARBITRAL 38, 39 (1950); ALSINA, 7 TRATADO TEÓRICO PRÁCTICO DE DERECHO PROCESAL CIVIL Y COMERCIAL 79 (1965); R. FERNÁNDEZ, 1 CÓDIGO DE PROCEDIMIENTO CIVIL COMENTADO 631, 635 (1955); *contra* E. Anaya, *Juicio Arbitral*, 4 BOLETÍN DE LA FACULTAD DE DERECHO Y CIENCIAS SOCIALES DE LA UNIVERSIDAD DE CÓRDOBA 33 (1968); T. JOFRÉ, 4 MANUAL DE PROCEDIMIENTO CIVIL Y PENAL 209-10 (1923). Most decisions denying suspensive effects to the means for attacking the award concern actions for setting aside equitable or amiable composition awards. F. Rosenbusch, *Recursos y Acciones Contra el Laudo Arbitral; Causales de Nulidad del Mismo*, 76 J.A. 735-39 (1941); Judgment of July 5, 1946, Cámara Comercial de la Capital, Argen., 43 L.L. 613; *Di Rico v. Salomone*, 1925-38 L.L. 167-68; *Fried, G. v. Strauss, F.*, 1937-58 J.A. 587-89.

tions and it is not allowed against "amiable composition" or equitable awards.

In Brazil, the prior homologation by a local court is required to enforce awards rendered in Brazil. The homologation may be refused on a number of grounds: Violation of public policy, the submission is null and void, the award went beyond the limits traced by the "compromiso," or the homologation was not timely.[114] This requirement lends itself to criticism, because it introduces an additional procedural requirement that is not justified where other procedural means (such as appeal or setting aside) are available for attacking awards which violate certain principles. In fact, current Brazilian draft legislation on the topic eliminates the homologation requirement.[115] However, confirmation of domestic awards does not necessarily indicate a hostile signal toward arbitration and may be viewed as an appropriate safeguard for arbitral adjudication.

The Netherlands 1986 Arbitration Act prescribes a "leave for enforcement" system for all arbitral awards rendered in Dutch territory.[116] On the other hand, English authorities maintain that, with or without exclusion clauses, an English court will never enforce an award which violates general principles of natural justice

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114. After homologation, the award has the same effect as a court decision and provides the plaintiff with an enforceable instrument opening the way for execution proceedings. C.P.C. art. 1079 (Braz.). Prior to homologation, the award is publicly communicated to the parties and filed with the secretary of the tribunal. The latter will give a copy of the award to each party and submits, within five days, the arbitral file to the competent judge (the judge who would have decided the dispute if no arbitral agreement existed) for homologation purposes. *Id.* art. 1096. In theory, the judge has 10 days to pronounce on the homologation. *Id.* arts. 1098-1099. Homologation is denied if the award is null and void under any of the grounds listed in article 1100 or violates public policy. *Id.* art. 1100. If homologation is given, an appeal (apelaçao) having suspensive effects may still be introduced against the homologation judgment for the same grounds set out at article 1100. This means of appeal may not be waived. *Id.* arts. 1101-1102; Marotta Rangel, *supra* note 15, at 42-43.

115. Pestalozzi, *supra* note 87, at 137.

116. P. SANDERS & A. VAN DEN BERG, *supra* note 8, at 36-43. A Dutch court may refuse leave for enforcement if the award is contrary to public policy or good morals. Even if leave for enforcement is granted, the award is still open to setting aside proceedings within three months if the award and leave for enforcement have been served on the party filing the means of setting aside. The grounds for setting aside include the following situations: where there is no valid arbitral agreement, where the arbitral award is in violation of the established procedure or beyond the issues submitted to arbitration, or where it is contrary to public policy or good morals. The award may also be revoked if it is based on fraud or forgery or if the other party withheld documents only known after the award is given. Revocation is possible within three months from the date these facts are known to the party requesting it. *Id.* Netherlands 1986 Arbitration Act arts. 1064-1068.

or public policy.[117] This rule applies even if the award was rendered in England and is not subject to appeal or attack. Basically, this stands for the proposition that an English court will not render enforceable or homologate awards, however final they might be, if it feels that certain fundamental principles have been violated.

G. Powers of Arbitrators and Separability of the Arbitration Clause

Legislation in most Latin American countries provides for court support in appointing arbitrators, if any of the parties fails to do so, and for the facilitation of arbitral proceedings.[118] However, like elsewhere, Latin American arbitrators are normally prevented from decreeing any measures, interim or otherwise, leading to the compulsory enforcement of the award.[119] The interested party must resort to the courts before, or during, the arbitral proceedings to have the interim measure decreed and enforced. In this regard, a solution such as the one set out at the UNCITRAL Model Law on International Commercial Arbitration, which allows interim measures of protection to be granted either by the arbitrators or by the courts, should be adopted by Latin American legislators. This should be implemented with respect to both domestic and international disputes.[120]

Some Latin American laws do show, however, a surprisingly modern attitude in this regard. For instance, article 4(e) of Argen-

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117. Under English law, an award may be set aside if the arbitrator never had jurisdiction, was not qualified to act as arbitrator, decided the case beyond the scope of his powers, or failed to apply the rules of natural justice. Steyn, *Report on England*, 8 Y.B. COM. ARB. 30-31 (1983).

118. CÓD. PROC. CIV. Y COM. arts. 743, 753 (Argen.); CÓD. PROC. CIV. arts. 717, 726 (Bol.); CÓD. ORG. TRIB. art. 232 (Chile); *see* Decree 2279, *supra* note 11, art. 9 (Colom.); Díaz Rubio, *supra* note 15, at 62 (Colom.) ; CÓD PROC. CIV. arts. 823, 827 (Para.); CÓD. PROC. CIV. arts. 551, 556, 567; C.F.P.C. arts. 222, 616, 626 (Mex.); CÓD. COM. art. 1418 (Mex.); Briseño Sierra, *supra* note 15, at 99; CÓD. PROC. CIV. art. 548 (Uru.); CÓD. PROC. CIV. art. 610(2) (Venez.). *See also El Salvador* : CÓD. PROC. art. 75(El Sal.); *Honduras:* CÓD PROC. art. 870 (Hond.); *Guatemala:* CÓD. PROC. art. 288 (Guat.)(all providing for court support in order to obtain evidence to be produced before the arbitral tribunal). ARBITRAJE COMERCIAL Y LABORAL EN AMERICA CENTRAL 82-83 (A. Garro ed. 1990).

119. *Argentina*: CÓD. PROC. CIV. Y COM. art. 753 (Argen.). *Bolivia*: CÓD. PROC. CIV. art. 726. *Brazil*: C.P.C. arts. 1086-1087. *Mexico*: Briseño Sierra, *supra* note 15, at 100-01.

However, it seems that in *Ecuador*, the arbitrators may order the sequestration or detention of goods in dispute. Jiménez Salazar, *supra* note 15, at 83.

120. UNCITRAL Model Law on International Comercial Arbitration, Annex 1 arts. 9, 17(3), U.N. Doc. A/46/17 (1985).

tine Decree 1918 of 1981, governing arbitrations within the context of Argentine grain market associations, authorizes the arbitral panel to grant or decree interim measures of protection in the course of the arbitration to ensure the enforcement of the future award.[121] According to article 32 of Colombian Decree 2279 of 1989 which introduced new arbitration law, if the dispute submitted to arbitration concerns property rights or any other real rights in movables or immovables, the arbitral tribunal may order that the pendency of arbitral proceedings be recorded in that property's record of title or its equivalent.[122] As a result, a third party is made aware that any rights he may acquire on such property is subject to the outcome of the arbitration. This provision also authorizes the arbitral tribunal to order the sequestration of movable property pending the outcome of the arbitration.

In most Latin American countries, there are opinions upholding the independence of the arbitral agreement from the underlying transaction and affirming the power of arbitrators to decide on their own jurisdiction (Kompetenz-Kompetenz).[123] Both principles are crucial for swift and unencumbered arbitration.

The legislation of some Latin American countries, including Colombia[124] and Mexico,[125] makes it clear that the incorporation of the Kompetenz-Kompetenz principle is indissolubly related to the autonomy of the arbitral agreement. On the other hand, in Argentina,[126] it is a generally accepted principle that once a voluntary submission to arbitration has taken place without the arbitrators' lack of jurisdiction being raised, the issue is precluded from being raised in a court of law.

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121. Decreto Ley 1918, 41-D A.D.L.A. 4114 (Argen.)(1981) [hereinafter Decree 1918].

122. Decree 2279, *supra* note 11, art. 32.

123. *Argentina*: Grigera Naón, *supra* note 15, at 11. *Brazil*: Marotta Rangel, *supra* note 15, at 35. *Chile*: Eyzaguirre Echeverría, *supra* note 19, at 48; *cf.* Aylwin Azocar, *supra* note 81, at 444-49 (contending that arbitrators may only decide on the scope of their powers, and only if the arbitral tribunal has already been constituted). *Colombia*: Díaz Rubio, *supra* note 15, at 60. *Ecuador*: C. LARREATEGUI, *supra* note 15, at 107. In the case of Ecuador, article 16 of the Ley de Arbitraje Comercial provides that the arbitral tribunal has exclusive jurisdiction to decide whether its acts are null and void, in full or in part, even if the issue has not been raised by any of the parties. *Peru*: Aramburu Menchaca, *supra* note 34, at 116, 121. *Venezuela*: Gabaldón, *supra* note 15, at 74.

124. Decree 2279, *supra* note 11, art. 29.

125. CÓD. COM. art. 1051, para. 2 (Mex.); Hoagland, *supra* note 24, at 94; C.F.P.C. art. 630 (Mex.); Briseño Sierra, *El Arbitraje Comercial en México*, in Liber Amicorum Zubkowski, *supra* note 14, at 367-71.

126. Judgment of June 23, 1975, Corte Suprema de Justicia de la Nación [C.J.N.], Argen., 1975-D L.L. 394.

If the arbitration agreement were not independent from the underlying transaction, questioning the latter's validity would prevent the immediate effectiveness of the arbitral clause until the preliminary issue of the transaction's validity is decided by adjudicators (most likely a state court) not designated under the arbitral clause. If arbitrators cannot decide on the scope of their adjudicatory powers, any objection regarding the validity of the arbitral agreement would have to be decided by a state court, not by the arbitral tribunal. In the interim, arbitration proceedings would be suspended with ensuing delay. It is obvious that these scenarios give ample opportunity for a party acting in bad faith to obstruct arbitral proceedings.

These issues are extremely important to the existence and future of arbitration. The absence of Latin American court decisions on this point and the lack of doctrinal opinions or interpretations of the existing law leave this point unresolved. The independence of the arbitral agreement and the Kompetenz-Kompetenz principle have not been accepted in national laws with the degree of permanence and predictability that lawyers and merchants involved in local and international commerce require.

In Argentina, the situation is blurred and needs some clarification. Some court decisions suggest that the arbitral clause is not independent of the main contract since the arbitrators cease to have jurisdiction if the validity or existence of the contract is questioned.[127] The solution supported by the majority seems to be that only if the *existence* or *validity* of the arbitral clause itself is attacked are the arbitrators deprived *ab initio* of jurisdiction to decide on such issues.[128] Also, if the arbitrability of the dispute is

127. T. JOFRÉ, 4 MANUAL DE PROCEDIMIENTO CIVIL Y PENAL 203-04 (1923) (denying jurisdiction to the arbitrators only if the existence of the contract where the arbitral stipulation is inserted is denied); Judgment of July 30, 1965, Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal, Argen., 120 L.L. 322. Only if the parties expressly allowed the arbitrators to decide on the existence and validity of the contract, would they be entitled to do so. A. FARHI & A. FARHI, *supra* note 80, at 76; *see* Judgment of Sept. 30, 1955, Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal, Argen., 82 L.L. 403.

128. Grigera Naón, *El Arbitraje Comercial en el Derecho Argentino Interno e Internacional Privado*, 163 REVISTA DE DERECHO MERCANTIL, Madrid, 115, 117-18 (1982). In *Argentina*, it would be a preliminary question to be resolved by the courts under the Code of Civil Procedure, article 752. Under this provision, until the preliminary question is resolved, arbitral proceedings are not suspended, though the making of the award must wait until a final court decision. The solution in Brazil is similar, though arbitral proceedings are totally suspended until the preliminary question is resolved. C.P.C. art. 1094 (Braz.). In *Venezuela*, if there is disagreement between the arbitrators on the interpretation of the compromiso or on any procedural rule, the issue must be submitted to and resolved by the first instance court.

questioned, the issue is decided by the courts and not by the arbitrators.[129] If matters submitted to arbitration and matters falling under court jurisdiction are closely related, the courts consider themselves competent to decide all issues. Consequently, arbitral jurisdiction is denied.[130]

Opinions in Argentina differ as to whether an arbitrator can decide on the scope of his own jurisdiction. Court decisions have allowed arbitrators to do so by determining the scope of their powers through the interpretation of an already existing "compromiso." It has also been held that if the arbitral agreement broadly refers all disputes to arbitration, it is not within the court's authority, when asked to draw a pending "compromiso" for the recalcitrant party, to determine if the dispute falls under the arbitral agreement. The decision on this issue must be left to the arbitrators themselves. Otherwise, there would be an invasion of the arbitrators' jurisdiction.[131] Most likely, if it is alleged that arbitration is not possible because of public policy reasons or because the subject-matter of the dispute cannot be compromised, the arbitrators are prevented from making any decision as to their own jurisdiction. The issue must then be considered a preliminary one to be decided by state courts.[132]

In the present state of Argentine law, if one of the parties resorts to a court for the drawing up of the "compromiso," the court may consider the following factors in deciding if the arbitral agreement is valid: (i) whether the arbitral agreement is contrary to

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Such a court's decision is not subject to appeal. CÓD. PROC. CIV. art. 618(2) (Venez.). This provision is an unnecessary limitation to the scope of arbitral jurisdiction on matters which do not concern the arbitrability of the dispute or the validity of the arbitral agreement and which should be solely decided by the arbitrators. On the other hand, the arbitral tribunal must be composed of an uneven number of arbitrators. CÓD. PROC. CIV. art. 608 (Venez). That being the case, no deadlock is possible, and it is then hard to understand why the arbitral tribunal is not authorized to decide by itself all the issues referred to at article 618(2), unless they touch upon the arbitrability of the dispute or the validity of the arbitral agreement.

129. Judgment of Aug. 3, 1918, Cámara Federal de Apelaciones, Argen., 128 Fallos 402; Cámara Federal, Gaceta del Foro VII, Mar.-Apr. 1922, at 95-96; Judgment of July 28, 1954, Com. Sala A, 76 L.L. 324; Judgment of July 31, 1948, Cám. Nac. Com., 52 L.L. 23; *see* Grigera Naón, *supra* note 128, at 117-18 (1982); A. FAHRI & A. FAHRI, *supra* note 80; L. PALACIO, *supra* note 18, at 116.

130. Judgment of Sept. 10, 1952, Cámara Nacional Comercial, Argen., 70 L.L. 50-52.

131. Judgment of Oct. 29, 1926, Cámara Comercial de la Capital, Argen., 22 J.A. 1177; *see also* Cámara 2a., Civil y Comercial de La Plata, Argen., 1945-II J.A. 725 (with a critical comment by R. Reimundin).

132. *See supra* note 129 and accompanying text.

public policy, mandatory rules, or concerns a non-arbitrable subject-matter; (ii) whether the consent of the parties to the arbitral agreement is vitiated; and (iii) whether the parties had the capacity to enter into the arbitral agreement. The arbitrators should declare themselves incompetent to decide such issues if included in the "compromiso" or if otherwise raised before them. Any other issue (such as whether there is a dispute falling within the scope of the arbitral agreement or whether the contract subject to arbitration exists or is valid) should be included by the court as disputed issues falling under the "compromiso" and submitted to the arbitral tribunal for adjudication. However, as already indicated, if the court is called upon to grant a "compromiso" through specific performance, certain courts might take it upon themselves to decide whether the dispute falls within the scope of the arbitral agreement.[133]

Unfortunately, the absence in Argentina of clear and articulate notions on the separability of the arbitral clause and on the Kompetenz-Kompetenz principle (as well as legal texts incorporating these concepts) aids to the confusion. It does not help that some of the decisions that attempt to promote these principles may be considered *obiter dicta*.[134] This situation has been aggravated by a recent decision of the Argentine Supreme Court of Justice,[135] casting new doubts on both the separability of the arbitral clause and the Kompetenz-Kompetenz principle. The case involved an arbitration between Argentine parties regarding a contract for the sale of corn and soybean. The proceeding was commenced before the arbitral tribunal of the Argentine Grain Market Association (Bolsa Argentina de Cereales).

According to article 31 of Decree Law 6698/63[136] governing arbitrations before the Argentine Grain Market Association, the dispute submitted to arbitration must arise from a contract for the sale of grains or grain subproducts.[137] Under article 4(5) of Decree 1918 of 1981 regulating arbitrations before Argentine grain market associations (cámaras argentinas de cereales), arbitrations within

133. *See supra* note 85 and accompanying text. *See also supra* note 132 and accompanying text.

134. Judgment of Sept. 26, 1988, Cámara Nacional de Apelaciones en lo Comercial "E", Argen., L.L., Nov. 2, 1989, at 5-6; Grigera Naón, *The Scope of the Separability of the Arbitration Agreement Under Argentine Law*, 1 AM. REV. INT'L ARB. 261 (1990).

135. Judgment of Feb. 2, 1990, C.J.N, Argen., 27 L.L. N. 24, 1-3 (1990).

136. Decreto Ley 6698/63, 23-B A.D.L.A. 1963 (Argen.) [hereinafter Decree 6698/63].

137. *Id.*

the context of a grain association require prior filing of the disputed sales contract with the respective grain market association.[138]

In court, the defendant in the arbitration proceedings questioned the jurisdiction of the arbitral tribunal by alleging that the underlying transaction was not actually a contract for the sale of grains, but rather a loan agreement. Accordingly, despite the broad and all-encompassing wording of the arbitral clause, the dispute would not fall within its scope or the powers of the arbitral tribunal. The defendant contended that the tribunal may only decide disputes relating to contracts for the sale of grains. If this latter characterization is challenged, the arbitral tribunal would be deprived of jurisdiction and should therefore stay its proceedings.

The intervening court accepted the defendant's arguments, declared itself competent to decide the dispute, and addressed a communication to the arbitral tribunal pursuant to article 9 of the Procedural Code. This communication invited the tribunal to stay arbitral proceedings and to transfer the case to the court. According to article 10 of the Procedural Code, a judge invited to transfer the case to another judge may either do so or uphold its jurisdiction and send the case to a superior court to decide the conflicting jurisdictional issues.[139]

The court, however, was obviously mistaken in resorting to articles 9 and 10 of the Procedural Code since they only apply to situations where two or more judges attempt to exercise jurisdiction over the same case.[140] Neither the letter nor the spirit of these provisions suggests that they apply to jurisdictional clashes between courts and arbitral tribunals. Under article 752 of the Argentine Procedural Code, the only effective way courts may stay arbitral proceedings is if the arbitrability of the dispute is questioned, if it is alleged that the substance of the dispute may not be subject to settlement or compromise between the parties, or if an essential prerequisite to the commencement of arbitral proceedings or the execution of the "compromiso" is pending.[141] None of the above situations were present in the case. The subject matter of the dispute was obviously susceptible to compromise or settlement,

138. *See* Decree 1918, *supra* note 121, art. 4(5).
139. CÓD. PROC. CIV. Y COM. art. 10 (Argen.).
140. *Id.* arts. 9, 10.
141. CÓD. PROC. CIV. Y. COM. art. 742 (Argen.).

and according to article 37 of Decree Law 6698/63[142] and article 7 of Decree 1918,[143] arbitrations before grain market associations are free from the prerequisite of the "compromiso." Even if this were not the case, the intervening court may not resort to articles 9-10. Rather, at the request of the interested party the court should issue an interim measure ordering the freeze of arbitral proceedings until the arbitrability question is decided or the "compromiso" is validly executed by the intervening court.

In this case, the arbitral tribunal rightly chose to maintain its jurisdiction and refused to transfer the case. However, instead of continuing the arbitral proceedings, the arbitral tribunal decided to observe the path provided by articles 9 and 10. It stayed the arbitration, and sent the case for further review of the jurisdictional issue to the superior court having jurisdiction over both the court and the arbitral tribunal.[144] This court, the Argentine Supreme Court of Justice, approved of the transfer. Thus, it would seem that the decision of the arbitral tribunal to maintain its jurisdiction is jeopardized, notwithstanding the independence of the arbitral clause from the underlying transaction. Therefore, it appears that a party could stay the arbitral process simply by challenging in court the jurisdiction of the arbitral panel, at least until the Argentine Supreme Court decides on the jurisdictional issue. It is interesting to note that scholars from other countries would concur with this decision and endorse the procedural path followed by both the lower court and the arbitral panel which denied the arbitrators Kompetenz-Kompetenz powers to decide their own jurisdiction.[145]

Based on the foregoing, it appears that legislation in this area is urgently needed in Argentina and other Latin American countries to incorporate the principles of independence of the arbitral clause and arbitral Kompetenz-Kompetenz as well as to reasonably limit their application whenever circumstances of strong public policy so require. As far as international arbitration is concerned, the 1975 Panama Convention provides that arbitration is to be governed by the Rules of the Interamerican Commission of Commercial Arbitration in the absence of a different choice by the parties. Article 3 of the Convention applies article 21 of these Rules

142. *See* Decree 6698/68, *supra* note 136.

143. *See* Decree 1918, *supra* note 123.

144. The arbitral interlocutory award is published at L.L. No. 24, Feb. 2, 1990, at 1-2.

145. This is the case in *Chile*. P. AYLWIN AZOCAR, *supra* note 81, at 449-51.

and explicitly establishes the autonomy of the arbitral agreement and authorizes the arbitrators to decide on their own jurisdiction. This, even if the validity or existence of the arbitral agreement or contract is questioned. However, as previously indicated,[146] the application of the Rules under the Convention cannot preempt public policy rules and principles of the member countries that may have an impact on the determination of the arbitrators' jurisdiction (such as the validity of the arbitral agreement or the arbitrability of the dispute) and which solely entrust decisions on these issues to the courts.

III. Recognition and Enforcement of Foreign Awards

As a rule, the same legal provisions that govern the enforcement of foreign court decisions apply to the enforcement of foreign arbitral awards in Latin American countries. In some countries, such as Argentina, a specific provision nullifies the enforcement of foreign arbitral awards made by arbitrators sitting abroad under an invalid foreign arbitration clause. Such a clause will not be valid under the following circumstances: i) if it concerns non-arbitrable subject-matter under Argentine law, ii) if the transaction subject to arbitration is non-patrimonial in nature or wholly domestic, iii) if the dispute falls exclusively under the jurisdiction of Argentine courts, or iv) if a specific legal provision excludes the disputed issues submitted to arbitration from foreign adjudication. In addition, the foreign award must meet certain requirements applicable to the enforcement of foreign court decisions listed in the procedural code.[147] In general terms, legal provisions governing the recognition and enforcement of foreign awards in Latin American countries are not very different from those existing in other countries. Most Latin American legislations limit the enforcement of judgments where the parties are from different countries. An award made outside the country must not infringe the forum's public policy and must comply with due process (*i.e.*, the defendant was notified of the proceedings and was given the opportunity to defend himself). In addition, the arbitration tribunal cannot interfere with the exclusive jurisdiction of forum courts or seek to decide a case already decided locally by a court or arbitrator.[148]

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146. *See supra* note 101 and accompanying text.

147. Cód. Proc. Civ. y Com. arts. 517-19 (Argen.). For such requirements, see *infra* note 148 and accompanying text.

148. *Argentina*: Cód. Proc. Civ. y Com. arts. 517, 519 (Argen.); *Bolivia*: Cód. Proc. Civ.

A. Certain Problematic Aspects of Enforcement in Latin America

Notwithstanding the progress made by Latin American countries, one must still admit that certain aspects of existing law on the recognition and enforcement of foreign arbitral awards could be improved. For example, under many national court systems, the recognition and enforcement of foreign awards by the forum is contingent on the reciprocal treatment of the enforcement abroad of awards rendered in such forum.[149] Though the reciprocity requirement is not always a dramatic requirement,[150] arbitration would be better served without it.

Nevertheless, many jurisdictions are eliminating a blanket rec-

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arts. 552, 555, 556 (Bol.). *Chile*: CÓD. ORG. TRIB. arts. 245-246 (Chile). *Colombia*: Díaz Rubio, *supra* note 15, at 68-69. *Ecuador*: CÓD. PROC. CIV. art. 451 (Ecuador). *Mexico*: C.F.P.C. art. 606 (Mex.); COD. COM. art. 1347-A (Mex.); Briseño Sierra, *supra* note 15, at 105. *Paraguay*: CÓD. PROC. CIV. arts. 532, 536 (Para.). *Peru*: CÓD. CIV. art. 2104 (Peru); CÓD. PROC. CIV. art. 1159 (Peru). *Uruguay*: CÓD. PROC. CIV. arts. 514-515 (Uru.). *Venezuela*: CÓD. PROC. CIV. art. 851 (Venez.); Montevideo Treaty on International Procedural Law, 1889, art. 5 (ratified by Argentina, Bolivia, Paraguay, Peru, and Uruguay, and acceded to by Colombia) [hereinafter 1889 Montevideo Treaty]; Montevideo Treaty on International Procedural Law, Mar. 19, 1940, art. 5 (ratified by Argentina, Paraguay, and Uruguay), *reprinted in* HUDSON, INTERNATIONAL LEGISLATION 472 (1949) [hereinafter 1940 Montevideo Treaty]; Bustamante Code, Convention on Private International Law, Feb. 20, 1928, arts. 423, 432, 86 L.N.T.S. 246 (ratified by Bolivia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Brazil, Chile, Honduras, Cuba, Nicaragua, Panama, Peru, El Salvador, and Venezuela) [hereinafter Bustamante Code]; Bolivian Treaty, July 18, 1911, art. 5 (ratified by Ecuador, Bolivia, Colombia, Venezuela, and Peru) [hereinafter Bolivian Treaty]; Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, art. 2, 51 U.N.T.S. 1 (ratified by Argentina, Colombia, Ecuador, Paraguay, Peru, Uruguay, and Venezuela) [hereinafter Inter-American Treaty]. Kos-Rabcewicz-Zubkowski, *Les Conventions Interaméricaines sur l'Arbitrage Commercial et la Commission Internationale Interaméricaine d'Arbitrage Commercial*, 4 REV. ARB. 411-22 (1983).

149. *Bolivia*: CÓD. PROC. CIV. arts. 553-554 (Bol.). *Peru:* CÓD. PROC. CIV. arts. 1156-1157 (Peru); CÓD. CIV. arts. 2102-2104 (Peru); *see generally* U. MONTOYA ALBERTI, *supra* note 19, at 20-209. *Chile*: CÓD. PROC. CIV. arts. 243-244 (Chile). *Mexico*: C.F.P.C. art. 606 (Mex.); CÓD. PROC. CIV. art. 1347-A (Mex.); Briseño Sierra, *supra* note 15, at 105. *Uruguay*: CÓD. PROC. CIV. art. 512 (Uru.). *Venezuela*: CÓD. PROC. CIV. art. 850 (Venez.). In *Argentina* federal procedural law as applied by the federal courts, the courts of the federal capital, and the courts of national territories, excludes reciprocity as a prerequisite to enforcement of foreign court decisions and awards. This does not hold true for certain Argentine provincial procedural codes. *E.g.*, the Provinces of Córdoba, CÓDIGO DE PROCEDIMIENTO CIVIL Y COMERCIAL DE LA PROVINCIA DE CÓRDOBA arts. 984-985 (Argen.), and Santa Fe, CÓDIGO DE PROCEDIMIENTO CIVIL Y COMERCIAL DE SANTA FE art. 270 (Argen.), require reciprocity as a precondition to the recognition and enforcement of foreign court decisions and awards within their territories.

150. *See* New York Convention, *supra* note 1, art.I(3); van den Berg, *supra* note 92, at 13-15.

iprocity requirement. This requirement is often narrowly construed by the courts in which enforcement of the foreign court decision or arbitral award is sought.[151] For the most part, Latin American countries joining the New York Convention have ratified international conventions regarding the recognition and enforcement of foreign arbitral awards without including the need for reciprocity.[152] Latin American courts have traditionally excluded reciprocity requirements that might be contemplated in their country's non-treaty legislation whenever international conventions not recognizing this principle apply.[153]

Some Latin American courts also deny enforcement of *ex parte* foreign awards against a domiciliary of the forum.[154] A strict interpretation of this type of provision suggests that if the defendant does not appear in the course of arbitral proceedings (even if process was duly served on him), the award is not enforceable. Countries having this type of provision, such as Brazil, will enforce foreign *ex parte* awards against a local defendant only if he was adequately notified of the existence of foreign arbitral proceeding, was thereby given a fair opportunity to defend himself, and received proper notice according to Brazilian law of the foreign confirmation proceedings.[155] A better solution would be to reflect this principle in the existing legislation and eliminate the requirement of the personal presence of the local defendant at the arbitral proceedings abroad. It should suffice that he was adequately notified at both the commencement of arbitration and the confirmation proceedings in order for the ensuing award to become enforceable.

A more troublesome problem is the Brazilian requirement that the foreign award be homologated (confirmed) in the country where it was made prior to its recognition and enforcement in Bra-

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151. *See* G. PARRA ARANGUREN, LA FUNCIÓN DE LA RECIPROCIDAD EN EL SISTEMA VENEZOLANO DEL EXEQUATUR 50-52 (1966).

152. *See* 1889 Montevideo Treaty, *supra* note 148, art. 5; 1940 Montevideo Treaty, *supra* note 148, art. 2; Bolivian Treaty, *supra* note 148, art. 5; Bustamante Code, *supra* note 148, arts. 423, 432, Panama Convention, *supra* note 2, art. 5.

153. van der Berg, *supra* note 92, at 29-32.

154. *Brazil*: Marotta Rangel, *supra* note 15, at 44. *Chile*: CÓD. PROC. CIV. art. 245(3) (Chile). *El Salvador*: CODE CIVIL [C. CIV.] art. 452(2) of the Code of Civil Procedure (El. Sal.). In *Argentina*, the Provinces of Santa Fe (PROC. COD. art. 269(2)), Córdoba (PROC. COD. art. 986(2)), and Tucamán (PROC. COD. art. 589(2)) do not authorize the enforcement of *ex parte* foreign decisions against defendants domiciled in Argentina.

155. de Magalhaes, *supra* note 29, at 91-93; Nattier, *International Commercial Arbitration in Latin America: Enforcement of Arbitral Agreements and Awards*, 21 TEX. INT'L L.J. 417 (1986); Samtleben, *supra* note 35, at 30 n.161.

zil. This is tantamount to requiring that the arbitral award become an executory instrument in the country where it was rendered though enforcement is actually sought in Brazil.[156]

B. The Requirement of Res Judicata Effect

The laws of most Latin American countries, including Argentina, normally only require that the foreign award be res judicata in the country where it was rendered. Therefore, the local legislation of the country where the award is made determines if res judicata has been reached. In this way, the parochial notions of finality of the forum where enforcement is sought will not control. Contrary to this principle, however, an Argentine court erred in judging whether a foreign award rendered in Germany had attained res

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156. C.P.C. art. 483 (Braz.); H. VALLADAO, 3 DIREITO INTERNACIONAL PRIVADO 217 (1978); Rosenn, *Enforcement of Foreign Arbitral Awards in Brazil*, 28 AM. J. COMP. L. 498 (1980); de Oliveira Novaes, *Difficulties in Resolving Conflicts Regarding High Technology Contracts in Brazil*, 16 INT'L BUS. L., 182 (1988). The present Brazilian pre-draft law on arbitration does not require "homologation" abroad (nor in Brazil) of the foreign award. However, it has been pointed out that draft law provisions exempting the award from homologation might be unconstitutional under the draft of the new Federal Constitution which would require "homologation" in Brazil of foreign awards. M. Pose, 2 NEWS AND NOTES FROM THE INSTITUTE FOR TRANSITIONAL ARBITRATION 2 (1987). It has been argued, however, that under article 20 of the draft Arbitration Law, the foreign award is not a court decision or judgment in the sense of the federal constitution but just a "titulo ejecutivo extrajudicial." Consequently, it is not subject to "homologation." Ermete de Oliveira, 3 NEWS AND NOTES FROM THE INSTITUTE OF TRANSNATIONAL ARBITRATION 2 (1988). *Brazil:* C.P.C. art. 247 (Braz.). *Bolivia:* CÓD. PROC. CIV. arts. 557-558 (Bol.). *Colombia:* Díaz Rubio, *supra* note 15, at 69. *Uruguay:* CÓD. PROC. CIV. art. 516. *Venezuela:* CÓD. PROC. CIV. art. 850 (Venez.). The foreign award is directly submitted to the Supreme Court for consideration. If the Supreme Court homologates it, it will be sent for enforcement to the corresponding court. Marotta Rangel, *supra* note 15, at 44. In *Peru*, the Superior Court with jurisdiction over respondent's domicile decides whether *exequatur* shall be granted. U. MONTOYA ALBERTI, *supra* note 19, at 212-14. Oddly enough, on January 12, 1988, Mexico modified its Federal Code on Commercial Procedure and incorporated a new article 570. It provides for the homologación by a Mexican court of arbitral awards rendered abroad whose enforcement is sought in Mexico, unless provided otherwise by a treaty to which Mexico is a party. The procedure would allow the party against whom enforcement is sought to raise defenses concerning the merits of the foreign arbitral award. CÓD. COM. art. 574. Though this provision cannot preempt international conventions to which Mexico is a party (particularly the 1958 New York Convention, since domestic awards do not need homolgación C.F.P.C. art. 632), its very existence seems to strike a dissonant note in the otherwise promising prospects of international commercial arbitration in Mexico. *See* Briseño Sierra, *El Actual Arbitraje Comercial*, 9-10 PEMELEX-REVISTA JURÍDICA DE PETRÓLEOS MEXICANOS, 10 (1989). It seems wiser simply to interpret that by homologation, this provision merely refers to ordinary *exequatur* proceedings in the course of which no revision on the merits is possible. *See* Siqueiros, *La Cooperación Procesal Internacional*, 19 JURÍDICA ANALES DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD IBEROAMERICANA 3, 17 (1988-89).

judicata.[157] Due to a mistaken reading of German legal provisions, the court equated res judicata with executory effects of the award in Germany. As a result, it wrongly held that the award could only be res judicata in Germany after having obtained a leave of enforcement from a German court. In general, although res judicata should be determined by the laws of the forum rendering the award, the type of res judicata required should be assessed according to the notions of forum law.

In continental law systems, there are two types of res judicata, "formal" and "material." Formal res judicata occurs when there are no available or pending appeals of the award nor any further remedy to review the arbitral decision in the course of arbitral proceedings in which the award was rendered. In arbitral proceedings, an appeal of the award filed in a state court is considered a continuation of the existing proceedings. A separate action to set aside the award, however, is not a continuation of existing arbitral proceedings and should be considered as an independent law suit having its own individuality. Material res judicata exists when (i) the award cannot be reviewed by appeal or otherwise in the same (arbitral) proceedings where the decision was made, and (ii) it cannot be reviewed in any other proceedings, including a separate action, concerning the same subject matter and parties.[158]

As far as Argentine law is concerned, I am of the view that only formal res judicata should be required for foreign arbitral awards. Furthermore, I believe that for enforcement purposes one cannot require a greater degree of finality for foreign awards than that required for local awards. As already indicated, a local award in Argentina may be enforced as soon as it is made so long as it is not subject to "suspensive" or "ordinary" means of recourse. It has already been explained that an action to set aside or an "extraordinary" means of recourse does not have "suspensive" effects.[159]

As a result, using Argentina as an example, I believe that a judge confronted with the recognition or enforcement of a foreign award has to look to the foreign law to determine two things: first, if there are pending appeals in the same proceedings against the award, and second, if such appeals exist, whether they have "suspensive" effects. When there are no such pending appeals and no

157. Cám. Nac. Com., Sala "B," *Schnabel, Gaumer & Co. v. Sepselon E.*, 41 E.D. 691 (with commentary by W. Goldschmidt).

158. C. COLOMBO, 1 CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN 294 (1975).

159. *See supra* note 113 and accompanying text.

"suspensive" effects exist, the foreign award is res judicata and is ready to be recognized and enforced in Argentina.[160]

In view of the scarcity of Latin American decisions on this topic, it is difficult to predict whether this approach is likely to enjoy widespread acceptance. There is some evidence, however, of a changing trend in this direction, as suggested by new article 1347-A(v) of the recently reformed Mexican Commercial Code. According to this provision, a foreign award is enforceable in Mexico if it is either final or has the force of res judicata in the country where rendered or no ordinary means of recourse is pending against the award.[161]

On the other hand, under present domestic Latin American legislations as well as treaties on the recognition and enforcement of foreign awards, the burden of proof rests on the party seeking recognition or enforcement to show that the requirements therefor have been met.[162] Thus, this party must bring evidence that res judicata was attained in the foreign forum, that the defendant was correctly notified, and in some cases, that the award was homologated by a local court in the country where it was rendered.[163] All these factors seem to indicate that many Latin American countries

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160. This view has been favored for interpreting the 1911 Bolivian Treaty provisions on enforcement of foreign court decisions and arbitral awards. G. PARRA ARANGUREN, *El Acuerdo Boliviano Sobre Ejecución de Actos Extranjeros (1911) a la Luz de la Jurisprudencia Venezolana*, 22 REVISTA DE LA FACULTAD DE DERECHO UNIVERSIDAD CATOLICA ANDRES BELLO [REV. FAC. D.U.C.A.B.] 69-71 (1975-1976).

161. COD. COM. art. 1347-A (Mex.).

162. Article 6(c) of the 1889 and 1940 Montevideo Treaties on International Procedural Law and article 6(d) of the 1911 Bolivian Treaty require that evidence must be presented in the form of a court ruling showing that the foreign award is not subject to appeal or has attained res judicata, and a copy of the laws on which such court decision is based must be brought (duly authenticated) before the enforcement forum. *See* Montevideo Treaty, *supra* note 148, art. 6(c). Article 3 of the 1979 Montevideo Convention has a similar requisite, but in addition it requires the interested party to produce authentic copies of the documentation showing (i) that the defendant has been served process in the arbitral proceedings in a manner substantially equivalent to the way such notices are made in the enforcement forum and (ii) that the rights of the defendant have been respected during arbitral proceedings. 1979 Montevideo Treaty, *supra* note 148, art. 3.

163. That formal confirmation of the award (homologation) in the country where it was rendered is a prerequisite for enforcement in a foreign forum is expressly established at article 3 of the 1889 and 1940 Montevideo Treaties and of 1911 Bolivian Treaty and is implicitly ratified by the requirement in these same treaties that the res judicata or binding force of the award be confirmed by a court ruling of the country where it was made. G. Parra Aranguren, *supra* note 151, at 50-51. This latter requirement is also set out at article 3(c) of the more recent 1979 Montevideo Convention, which suggests that the latter is equally subordinating extraterritorial enforcement of arbitral awards to a sort of homologation in the country of origin.

should seriously consider becoming parties to international conventions which resolve some or all of the problems above.

C. *Adherence to International Conventions*

In fact, with few exceptions, the most important Latin American countries have become parties either to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[164] the 1975 Panama Inter-American Convention on International Commercial Arbitration,[165] or the 1979 Montevideo Inter-American Convention on the Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards. The provisions of the Panama Convention are almost a replica of article V of the New York Convention. The Panama Convention, like the New York Convention, also provides for the recognition of arbitral agreements.[166] Consequently, if a country such as Brazil accedes to any of these conventions, it will be possible to obtain from a Brazilian court specific performance of an arbitral agreement concerning an international transaction, along with a stay of court proceedings. This is achieved by invoking the existence of an arbitral agreement with a foreign party which has ratified or acceded to any of these conventions. The Inter-American Conventions are open to the signature and ratification to all countries belonging to the Organization of American States (OAS). The United States has recently become a party to the 1975 Panama Convention.[167] These

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164. These include Chile, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, Haiti, Mexico, Panama, and Uruguay. *Peru* ratified it in May 1988. *See* New York Convention, *supra* note 1. *Argentina* signed the Convention on August 26, 1958 and ratified it through Law 23619 of September 28, 1988, promulgated through Decree 1524/88 of October 21, 1988. Official Bulletin No. 26501 of Nov. 4, 1988, 1-3. Grigera Naón, *Ratificación por la Convención de Nueva York de 1958, Sobre Reconocimiento y Ejecución de Laudos Arbitrales Extranjeros*, L.L., May 17, 1989, at 1-5; *Ratification by Argentina of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards*, 6 J. INT'L ARB. 121-23 (1989). In the case of *Colombia*, a recent decision of the Colombian Supreme Court of Justice declared the law ratifying the New York Convention unconstitutional on account of a formal defect. Judgment of Oct. 6, 1988, Supreme Court of Justice, Colom., *Carmen Marina Melo Torres*, Decisión No. 108, File No. 1805, Oct. 6, 1988. This led Colombia to accede to the New York Convention again through Law 39 of Nov. 20, 1990. Revista de Información y Consulta No. 917, Dec. 30, 1990, at 691-93.

165. These include Chile, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela.

166. *See* Panama Convention, *supra* note 2.

167. On the attitude of the U.S. with respect to the ratification of the 1975 Panama Interamerican Convention, see Leich, *The Inter-American Convention on International Commercial Arbitration*, 75 AM. J. INT'L L. 982 (1981). The U.S. bill to implement this Con-

Conventions are also open to the accession of any country not belonging to the OAS. Nevertheless, no such accessions have taken place so far.

The court decision granting or denying *exequatur* is normally subject to the general means of recourse available to all trial decisions of that country unless, as is often the case in many Latin American countries, such decision is directly made by the Supreme Court of Justice or higher courts and is thus not subject to further challenge or review.[168] In Argentina, such an appeal suspends the enforcement of the award but the interested party may obtain interim protective measures to ensure the enforcement of the award.[169] If *exequatur* is granted through a final decision, the foreign award is equated with an Argentine award or court decision. As such, it will have to go through the same enforcement proceedings contemplated for both. In the course of such proceedings, only limited defenses may be raised, such as payment, extension of the term for payment, or remission of the debt occurring after the *exequatur* order was obtained. No defense that could have been raised in the course of *exequatur* proceedings may be presented at this stage. The appeal against a ruling rejecting such defenses and ordering the public sale of the debtor's assets has suspensive effects, unless the intervening court accepts suitable security from the plaintiff.[170] *Exequatur* proceedings are not required when the party seeks only the recognition of res judicata effect but are required for enforcement of the foreign award. In such a case, recognition will be granted by the court at the end of summary proceedings, when it is shown that the award fulfills the same substantial and formal requirements needed for its enforcement.[171]

IV. CONCLUSION

This review of the present legislation on arbitration shows that arbitration is a long-standing institution which is looked upon

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vention was passed by Congress and was signed by President Bush on August 13, 1990. The United States deposited the instrument of ratification on September 27, 1990. *See* Lowry, *The United States Joins the Inter-American Arbitration Convention*, 7 J. INT'L ARB. 83-90 (1990).

168. *See supra* note 156 and accompanying text.

169. L. PALACIO, 7 DERECHO PROCESAL CIVIL 329 (1982); L. PALACIO, 5 DERECHO PROCESAL CIVIL 102 (1975). This is also the case in *Mexico*. C.F.P.C. art. 608 (MEX.).

170. CÓD PROC. CIV. Y COM. arts. 499-516 (Argen.).

171. *Id.* art. 519.

favorably in Latin America. Recent legislative changes are clearly aimed at broadening the sphere of arbitrable matters and at updating and improving procedural rules. This positive attitude of Latin American countries during the last fifteen years has led to the ratification of international conventions favoring arbitration, a fact that certainly confirms this trend.

Though much remains to be done, there now exists a substantial amount of information on Latin American arbitration as well as growing experience in the field. This has led to the creation of a positive intellectual environment for achieving the required changes in the near future. It is expected that this educational phenomenon will reduce the danger of ill-drafted arbitral agreements, which are always disruptive, irrespective of the excellence of the available legislation.[172] Further it will facilitate the training of qualified Latin American arbitrators. This cultural change is also likely to lead to the improvement of existing institutional arbitration facilities and the creation of new ones which will attract still more arbitrations.

A significant role in this regard has been, and will be, played by Latin American chambers of commerce and similar organizations. Reference has already been made to pioneer legislation in Ecuador in this sense.[173] In Argentina, both the Argentine Chamber of Commerce and the Buenos Aires Stock Exchange have been actively involved in the dissemination and implementation of commercial arbitration.[174] The same may be said of the National Chamber of Commerce of Mexico City. In Colombia, the commercial code entrusts to local chambers of commerce the *ex aequo et bono* conciliation and resolution of commercial disputes. A network of local chambers of commerce led by the Bogotá Chamber of Commerce seems to be extremely successful in the field of conciliation and particularly active in the spreading of the utilization of

172. For example, the Argentine Supreme Court declared in *Gas del Estado v. E.T.P.M. y Otro* that the Argentine federal courts are solely competent, in lieu of the ICC Court of Arbitration, to appoint the members of an arbitral tribunal sitting in Argentina to decide a dispute between an Argentine state entity and a foreign party under ICC Rules. This conclusion was exclusively the consequence of an ill-drafted and obscure arbitral clause. Judgment of July 28, 1983, C.J.N., Argen., 305-1 Fallos 9630. As a result of the defects in the arbitral clause affecting the designation of the arbitrators by the ICC Court of Arbitration, enforcement of the arbitral award was denied in France. *Société Gas del Estado c/Sociétés Ecofisa et E.T.P.M.*, Cour d'appel de Paris (Re Ch. Suppl.), 4 REV. ARB. 683-89 (1989).

173. *See supra* notes 15-19 and accompanying text.

174. Grigera Naón, *supra* note 13, at 2.

commercial arbitration.[175] In Venezuela, the Caracas Chamber of Commerce has recently created a Conciliation and Arbitration Center and provided it with its arbitration rules.[176] Legislation in Honduras allows reference to arbitration before the chambers of industry and commerce in deciding on both international and domestic commercial cases.[177] The Chamber of Commerce of Lima, Perú is not only vested with powers to decide economic or commercial disputes through *ex aequo et bono* arbitration, but can also certify the existence, effectiveness, and substance of commercial usage.[178] The vital importance of these institutions fundamentally resides in their direct and wide appeal to the users of commercial arbitration, who are also their members.

The UNCITRAL Model Law on international commercial arbitration is certainly a valuable guideline and source of inspiration to move in that direction. Even its general adoption would not jeopardize the essential public policy principles on arbitrability and other vital areas that many Latin American countries feel necessary to safeguard.[179] The mere incorporation of its guiding postulates[180] would certainly dispel once and for all any remaining apprehensions that winds hostile to arbitration are still blowing in Latin America.

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175. Montealegre Escobar, *Los Arbitros en el Derecho Colombiano y en el Centro de Arbitraje y Conciliacion Mercantiles de la Camara de Comercio de Bogota*, in Liber Amicorum Zubkowski, *supra* note 14, at 251, 260-63; Suarez Melo, *El Arbitraje Comercial en Colombia*, in Liber Amicorum Zubkowski, *supra* note 14, at 273-75.

176. *Normas Relativas al Centro de Conciliación y de Arbitraje de la Cámara de Comercio de Caracas* (Caracas Chamber of Commerce Brochure) (Nov. 1989).

177. León Gómez, *supra* note 14, at 351-52.

178. Parodi Remon, *El Arbitraje en el Peru*, in Liber Amicorum Zubkowski, *supra* note 14, at 515-16. Parodi Remon also points out that one of the main aims of the federation of chambers of commerce of the Andean Group (Confederación de Camaras de Comercio del Grupo Andino), as spelled out in its by-laws, is to act as international conciliation or arbitral tribunals to resolve disputes between merchants belonging to countries of the Andean subregion (Bolivia, Venezuela, Colombia, Peru, and Ecuador).

179. Article 1(5) of the Model Law provides that it "shall not affect any other law of this state [the state adopting it] by virtue of which certain disputes may not be submitted to arbitration only according to provisions other than those of this law." This provision was proposed by the Soviet delegate with the immediate support or approval of the Australian, French, U.K., U.S., Hungarian, and Cuban representatives. UNCITRAL, 18th Sess., *Summary Records of the 305th to 333rd Mtgs.*, at 19-21, U.N. Doc. A/CN.9/SR. 305-33 (1985); Grigera Naón, *La Ley Modelo de la CNUDMI Sobre Arbitraje Comercial Internacional y el Derecho Argentino*, L.L., Feb. 13-14, 1989, 3-4.

180. Garro, *The UNCITRAL Model Law and the 1988 Spanish Arbitration Act: Models For Reform In Central America*, 1 AM. REV. INT'L ARB. 201-04 (1990).