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The Applicability of Arbitration in the Americas: An Avant-Garde Approach to the Panama Convention

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The Applicability of Arbitration in the Americas: An Avant-Garde Approach to the Panama Convention

Elizabeth A. Briggs¹

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1. J.D. Candidate for the class of 2013 at the University of Miami School of Law. I wish to thank Professor John H. Rooney, Jr., International Arbitrator, for his valuable feedback, insightful commentary, and thorough assistance in the development of this Article. I am also eternally grateful to the members of the Inter-American Law Review for their many hours of dedication to prepare this Article for publication.

I. INTRODUCTION

Situated on the right bank and nestled in a famous, old *quartier* in Paris, France rests the picturesque former urban resort for the French aristocracy at the Place des Vosges.² Built in the early 1600's, this area represented city-planning at its finest as an escape to the countryside retreats that were popular among European royalty at the time.³ Today, it stands amazingly well preserved among its idyllic gardens, red brick house structures, vaulted arcades, and long corridors.⁴ This antiquated square in the *Marais*, or marsh, district of the city hosted the famed duel between the three Mignons of King Henri III and the three partisans of the Duc de Guise in April of 1578 during the French Wars of Religion.⁵ These two rival court parties engaged in menacing attacks against each other in the square as a rumored way to resolve a dispute.⁶ However, the noted battle resulted in multiple deaths and seemingly irreparable, torturous agonies among those injured and slain.⁷ Due to this incredible fight, public opinion soared; legends trickled through the winding streets of Paris that the duel mimicked infamous ancient Roman brawls.⁸ Several written texts erupted, and an array of stories romanticized what seemed to be an illogical and hopeless loss of life.⁹

Stories like the one mentioned above elaborate the vast depth, emotion, and history that quarrels bring between parties. Around the same time, Spanish conquistadors thrashed through vast, uncharted lands of the Americas conquering the native

2. KARL BAEDEKER, *PARIS ET ENVIRONS: WITH ROUTES FROM LONDON TO PARIS* 200 (18th rev. ed. Charles Scribner's Sons 1913); the word "quartier" in French translates to "neighborhood" in English.

3. *Id.*

4. *Id.*

5. *Id.*; BRIAN SANDBERG, *WARRIOR PURSUITS: NOBLE CULTURE AND CIVIL CONFLICT IN EARLY MODERN FRANCE* 170, (Johns Hopkins Univ. Press 2010).

6. See MARTHA WALKER FREER, *HENRY III, KING OF FRANCE AND POLAND: HIS COURT AND TIMES* 62 (Vol. II, Dodd, Mead and Co. 1888) (showing that Henri and his mignons would spend much of their day "adjusting their disputes"); see also THOMAS WRIGHT, *THE HISTORY OF FRANCE: FROM THE EARLIEST PERIOD TO THE PRESENT TIME* 763 (Vol. I, The London Ptg. and Publishing Co. 1856-62) (showing that Henry feared and hated the house of Guise).

7. See MARIO READING, *THE COMPLETE PROPHECIES OF NOSTRADAMUS* 168 (Sterling Publishing Co., Inc. 2009).

8. *Id.* (showing that King Henri III and the Duc de Guise had a "scrupulous reenactment of the arranged combat between the Horatii and the Curiatii" from 672-642 BC).

9. For a complete description of this story, see GEORGES BRÉZOL, *L'HISTOIRE LICENCIEUSE: HENRI III ET SES MIGNONS* (Les Éditions des Bibliophiles 1935).

tribes that thrived there; these American communities eventually all but vanished and their adversaries met similar, disheartening fates.¹⁰ Thankfully, the development of modern society now allows for flexible dispute resolution mechanisms, aside from battle, that allow parties to settle peacefully and neutrally.

Today, international arbitration serves as an invaluable tool both for parties to utilize the expertise of professionals and the procedural securities common in legal proceedings in order to ensure fairness, uniformity, and reliability. The term “arbitration” roughly refers to a private dispute resolution process that begins when two or more parties agree to submit disputes to an impartial tribunal consisting of one or more arbitrators.¹¹ The chosen tribunal must abide by certain procedural rules in order to have a peaceful settlement of the dispute.¹² The tribunal renders an award, which finally and legally binds the parties involved, and which judicial courts may recognize and enforce.¹³

In order to accomplish the impressive goals of arbitration, a revolutionary change occurred in 1958 with the passage of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (hereinafter the “New York Convention”).¹⁴ Countries around the world embraced this outlook on resolving international disputes through arbitration and locked their signatures to the Convention with intent to be bound to it.¹⁵ After the passage of the New York Convention, other regional arbitration

10. See generally JIM OLLHOFF, *THE CONQUISTADORS* (ABDO Publishing Co. 2012).

11. See UNCITRAL Model Law on International Commercial Arbitration, U.N. doc. A/40/17, Annex I, Art. 2 (June 21, 1985), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html [hereinafter UNCITRAL Model Law].

12. MARK HULEATT-JAMES & NICHOLAS GOULD, *INTERNATIONAL COMMERCIAL ARBITRATION: A HANDBOOK* 20 (LLP Ltd., 2nd ed. 1999).

13. *Id.*; see also Jan Paulsson, *Jurisdiction and Admissibility*, in *GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE, AND DISPUTE RESOLUTION* 601 (ICC Publishing, Publication 693 2005), available at www.iccbooks.com.

14. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, available at <http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/> [hereinafter New York Convention]. The United States did not sign the New York Convention until 1971 and codified it at 9 U.S.C. §§ 201-08. See John P. McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM. 735, 737 (1971).

15. See, e.g., Gloria Miccolli, *International Commercial Arbitration*, AMERICAN SOCIETY OF INTERNATIONAL LAW (Jan. 15, 2012, 8:49 PM), <http://www.asil.org/erg/?page=arb> (showing that over 140 countries have agreed to the New York Convention, see *supra* note 13). For a complete and current list of all parties to the New York Convention, see *Status – 1958 Convention on the Recognition and Enforcement of*

instruments grew in popularity to encompass local ideals and principles inherent throughout the world.¹⁶ Thus, the Panama Convention was born, and, as it gained notoriety, became a useful, practical tool in American arbitration disputes.

Despite its wide acceptance today, arbitration among the American nations took varied historical approaches.¹⁷ While the United States developed an open mind to the arbitration process, Latin American countries took much smaller reluctant steps to widen an encompassing attitude toward arbitration.¹⁸ The United States saw vast expansions in the realms of its own litigation and alternative dispute resolution processes, but Latin American countries long feared the North American and comparative European ideals of business and trade.¹⁹ Instead, the neighboring countries to the south routinely preferred to utilize internal practices that compelled individuals and businesses to accept Latin American local remedies instead of international arbitration.²⁰ Now, scholars often refer to this domestic approach as the Calvo Doctrine; it resisted the intrusion of foreign pressures in dispute resolution and precluded foreign parties from arbitrating disputes in Latin American contracts.²¹ However, over time, Latin America slowly came to embrace the growing trend of internationalism and

Foreign Arbitral Awards, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

16. See, e.g., Inter-American Convention on International Commercial Arbitration, Jan 30, 1975, OAS Doc. OAS/Ser. A/20 (SEPF) (1975), *reprinted in* 14 I.L.M. 336 (1975) [hereinafter Panama Convention]; European Convention on International Commercial Arbitration, Apr. 21, 1961, U.N. Treaty Series, vol. 484, p. 364, No. 7041, *available at* <http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/>; Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific, and Technical Co-operation ("Moscow Convention"), May 26, 1972, official English translation by UNCITRAL at 13 I.L.M. 5 (1974) ; see UNCITRAL Model Law, *supra* note 10; Spiros V. Bazinas, *Harmonization of International and Regional Trade Law: The UNICTRAL Experience*, 8 UNIF. L. REV. 53, 55 n.9 (2003).

17. See generally HULEATT-JAMES & GOULD, *supra* note 11, at 20-22.

18. See *id.* at 22.

19. *Id.*

20. Manuel Garcia-Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 MARQ. L. REV. 205, 219 (1950) (showing that the Calvo Doctrine's purpose compelled Aliens to use internal courts first in Latin America rather than resorting to diplomatic channels).

21. See *infra* Sec. II(A); R. Doak Bishop & James E. Etri, *International Commercial Arbitration in South America*, at 11-2, as *reprinted in* R. Doak Bishop, *The United States ' Perspective Toward International Arbitration with Latin American Parties*, 8 INT'L L. PRACTICUM 63 (1995); Jonathan C. Hamilton, *Three Decades of International Commercial Arbitration*, 30 U. PA. J. INT'L L. 1099, 1100 (2009); see also Garcia-Mora, *supra* note 19, at 219.

its effects on arbitration.²² In fact, the treaties and conventions of today provide ringing evidence of a long but noteworthy acceptance process.²³

Realizing the importance of resolving international disputes rather than focusing on internal matters, the majority of American states gathered in unity to form a neutral arbitration process in 1975.²⁴ The processes that ensued created the legal document called the Inter-American Convention on International Commercial Arbitration, more commonly known as the “Panama Convention”.²⁵ It served as a channel linking the American states together and created a consistent arbitration process that bridged the gap in foreign disputes.²⁶ Today, it functions as a steady document that has endured the test of time, and tribunals routinely use it international disputes throughout the Americas.²⁷ It is therefore important to understand the Panama Convention’s international role today juxtaposed with its important arbitration counterpart: the New York Convention.

Currently, the United States and several Latin American countries are parties to both the New York and Panama Conventions.²⁸ While these documents may be similar in their overall goals in international arbitration, courts, parties, and tribunals still confuse the two and dispute how to apply them.²⁹ In fact, recent trends in United States case law demonstrate that courts often apply these two separate Conventions identically.³⁰ Thus, an important question arises as to whether it is prudent to treat these two separate Conventions alike when scholars and practitioners developed them during different time periods; different

22. See, e.g., HULEATT-JAMES & GOULD, *supra* note 11, at 22; Bishop & Etri, *supra* note 20, at 11-2; Hamilton, *supra* note 20, at 1100.

23. See Hamilton, *supra* note 20, at 1100 (showing a large number of Latin American countries as parties to the Panama Convention, New York Convention, and the ICSID Convention).

24. *Id.*; see also Garcia-Mora, *supra* note 19, at 205-08 (showing that the Latin American States were previously making several attempts to incorporate the Calvo Doctrine into a Pan-American Convention).

25. See generally Panama Convention, *supra* note 15.

26. See Hamilton, *supra* note 20, at 1099.

27. *Id.* at 1101 (showing that there has been evolutionary expansion in the Panama Convention’s use, particularly since the 1990’s); see also Organization of American States, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 14, 1979, 1439 U.N.T.S. 87.

28. See Hamilton, *supra* note 20, at 1100, 1102.

29. See *infra* Sec. IV(B).

30. *Id.*

parties signed them in different places, and; they represent different cultural and ideological backgrounds.

With these considerations in mind, this text traces the applicability and scope of the Panama Convention within international commercial arbitration. While a historical appreciation and study is included, this article primarily focuses on the treatment of the Convention within the past decade. Thus, Section II of the paper includes a comprehensive discussion of the historical attitudes and doctrinal arbitral developments in the Americas. This section traces the contours and appeal of the Panama Convention as an important instrument by focusing on two areas: the varied historical context of arbitration in Latin America, and the legal structure of international commercial arbitration within the United States. Section III expands upon the appeal and acceptance of arbitration within the framework of the Panama Convention in the Americas. This section also highlights an important textual breakdown of the overall arbitration process under the regional Convention and its transformation on the status of arbitration in the Americas. Section III also focuses on setting forth two recent United States court decisions within the context of the Panama and New York Conventions: the *Termorio* decision and the recent *DRC, Inc.* case. Section IV provides a critical overview of the practical importance of treating the Panama Convention as its own separate document. This section is broken into three primary categories of analysis. The first focuses on important textual differences between the New York and the Panama Conventions. It analyzes six important disparities among the Conventions. These topics show that, while the overall goals of the Conventions may ultimately be similar, each distinction can create friction between the two Conventions. The next category analyzes United States judicial confusion between the two Conventions as well as some of the fundamental weaknesses of the Conventions' arbitral developments in case law. This section culminates with a discussion focusing on the need for doctrinal distinctiveness between the two Conventions. Finally, Section VII of this article concludes with some overall thoughts for further reflection and final comments for consideration.

II. RESISTANCE OR ACCEPTANCE? APPROACHES TO INTERNATIONAL ARBITRATION IN THE AMERICAS

In an effort to advance the resolution of international disputes in the Americas, the Organization of American States, (hereinafter the "OAS"), held a conference in 1975 that produced

the Panama Convention.³¹ This international arbitration document attempted to bridge different American approaches and build a regional acceptance on the philosophy requiring the enforcement of foreign arbitral awards set forth in the New York Convention.³² Thus, there are two salient reasons why the Panama Convention is appealing despite the disparities between the American countries: it first embodies the resistant, historical Latin American approaches [A], it and also represents the United States' legal structures in the overall arbitration process [B].

A. *A Historical Perspective On Arbitration In Latin American States*

Historically, Latin American countries strongly opposed the idea of arbitration in the development of their legal dispute settlement mechanisms.³³ Southern American perspectives show that their developments in the international realm took a slow, grueling process of over 100 years to comply with the arbitration system of today.³⁴ Tracing the historical steps chronologically, Latin America went from a time of resistance under the Calvo Doctrine, to openness under the New York Convention, and finally to acceptance under a regional arbitration document and beyond.³⁵ Therefore, each of these stages that led to the eventual adoption of the Panama Convention all favor its independent treatment incorporating Latin American ideals in settling disputes.

First, the Calvo Doctrine has long been hailed in Latin America as the predominant force for settling disputes and restricting international negotiations.³⁶ Starting in the mid-1800's, an Argentinian diplomat named Carlos Calvo created principles enumerated in his six-volume treatise entitled *Le Doit International Theorique et Pratique*, translated as "The Theory

31. Hamilton, *supra* note 20, at 1100.

32. Bishop & Etri, *supra* note 20, at 11-2; *see also* Miccolli, *supra* note 14 (showing that today, over 140 countries are signatories to the New York Convention).

33. *See* Bishop & Etri, *supra* note 20, at 11-1.

34. The Calvo Doctrine began in the mid-19th century where as the American countries did not create the Panama Convention, *supra* note 15, until 1975.

35. *See generally* Bishop & Etri, *supra* note 20, at 11-1.

36. *See generally* Denise Manning-Cabrol, *The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors*, 26 LAW & POL'Y INT'L BUS. 1169, 1169 (1994); David E. Graham, *The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection*, 6 TEX. INT'L L. J. 289, 289 (1971).

and Practice of International Law.”³⁷ The significance of this doctrine emerged during the armed conflicts between Mexico and France between 1831 and 1861 and showed that Latin American approaches to international law created problems for these states for years to come.³⁸ The creation of the Calvo Doctrine implemented a strong resistance toward international arbitration in Latin American states.³⁹ The basic premise of this doctrine flowed from the idea that, in the international realm, jurisdiction remained in the country where the dispute is located.⁴⁰ In this context, foreigners had to resort to using the local courts where their claim occurred instead of using their own legal system.⁴¹

The justification behind the Calvo Doctrine developed during political armed tensions between Mexico and France.⁴² It derived from keeping the power of different countries in balance: Calvo himself did not want the stronger, more powerful states to abuse the jurisdictions or weaker, smaller states.⁴³ This doctrine embodied the ideals of Latin American countries that wanted to restrict outside influences, and many countries even adopted these principles into their own constitutions and national statutes.⁴⁴ However, as foreign agreements arose and international investments grew over time, Latin countries begrudgingly started to realize that their hostility and reluctance to accept alternative dispute resolution processes could in fact be hindering them in the modern world.⁴⁵ Therefore, many countries ultimately rejected the Calvo Doctrine and began seeking other methods to resolve disputes.⁴⁶

Second, beginning as far back as the 1950's through the 1970's, Latin America began to show trends of opening up to the

37. DONALD SHEA, *THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY* 17 (Univ. of Minn. Press 1955).

38. Bishop & Etri, *supra* note 20, at 11-2; Hamilton, *supra* note 20, at 1100.

39. See Bishop & Etri, *supra* note 20, at 11-1.

40. *Id.*; Hugo Caminos, *The Latin American Contribution to International Law*, 80 AM. SOC'Y INT'L L. PROC. 157, 157 (1986).

41. Caminos, *supra* note 39, at 160.

42. Bishop & Etri, *supra* note 20, at 11-2.

43. See generally Bruce G. Rinker, *The Future of Arbitration in Latin America: A Study of Its Regional Development*, 8 CASE W. RES. J. INT'L L. 480, 480 (1976); *International Fisheries Co (U.S.A.) v. United Mexican States*, R.I.A.A. 691, 691 (1931). See also *N. American Dredging Co. of Tx. (U.S.A.) v. United Mexican States*, R.I.A.A. 21, 26 (1926) (for the leading arbitral decision upholding the validity of the Calvo Doctrine).

44. Bishop & Etri, *supra* note 20, at 11-2, 11-4; Rinker, *supra* note 42, at 492.

45. Bishop & Etri, *supra* note 20, at 11-5.

46. See generally Manning-Cabrol, *supra* note 35, at 1169.

idea of international arbitration,⁴⁷ and the world saw vast transformations in the arbitration field with the passage of the New York Convention.⁴⁸ This arbitration instrument aimed to require the enforcement of foreign arbitral awards while simultaneously allowing for uniform application in arbitration.⁴⁹ It offered an approach to international arbitration allowing for a single, final forum at the arbitral *situs* and a quick resolution of disputes.⁵⁰

While foreign countries embraced the field of arbitration in their dispute settlement systems, Latin American countries still had hesitations and wanted to keep arbitration under their court's auspices.⁵¹ However, States began to understand that instruments like the New York Convention allowed arbitration processes to help resolve international disputes in a neutral forum and reduce the time and expense of litigation.⁵² With the passage of this Convention, the outlook of arbitration grew slowly but tremendously over time, and the Latin American states further opened their ideals and adapted to the changes.⁵³

Third, as the inter-American States realized that foreign trade was increasing each year with a more globalized economy developing, many countries began to accept the idea that a regional mechanism would be a good way to resolve potential disputes that were also arising.⁵⁴ In 1975, the Panama Convention achieved this goal between the different inter-American countries by providing a regional mechanism for dispute settlement.⁵⁵ It preserved important regional prerogatives inherent in Latin American legal histories.⁵⁶ However, it also promoted trade relations and globalization through a uniform dispute resolution

47. Bishop & Etri, *supra* note 20, at 11-5 (showing that Article 136 of the Peruvian Constitution in 1979 allowed arbitral clauses to be added in international loan agreements); see generally Rinker, *supra* note 42, at 486-95.

48. New York Convention, *supra* note 13.

49. Bishop & Etri, *supra* note 20, at 11-6.

50. GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2553 (Kluwer Law International 3d. ed. 2009).

51. Joseph Jackson, Jr., *The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application and Problems*, 8. J. INT'L ARB. 91, 91-100 (1991).

52. *Id.* at 99.

53. See Charles Robert Norberg, *Inter-American Commercial Arbitration – Unicorn or Beast of Burden*, 5 PACE L. REV. 607, 608-13 (1984-1985).

54. See Federal Arbitration Act, 9 U.S.C. §§ 201-208 (1970) [hereinafter FAA]; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

55. See HULEATT-JAMES & GOULD, *supra* note 11, at 22; BORN, *supra* note 49, at 2336-39.

56. See Hamilton, *supra* note 20, at 1103-4 (showing that the *Compendium of Latin American Arbitration Law* tracks the enactment of the Panama and New York

mechanism between the United States and Latin America.⁵⁷

In creating this arbitration tool, the Panama Convention attempted to form “a viable, treaty-based system for resolving inter-American commercial disputes by arbitration going back a quarter-century.”⁵⁸ During its passage, the Convention aimed to achieve three primary objectives: (1) to persuade Latin American states that were not party to an arbitration Convention at the time to consider joining the Convention; (2) to encourage economic expansion between the American states by providing a faster and more impartial dispute resolution method; and (3) to attain the underlying political goal to enhance trade in the Americas.⁵⁹ With the help of the Panama Convention, inter-American arbitration grew to place a significant imprint in dispute resolution and attracted significant advancements to the older approaches in Latin American law. Now, the Convention serves a valuable role as a regional instrument in international settlements. Thus, Latin America significantly advanced its dispute mechanisms from resistance, to openness, and finally to acceptance by having arbitration help resolve international disputes.⁶⁰

B. The United States Accepts Arbitration-Enabling Legislations

Although Latin America took a sluggish route to accepting the process of international arbitration, several national initiatives within the United States reflected a popular trend of accepting alternative dispute resolution processes.⁶¹ As the popularity of international arbitration grew after the passage of the New York Convention, American lawyers grew to be much more accustomed to using arbitral mechanisms over their Latin American counterparts.⁶² Further, while Latin America did not have as many his-

Conventions throughout Latin America and notes the year each state adopted and/or amended its domestic arbitration law).

57. See Paul E. Mason & Mauricio Gomm-Santos, *New Keys to Arbitration in Latin America*, 25 J. INT'L ARB. 31, 40 (2008) (showing that arbitration is growing due to the rise of trading blocs and in response to globalization); see generally Jackson, *supra* note 50.

58. Jackson, *supra* note 50, at 90.

59. *Id.*

60. *Id.* at 97 (showing that (1) the party resisting enforcement of the award has the burden of proof, and (2) the Panama Convention, as a regional convention, overrides the New York Convention, as well as some local laws).

61. See *Id.* at 96.

62. *Id.* at 92. For a thorough discussion of the complete historical approach taken by the United States, see generally Rinker, *supra* note 42, at 480.

torical legislation arbitration statutes because of its traditional bias against arbitration, the United States adopted the Panama and New York Conventions in many state and federal arbitration statutes.⁶³ Therefore, two other focal areas directly correlate to the appeal of international arbitration within the United States: the UNCITRAL Model Law and Arbitration Rules as well as the Federal Arbitration Act.

First, the United Nations Commission on International Trade Law (hereinafter “UNCITRAL”) adopted the Model Law on International Commercial Arbitration in 1985.⁶⁴ This set of arbitration rules intended to provide greater uniformity to determine which set of international laws would be applicable to contractual relationships between international parties.⁶⁵ As of 2011, seven individual states in the United States have taken various approaches adopting the Model Law into their local arbitration systems.⁶⁶ This shows that since its passage in 1985, states within the United States are gradually adopting the principle objectives of the Model Law into their own legal systems.⁶⁷

Further, the UNCITRAL Arbitration Rules of 1976 prove to be specifically important in relation to the Panama Convention: these rules of procedure preemptively apply if the parties under the Panama Convention cannot agree to a uniform procedure for the arbitration.⁶⁸ These arbitral rules allow parties significant flexibility in choosing how to operate their proceedings, and further help create the sense of a harmonious arbitration model between the American countries.⁶⁹ Therefore, the UNCITRAL Model Law and Arbitration Rules show the overlapping utility,

63. *See supra* Sec. II(A); H.R. 4314 (Pub. L. No. 101-369) implemented the Panama Convention, *supra* note 15, codified at 9 U.S.C. § 301 *et seq.*; Jackson, *supra* note 50, at 91 (showing that President Bush signed the Panama Convention into law in 1990).

64. UNCITRAL Model Law, *supra* note 10.

65. HULEATT-JAMES & GOULD, *supra* note 11, at 23-25; PAULSSON, *supra* note 12, at 610.

66. *See* Miccolli, *supra* note 14 (showing that California, Connecticut, Florida, Illinois, Louisiana, Oregon, and Texas have all adopted the Model Law); *see also* UNCITRAL Model Law, *supra* note 10.

67. HULEATT-JAMES & GOULD, *supra* note 11, at 23.

68. *Id.* at 22-25 (showing that the regional Inter-American Commercial Arbitration Commission rules of procedure, [hereinafter IACAC], apply and are now incorporated into the UNCITRAL Arbitration Rules, United Nations Commission on International Trade Law Arbitration Rules, 31 U.N. GAOR Supp. (No. 17), U.N. Doc. A/31/17 (1976)).

69. *Id.*

impact, and benefits of international arbitration enumerated in the Panama Convention.

Second, in 2000, Congress codified and amended the Federal Arbitration Act, (hereinafter the "FAA"), as another initiative to reinforce the importance of arbitration.⁷⁰ This Act passed in order to have an American approach counteracting the "long-standing judicial hostility to arbitration agreements that had existed at English common law."⁷¹ The FAA also correlates to several comparable state arbitration statutes, and both require the enforcement of arbitral agreements.⁷² Before the passage of the FAA, Americans realized the benefits of arbitration that had existed for decades⁷³ and decided to incorporate the Panama and New York Conventions. Therefore, the FAA highlights the prominence of the Panama Convention's application in United States national law through the Act's Third Chapter, which Congress passed in 2002.⁷⁴ In fact, although international arbitration grew first through contracting states joining the New York Convention in 1958,⁷⁵ the FAA further shows it favors a regional adoption of the 1975 Panama Convention over the New York Convention when both apply.⁷⁶ Thus, the passage of the FAA provides valuable insight to how the United States affords the Panama Convention its own weight in national legislation.

These progressions incorporating the Panama Convention in United States legislation show that America recognizes the impor-

70. See generally United States Arbitration Act, Ch. 213, 43 Stat. 883 (1925), codified as amended FAA, *supra* note 53, §§ 1-16.

71. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); see also S. REP. NO. 68-536, at 2-3 (1924).

72. Jaquelyn A. Beatty, *Recent Developments In Case Law Affecting Alternative Dispute Resolution*, 37 TORT & INS. L.J. 265, 266-68 (2001-2002).

73. See, e.g., *Dederick's Adm'rs v. Richley*, 19 Wend. 108, 111 (N.Y. Sup. 1838); *Neely v. Buford*, 65 Mo. 448, 451 (1877); *Camp v. Root*, 18 Johns. 22, 23 (N.Y. Sup. 1820); *Pike v. Emerson*, 5 N.H. 393, 393 (N.H. 1831).

74. FAA, *supra* note 53, § 301.

75. New York Convention, *supra* note 13.

76. FAA, *supra* note 53, § 305(1). Due to the similarities between the New York and Panama Conventions, Congress even entered a clause into Chapter III of the FAA to help prevent confusion between the two Conventions. Compare FAA, *supra* note 53, § 305 (stating "[i]f a majority of the parties to the arbitration agreement are citizens of a [Country] that [has] ratified or acceded to the Inter-American Convention and are [members] of the Organization of American States, the Inter-American Convention shall apply), with New York Convention, *supra* note 13, Art. VII (stating that "[t]he provisions of the [New York Convention] shall not affect the validity of multilateral or bilateral agreements."). However, scholars and case law still demonstrate that misunderstandings exist when it comes to each Convention's actual application in practice. See *infra* Sec. IV.

tance of this regional arbitral instrument in a legal field that has grown tremendously.⁷⁷ With the passage of the UNCITRAL international agreement and the national FAA instrument, the United States has incorporated a system to help ensure the international enforceability of arbitration agreements and awards.⁷⁸ Thus, the strong interest and the appeal of international arbitration allows for the betterment of a uniform dispute resolution system in the Americas.

III. TEXTUAL AND JUDICIAL DISCOVERIES OF THE PANAMA CONVENTION: REGIONAL, ARBITRATION BENEFITS

The American states took different approaches to recognizing the benefits of arbitration, but each region eventually realized the importance of having a regional international arbitration instrument.⁷⁹ As American states began to appreciate the protections of arbitration, international commercial practice offered many important developments in the unification of arbitration laws and rules.⁸⁰ Therefore, the Panama Convention's legal significance flows from a better understanding of its text and procedure [A] and a comprehensive judicial interpretation of two recent United States decisions dealing with the Panama Convention and its arbitral counterpart, the New York Convention [B].

A. *An Overview To The Arbitration Process Under The Panama Convention*

Historically, the field of commercial arbitration desired a uniform application and interpretation in enforcing agreements and awards.⁸¹ Indeed, the Panama Convention achieves both historical and modern goals of arbitration that create a desirable process for its application.⁸² Therefore, this section provides an understanding of each of the thirteen articles under the Convention.

Article I changes the application of former Latin American

77. See Jackson, *supra* note 50, at 97-98 (revealing a strong pro-enforcement policy of the Panama Convention under United States law).

78. *Id.* at 97.

79. Rinker, *supra* note 42, at 480.

80. Martin Domke, *Recent Development in International Commercial Arbitration*, 2 N.Y.U. J. INT'L L. & POL. 267, 267 (1969).

81. *Id.* (citing *Report of the United Nations Commission on International Trade Law on the Work of its First Session*, 23 U.N. GAOR Supp. No. 16, UNCITRAL, U.N. Doc A/ 7216 at 23 (1968)).

82. Beatty, *supra* note 71, at 265 (stating that privacy, simplicity, informality, flexibility, and time and cost savings are all benefits of arbitration).

jurisprudence and allowed for arbitration under the Convention to settle "any differences that may arise or have arisen between [the parties]."⁸³ The Convention now follows the modern business trend in expanding the scope of agreements to include "exchange[s] of letters, telegrams, or telex communications."⁸⁴ Article II allows parties to delegate a third party as an arbitrator, whether or not they are a natural or juridical person.⁸⁵ This process was not possible under older methods of arbitration.⁸⁶

Article III provides a unique procedural aspect. It states that if the parties do not have an express agreement, then "the arbitration shall be conducted in accordance with the rules of procedure of the [IACAC]."⁸⁷ Thus, the Panama Convention allows parties to default to the rules of procedure under the IACAC, which supersedes any domestic procedural rules that may be applicable.⁸⁸ By establishing the IACAC, Article III became the first international commercial arbitration article that acknowledged an administrative body to cover it.⁸⁹

Article IV provides a significant and lasting change in the field of commercial arbitration, stating that an "arbitral decision or *award* . . . [has] the force of a final judicial judgment."⁹⁰ Article V provides the only option where a party or court can refuse to recognize or enforce an arbitral decision.⁹¹ This article parallels Article V of the New York Convention and examines different remedies that a party can take in order to achieve non-enforcement.⁹² Article VI also mirrors the New York Convention providing for a competent authority to postpone the execution of an arbitral decision.⁹³ It also allows the authority "to instruct the other party [to the arbitration] to provide appropriate guaranties."⁹⁴

Article VII is significant because it allows the Convention to

83. Norberg, *supra* note 52, at 614.

84. Panama Convention, *supra* note 15, art. I.

85. Norberg, *supra* note 52, at 614.

86. *Id.*

87. Panama Convention, *supra* note 15, art. III.

88. Norberg, *supra* note 52, at 615; see UNCITRAL Arbitration Rules, *supra* note 67, (incorporating the IACAC Rules of Procedure).

89. Norberg, *supra* note 52, at 615.

90. Panama Convention, *supra* note 15, art. IV.

91. Jackson, *supra* note 50, at 96.

92. Norberg, *supra* note 52, at 616; Jackson, *supra* note 50, at 96.

93. Panama Convention, *supra* note 15, art. VI.

94. *Id.*

be open for signature by members of the OAS.⁹⁵ Article VIII further elaborates that the Convention is open to ratification by the member states.⁹⁶ Article IX adds an important provision stating that the Convention “shall remain open for accession by any other State.”⁹⁷ These articles show that the Panama Convention favors its application not only within the inter-American states but also to other areas of the world.⁹⁸

Article X provides for the date the Convention enters into force.⁹⁹ Article XI provides for the applicability of declarations for states that have signed, ratified, or acceded to the Panama Convention.¹⁰⁰ Article XII allows the Convention to “remain in force indefinitely, but any of the States Parties may denounce it.”¹⁰¹ Finally, Article XIII provides for parties to consider each language of the original instrument’s text as authentic.¹⁰²

The applicability of these thirteen articles shows that the American states adopted the principles of international arbitration together. Embodied within the text and structural contours of the Convention, this international arbitration document respected the unique, regional goals and cultural aspects of the American countries that helped create it. Thus, its independent significance deserves credit for incorporating the ideals of its contracting states.

B. Two United States Case Studies in Action

Understanding the legal impact of the Panama Convention requires more than just a mere breakdown of its text. The instrument gains significance from its entry into force and its application upon the member parties to it.¹⁰³ However, while designed as an international arbitration tool, the Panama Convention, like other arbitral Conventions, must sometimes pass under the auspices of judicial proceedings.¹⁰⁴ Thus, two important United

95. *Id.* at art. VII.

96. *Id.* at art. VIII.

97. *Id.* at art. IX.

98. Norberg, *supra* note 52, at 616.

99. Panama Convention, *supra* note 15, art. X.

100. *Id.* at art. XI.

101. *Id.* at art. XII.

102. *Id.* at art. XIII.

103. MALGOSIA FITZMAURICE, *Treaties*, in Max Plank Encyclopedia of Public International Law, ¶¶ 16, 49 (Feb. 2010) (showing that a Convention is commonly referred to as another name for a treaty and that a treaty’s entry into force acquires full legal force as a legal act).

104. *See generally* RZS Holdings AVV v. DVSA Petroleos S.A., 598 F. Supp. 2d 762,

States decisions outline recent judicial treatment of the Panama Convention in relation to the New York Convention: the *Termorio* decision [I] and the *DRC, Inc.* decision [II].

i. The *Termorio* Decision

In 2007, the United States Court of Appeals handed down the revolutionary *Termorio v. Elecantra* decision.¹⁰⁵ In *Termorio*, a Colombian state-owned public utility company entered into a purchase agreement with a Colombian energy supplier to generate power.¹⁰⁶ A dispute arose, and the parties first went to arbitration in Colombia under the arbitral clause found in the parties' agreement.¹⁰⁷ The tribunal awarded over \$60 million to the energy supplier, and the utility company appealed to the highest Colombian administrative court by filing an "extraordinary writ" to overturn the award.¹⁰⁸ The Colombian court nullified the award from the arbitral tribunal that was in favor of the utility company because the arbitration clause in the agreement violated Colombian state law.¹⁰⁹

Hoping to seek relief in the United States, the utility company subsequently filed a lawsuit in a United States District Court for the enforcement of the arbitral award and cited to the FAA for support.¹¹⁰ However, the District Court dismissed the claim for three reasons: lack of standing, failure to state a claim for which relief can be granted, and forum *non-conviens*. The lower court cited to the popular New York Convention annulment provision, found in Article V(1)(e), that allows for the recognition and enforcement of an award to be refused "if that party furnishes . . . proof that: . . . [t]he award . . . has been set aside . . . by a competent authority of the country in which, or under the law of which, that award was made."¹¹¹

On appeal, the issue concerned whether the previous Colom-

762 (E.D. Va. 2009) *aff'd sub nom* RZS Holdings AVV v. DVSA Petroleo S.A., 383 F. App'x 281 (4th Cir. 2010); Banco de Seguros del Estado v. Mut. Marine Offices, Inc., 257 F. Supp. 2d 681, 681 (S.D.N.Y. 2003); Productos Mercantiles E Industriales, S.A. v. Faberge USA Inc., 23 F.3d 41, 41 (2d Cir. 1994); Empresa Constructora Contex Limitada v. Iseki, Inc., 106 F. Supp. 2d 1020, 1020 (S.D. Cal. 2000).

105. *Termorio S.A. E.S.P. v. Elecantra S.P.*, 487 F.3d 928, 930 (D.C. Cir. 2007).

106. *Id.* at 929.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*; see *supra* Part II.B for a more thorough discussion of the FAA.

111. *Termorio S.A. E.S.P.*, 487 F.3d at 930 (citing New York Convention, *supra* note 13, art. V(1)(e)).

bian arbitration award from the tribunal was considered binding.¹¹² The Appellate Court affirmed the judgment from the United States court below and stated that the award had been properly “set aside” by the highest administrative court in Colombia, which was a “competent authority” in the State where the arbitration award was made.¹¹³ In its rationale, the Court of Appeals looked not only to the New York Convention, but also to the Panama Convention to determine the appropriate international agreement.¹¹⁴ The energy supplier argued that the Panama Convention applied instead of the New York Convention.¹¹⁵ However, the appellate court decided to apply the New York Convention even though the United States and Colombia were both signatories to both Conventions.¹¹⁶ The Court stated binary reasons for applying the former instead of the latter arbitration instrument: (1) the “relevant provisions” of the two Conventions were “substantively identical,” and (2) neither party objected the lower court’s analysis applying Article V(1)(e) under the New York Convention.¹¹⁷

ii. The *DRC, Inc.* Decision

The *Termorio* decision in 2007 follows the court’s approach applying the relevant provisions of the New York and Panama Conventions as one and the same.¹¹⁸ On March 28, 2011, the United States District Court for the District of Colombia handed down one of the latest decisions regarding the application and scope of both the New York and Panama Conventions.¹¹⁹ In *DRC*,

112. *Termorio S.A. E.S.P.*, 487 F.3d at 930.

113. *Id.*; New York Convention, *supra* note 13, art. V(1)(e).

114. *Termorio S.A. E.S.P.*, 487 F. 3d at 933.

115. *Id.*

116. *Id.*

117. *Id.*

118. See *RZS Holdings AVV v. DVSA Petroleos S.A.*, 598 F. Supp. 2d 762, 770 (E.D. Va. 2009); *aff’d sub nom RZS Holdings AVV v. DVSA Petroleo S.A.*, 383 F. App’x 281 (4th Cir. 2010); Louis M. Solomon, *Panama Convention and New York Convention Interpreted Consistently; Action To Enforce Arbitral Award Stayed Pending Litigation in Honduras*, CADWALADER INTERNATIONAL PRACTICE LAW BLOG (Jan. 4, 2012), <http://blog.internationalpractice.org/international-practice/panama-convention-and-new-york-convention-interpreted-consistently-action-to-enforce-arbitral-award-stayed-pending-litigation-in-honduras.html>; Ted Folkman, *Case of the Day: DRC, Inc. v. Republic of Honduras*, LETTERS BLOGATORY (Mar. 31, 2011), <http://lettersblogatory.com/2011/03/31/case-of-the-day-drc-inc-v-republic-of-honduras/>.

119. *DRC, Inc. v. Republic of Honduras*, 774 F. Supp. 2d 66, 67 (D.D.C. 2011).

Inc., a contractor brought an action in the United States to enforce a foreign arbitral award from Honduras against the State based on a construction contract formed under Honduran law.¹²⁰ An arbitral tribunal in Honduras awarded over \$51 million to the contractor, and he asked the Honduran Supreme Court to confirm his arbitral award against the Republic of Honduras.¹²¹ After he petitioned the Honduran court, the contractor also sought recognition and enforcement from a United States District Court.¹²²

The District Court held that because the contractor asked the Honduran Supreme Court to recognize and enforce the arbitration award before commencing his lawsuit in the United States, the District Court could properly stay the United States proceeding under the Panama Convention.¹²³ The court reasoned that both parties in the case had agreed that the Panama Convention applied even though both countries were signatories to the New York Convention as well.¹²⁴ The court went on to state that both Conventions were “intended to achieve the same results and their key provisions adopt the same standards. . . .”¹²⁵ It also enumerated that multiple articles of both Conventions are “substantively identical.”¹²⁶ Thus, while the parallel pending action in Honduras took place, the United States’ proceeding would not yet enforce the foreign arbitration award rendered in the Republic of Honduras due to the appropriate guarantees of the Panama Convention.¹²⁷

IV. THE EFFECTS OF SEPARATE TREATMENT: AN AVANT-GARDE EXPLORATION OF PANAMA CONVENTION TODAY

The textual interpretations and judicial applications of the Panama Convention show that tribunals and courts should treat it as a separate document from the New York Convention. Even if these two Conventions contain many of the same common goals in international arbitration, each Convention deserves distinct treatment allowing the documents to fulfill their different interpreta-

120. *Id.*

121. *Id.*

122. *Id.* at 67-68.

123. *Id.* at 76.

124. *Id.* at 71.

125. *Id.* at 71 (citing *Energy Transp., Ltd. v. M.V. San Sebastian*, 348 F. Supp. 2d 186, 198 (S.D.N.Y. 2004)).

126. *Id.* (citing *Int'l Ins. Co. v. Caja Nacional de Ahorro y Seguro*, 293 F.3d 392, 396 (7th Cir. 2002)).

127. *Id.* at 76.

tions and applications while also maintaining their proper scope. Thus, taking an avant-garde approach of separate treatment may prove to be exactly what the arbitral process needs to further the benefits of international arbitration for two reasons: the friction that results by applying the Panama and New York Conventions' underlying structures and texts as the same [A], and the confusion seen by United States courts in their identical application and implementation of the two Conventions [B].

A. Textual Friction of Whether Similar Treatment Is Favorable: A Better Understanding Of The True Differences Between The New York And Panama Conventions

Both the New York and Panama Conventions are pro-international commercial arbitration documents that attract attention and popularity.¹²⁸ However, the structure and text of the Panama Convention show that tribunals should treat it as its own document; in fact, friction results when it is treated equivalently to the New York Convention.¹²⁹ Comparing the thirteen articles found in the Panama Convention to the sixteen articles in the New York Convention, several similarities, but also many differences, materialize.¹³⁰ Thus, six important areas emerge for comparison within the structure of the documents, and all provide essential distinctions found between the instruments that favor separate treatment: (1) the commercial relationship requirement; (2) the limitation of annulments of international awards; (3) the defined legal relationships among the Conventions; (4) the meaning of foreign and non-domestic awards; (5) the applicability of reciprocity in arbitration awards; and (6) the application of the IACAC rules.

First, both the New York and Panama Conventions apply to arbitral decisions arising out of "commercial" relationships.¹³¹ The New York Convention's approach to the commercial relationship

128. See, e.g., Solomon, *supra* note 117; MIAMI INTERNATIONAL ARBITRATION SOCIETY, <http://miamiinternationalarbitration.com/en/events/details/17-the-new-york-european-and-panama-conventions-do-they-have-a-future.html> (last visited Jan. 15, 2012).

129. Hamilton, *supra* note 20, at 1106.

130. See generally Albert Jan van den Berg, *The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?*, 5 *ARB. INT'L* 214, 229 (1989), available at <http://www.newyorkconvention.org/publications/full-text-publications/full-text-publications/the-new-york-convention-1958-and-panama-convention-1975-redundancy-or-compatibility>.

131. BORN, *supra* note 49, at 2361.

requirement applies to both the arbitral awards and agreements.¹³² However, the Panama Convention provides slightly different language, stating that “[a]n agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a *commercial transaction* is valid.”¹³³ This language is different in the Panama Convention than under the New York Convention. In fact, scholars have made clear that no generally accepted definition of the word “commercial” exists in the context of international arbitrations.¹³⁴ Nonetheless, the “commercial transaction” requirement still applies both to arbitration agreements and awards if the parties’ underlying arbitration agreement falls under the Panama Convention’s scope.¹³⁵ Therefore, the term “commercial” appears to encompass similar meanings under both the Conventions despite disparities in sentence structure, language, and definition.

Second, the Panama and New York Conventions apply similar treatment in the annulment of international awards.¹³⁶ The drafting history of the New York Convention shows that the drafters did not expressly contemplate issues of defining the standards of non-recognition for an annulled award,¹³⁷ but they surely intended to limit the chances of parties abusing the arbitration system through multiple annulment proceedings.¹³⁸ In its current text, Article V of the New York Convention shows that a party may refuse to enforce an award, but only if the resisting party establishes one of the encompassing conditions: five under Section I or two under Section II,¹³⁹ which also encompasses the “public policy” exemption in avoiding enforcement of an arbitral award.¹⁴⁰ Article V of the Panama Convention also provides treatment for the annulment of awards in similar language, and scholars often view it as paralleling Article V of the New York Convention.¹⁴¹ It

132. *Id.* (quoting the New York Convention, *supra* note 13, art. I(3) (“[Any contracting State may also] declare that it will apply the Convention only to differences arising out of legal *relationships*, whether contractual or not, which are considered as *commercial* under the national law of the State making such declaration.”) (emphasis added)).

133. Panama Convention, *supra* note 15, art. I (emphasis added).

134. HULEATT-JAMES & GOULD, *supra* note 11, at 4-5.

135. BORN, *supra* note 49, at 2362.

136. *See id.* at 2117.

137. GEORGIOS PETROCHILOS, *PROCEDURAL LAW IN INTERNATIONAL ARBITRATION* 336 (2004).

138. BORN, *supra* note 49, at 2406.

139. New York Convention, *supra* note 13, art. V.

140. Jackson, *supra* note 50, at 91.

141. BORN, *supra* note 49, at 2339.

also provides seven grounds divided in two sections where an award can be annulled.¹⁴² These texts of the Conventions show that if a party desires an annulment action, it can only bring the claim at the place of the arbitral *situs* or under the law of the state where the award was made.¹⁴³

Because the Panama Convention encompasses only the regional scope of the American states, the actual amount of annulled awards is more likely to be less than under the New York Convention.¹⁴⁴ In fact, an impressive number of courts routinely look to the New York Convention's Article V, which is popular because it does not impose limits for the annulment of arbitral awards.¹⁴⁵ However, under the Panama Convention, if a tribunal issues an award in the United States, it has the effect equal to a judgment. Thus, this key feature emerges to make the Panama Convention unique:¹⁴⁶ the Convention does not contain any article discussing the enforcement of arbitration agreements.¹⁴⁷ An arbitral award under the Panama Convention has great power and requires execution rather than enforcement.¹⁴⁸ Thus, while the language and treatment of the annulment of awards may be similar, the regional application of the Panama Convention to the Americas can affect annulment actions differently than the vast scope of the New York Convention.

Third, both the New York and Panama Conventions apply in varying degrees to legal relationships.¹⁴⁹ Article II of the New

142. Panama Convention, *supra* note 15, art. 5.

143. BORN, *supra* note 49, at 2417 (citing *Unionamerica Ins. Co. v. Allstate Ins. Co.*, 302 F. Supp. 2d 865, 868-69 (N.D. Ill. 2004); *Banco de Seguros del Estado v. Mutual Marine Offices, Inc.*, 230 F. Supp. 2d 362, 371-75 (S.D.N.Y. 2002), *aff'd*, 344 F.3d 255, 257 (2d Cir. 2003)).

144. Jackson, *supra* note 50, at 93; *see* UNCITRAL, *supra* note 14 (showing 146 party countries), *and* Inter-American Convention on International Commercial Arbitration, 1975, AMERICAN ARBITRATION ASSOCIATION (2007) (showing 19 total signatures and ratifications), <http://www.adr.org/sp.asp?id=31620>.

145. *See, e.g.*, *Yusuf Ahmed Alghanim & Sons WLL v. Toys "R" Us, Inc.*, 126 F.3d 15, 22 (2d Cir. 1997); *Karaha Bodas Co. v. Perusahaan Petrambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 368 (5th Cir. 2003); *Int'l Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera*, 745 F. Supp. 172, 181 (S.D.N.Y. 1990).

146. Hamilton, *supra* note 20, at 1117.

147. HULEATT-JAMES & GOULD, *supra* note 11, at 20.

148. Panama Convention, *supra* note 15, arts. V-VI (providing first, the only grounds for refusing to recognize and enforce an award and second, the ability of a competent authority to delay the execution of the award); *see* Hamilton, *supra* note 20, at 1106 (showing that "the Panama Convention does not contain formal requirements for obtaining the recognition and enforcement of a foreign arbitral award. . .").

149. BORN, *supra* note 49, at 2363.

York Convention states that “[e]ach Contracting State shall . . . submit to arbitration all or any differences which have arisen or which may arise between them in respect of a *defined legal relationship*, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”¹⁵⁰ The requirement from this Article shows that an award may only be enforceable if it arises from a “defined legal relationship.”¹⁵¹ The legal relationship’s textual analysis under the Panama Convention applies in a different sense. Article I only extends to “commercial transactions” and does not specifically provide a “defined legal relationship” like in the New York Convention.¹⁵² However, because the Panama Convention favors a pro-enforcement strategy within its Contracting States even for non-contractual claims, it should not be confined to the strict “legal relationship” definition found in Article II of the New York Convention.¹⁵³ Therefore, the distinct and separate use of the legal relationship standard under each Convention favors independent treatment.

Fourth, each Convention takes a different territorial approach. The New York Convention states in its title that it applies to “foreign” and “non-domestic awards.”¹⁵⁴ The Panama Convention’s title, on the other hand, applies to “international commercial arbitration” disputes.¹⁵⁵ In the United States, the FAA adopted the New York Convention approach in order to have uniform application.¹⁵⁶ It also evidenced that the Panama Convention was to “be interpreted as conferring the same protections as, the New York Convention.”¹⁵⁷ However, outside of the United States, the question remains whether courts should adopt the New York Convention approach or the Panama Convention approach to territoriality if the state is a member to both Conventions.¹⁵⁸ Because both Conventions handle the territorial functions differently, this area also favors separate application.

150. New York Convention, *supra* note 13, art. II(1).

151. *Id.*; BORN, *supra* note 49, at 2363.

152. Compare Panama Convention, *supra* note 15, art. I, with New York Convention, *supra* note 13, art. II(1).

153. BORN, *supra* note 49, at 2363.

154. New York Convention, *supra* note 13.

155. Panama Convention, *supra* note 15.

156. FAA, *supra* note 53, § 304.

157. BORN, *supra* note 49, at 2385.

158. See BORN, *supra* note 49, at 2384, (stating that “[i]t is unclear . . . whether the New York Convention’s territorial application to “foreign” awards or the European Convention’s approach to awards between parties from different Contracting States should be adopted.”).

Fifth, the reciprocity provisions between the two Conventions call for separate treatment. Reciprocity encompasses the idea of generally returning one's behavior, or a kind of tit-for-tat strategy, that provides for overall cooperation even when no authority exists on the matter.¹⁵⁹ While reciprocity contains important implications in international law in general, it also plays an important role in international arbitration.¹⁶⁰ The New York Convention's reciprocity provisions can be found in Articles I(3) and XIV.¹⁶¹ However, the Panama Convention contains no reciprocity provision in its text.¹⁶² In fact, there is no inclination that the drafters of the Panama Convention even implied such a provision in the drafting history.¹⁶³ While the New York Convention contains two reciprocity provisions, the regional Panama Convention is void of any similar language.¹⁶⁴ In fact, renowned Professor Albert van den Berg remarked under his New York Convention "Draft Proposal" to eliminate the reciprocity requirement in order to achieve a more modern, uniform approach to arbitration that would hopefully narrow the gaps between the two Conventions.¹⁶⁵ Without even an inference of a reciprocity provision, the Panama Convention should be entitled to its own treatment by tribunals and courts aside from the New York Convention.

Sixth, the application of the IACAC rules displays another area of variance between the New York and Panama Conventions. Each Convention incorporates important procedural rules guaranteed in the arbitration process.¹⁶⁶ However, the applicability of the

159. Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93, 93 (2003).

160. BORN, *supra* note 49, at 2389.

161. *See* New York Convention, *supra* note 13, Art. I(3) (stating that "any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting state," *and* New York Convention Art. XIV (stating that "[a] Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.").

162. BORN, *supra* note 49, at 2396.

163. *Id.*

164. *See supra* notes 160-61.

165. *See* Alert Jan van den Berg, *Striving for Uniform Interpretation*, in ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION 41, 42 (U.N. ed., 1999); *see also* G.A. Res., 61/33, ¶ 5, U.N. Doc. A/61/453 (Dec. 18, 2006) (showing the importance of promoting harmony and uniformity in international commercial arbitration).

166. *Compare* the Panama Convention, *supra* note 15, Art. III (incorporating the IACAC Rules of Procedure) *with* the New York Convention, *supra* note 13, Art. III (incorporating the rules of procedure in accordance with the territory where the award is relied upon).

IACAC rules for the Panama Convention differs from the other procedural rules under the New York Convention.¹⁶⁷ In fact, Article III of the Panama Convention expressly provides for mandatory use of the IACAC Rules when there is no agreement as to which procedural matters to apply.¹⁶⁸ However, even with such comparisons, a close inspection of the texts reveals differences that call for disparity and friction in application.¹⁶⁹ While the two Conventions embody pro-arbitration ideals, their scopes differ: from a “universal”¹⁷⁰ influence among all of the countries of the New York Convention to the regional regime of the Panama Convention.

B. Judicial Confusion: A Problematic Way To Achieve Arbitral Uniformity

The text and structural differences between the Panama and New York Conventions can cause friction for counsel and tribunals in arbitrations.¹⁷¹ However, United States courts should also strongly question whether the similar treatment of the New York and Panama Conventions is actually a favorable alternative for American jurisprudence. Today, courts routinely apply the two Conventions identically when arbitral disputes cross over into the judicial realm.¹⁷² A quick or decisive leap to the same application can lead to a further confused misunderstanding of even the most basic guiding principles underlying each of the separate documents.¹⁷³ In fact, confusion between the New York and Panama

167. van den Berg, *supra* note 129, at 229.

168. Panama Convention, *supra* note 15, Art. III; see NIGEL BLACKABY, DAVID LINDSEY & ALESSANDRO SPINILLO *Overview of Regional Developments*, in INTERNATIONAL ARBITRATION IN LATIN AMERICA 1, 6 (2002); see also *Anderra Energy Corp. v. SAPET Dev. Corp.*, 22 Y.B. Com. Arb. 1077, 1085 (N.D. Tex 1997).

169. Hamilton, *supra* note 20, at 1106 (showing that Professor van den Berg queried whether the two Conventions could “co-exist” together).

170. BORN, *supra* note 49, at 2389.

171. Hamilton, *supra* note 20, at 1106.

172. *Termorio S.A. E.S.P. v. Elecantra S.P.*, 487 F.3d 928, 933 (D.C. Cir. 2007); *Int'l Ins. Co. v. Caja Nacional de Ahorro y Seguro*, 293 F.3d 392, 396 (7th Cir. 2002); *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994); *Energy Transp. Ltd. v. M.V. San Sebastian*, 348 F. Supp. 2d 186, 198 (S.D.N.Y. 2004); *Empresa Constructora Contex Ltd. v. Iseki, Inc.*, 106 F. Supp. 1020, 1024 (S.D. Cal. 2000); *Progressive Cas. Ins. v. C.A. Reaseguradora Nacional de Venezuela*, 802 F. Supp. 1069, 1074-75 (S.D.N.Y. 1992).

173. See, e.g., S.I. Strong, *International Arbitration and the Republic of Colombia: Commercial, Comparative and Constitutional Concerns from a U.S. Perspective*, 22 DUKE J. COMP. & INT'L L. 47, 51 n.27 (2011); *contra* Hamilton, *supra* note 20, at 1106 (quoting Professor van den Berg that “no major conflict between both Conventions would seem to arise.”).

Conventions hinders the very uniformity that arbitration seeks.¹⁷⁴ Therefore, courts should also treat each Convention as its own individual instrument that encompasses the ideals of its drafters and the values of a peaceful, international dispute resolution system.

Both the *Termorio* and *DRC, Inc.* decisions exemplify the judicial problems of interpretation and application of the two Conventions as the same. First, the 2007 *Termorio* decision showed that a United States court applied the New York Convention concerning a Colombian court annulment of an arbitral award on the grounds that the decision to agree to arbitrate violated local Colombian public policy rules.¹⁷⁵ Second, the 2011 *DRC, Inc.* case showed that the Panama Convention applied in a Honduran construction contract case to avoid duplicative litigation actions in the United States and Honduras.¹⁷⁶ Looking to these two cases, one can see that even the most apt of judges can confuse when to apply each Convention; every country involved in these disputes have ratified or accepted both of the Conventions.¹⁷⁷ Thus, one must wonder why one United States court chose to apply the New York Convention and the other opted to apply the Panama Convention.

The *Termorio* decision exemplifies how United States courts often use the New York Convention for its rulings.¹⁷⁸ Within the first two paragraphs of the decision, Senior Circuit Judge Edwards cited to both the FAA and the New York Convention without even mentioning the Panama Convention.¹⁷⁹ While the Appellate Court does go on to discuss the applicability of each Convention in its analysis, it ultimately sides with the lower court, which decided to not even discuss the applicability of the Panama Convention in the dispute because its application was

174. See G.A. Res. 61/33, *supra* note 164, ¶ 5.

175. *Termorio*, 487 F.3d at 930.

176. *DRC, Inc. v. Republic of Honduras*, 774 F. Supp. 2d 66, 70-71 (D.D.C. 2011).

177. The countries involved in the *Termorio* decision are the United States and Columbia; the countries involved in the *DRC, Inc.* decision are the United States and Honduras. For a complete list of member countries to the New York and Panama Conventions, see *Status – 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html; see also *Inter-American Convention on International Commercial Arbitration*, 1975, AMERICAN ARBITRATION ASSOCIATION (2007), <http://www.adr.org/sp.asp?id=31620> (showing 19 total signatures and ratifications).

178. See, e.g., *Yusuf*, *supra* note 144, at 18-19; *Karaha Bodas*, *supra* note 144, at 287-88; *Telenor Mobile Comm. AS v. Storm LLC*, 584 F.3d 396, 405 (2d Cir. 2009).

179. See *Termorio*, 487 F.3d at 929.

“unnecessary.”¹⁸⁰ The Appellate Court took another approach, but still quickly dismissed the Panama Convention for slightly different reasons.¹⁸¹ The court did not necessarily resolve the lower court’s decision of whether the codification of the Panama Convention into United States law incorporated the New York Convention; however, it did go on to state that the relevant provisions between the two Conventions are “substantively identical.”¹⁸² With that decisive step, and because the parties did not previously object to the lower court’s decision to use the New York Convention, the Appellate Court decided to solely reach its decision without the Panama Convention.¹⁸³

Interestingly enough, the *Termorio* case shows that, despite the United States’ adherence to the latter set forth in Chapter III of the FAA, courts can still choose to apply to the New York Convention over the Panama Convention when both apply.¹⁸⁴ The reason why regional arbitral Conventions exist is to incorporate arbitration’s overall goals while still representing the ideals of each nation involved.¹⁸⁵ The Panama Convention incorporates the history of a long mistrusting nature of Latin American countries with the recognized benefits of international arbitration.¹⁸⁶ Thus, although international arbitration’s goal may be to achieve greater consistency, consistency is lost when courts continue to deem two separate Conventions as the same instrument.

Further, the *DRC, Inc.* decision also shows the confusion that courts have in applying the two international arbitration Conventions.¹⁸⁷ In that case, the court came to the opposite conclusion as the *Termorio* court and applied the Panama Convention over the New York Convention. Within the first sentence of its Legal Standard discussion, the *DRC, Inc.* court abruptly and decisively used the Panama Convention where the *Termorio* court seemed to take

180. *Id.* at 933 (stating that the Panama Convention “incorporates by reference the relevant provisions of the New York Convention. . . .” However, the Panama Convention never once mentions nor references the New York Convention in its actual text.).

181. *Id.*

182. *Id.*

183. *Id.*

184. *But see* Nicor Int’l. Corp. v. El Paso Corp., 292 F. Supp. 2d 1357, 1371 (S.D. Fla. 2003) (citing 9 U.S.C. § 305).

185. *See generally* European Convention, *supra* note 15; *see also* Moscow Convention, *supra* note 15.

186. HULEATT-JAMES & GOULD, *supra* note 11, at 20.

187. *See, e.g.,* Strong, *supra* note 174, at 51 n.27.

the opposite approach in applying the New York Convention.¹⁸⁸ In *DRC, Inc.*, although the parties agreed that the Panama Convention applied, the court still went further in a brief analysis of why it applied the Panama Convention over the New York Convention.¹⁸⁹ In its analysis, even though the court used substantially similar reasoning as the *Termorio* court, it came to the opposite conclusion in deciding which Convention to use.¹⁹⁰ Indeed, District Court Judge Friedman quoted that “[b]oth conventions . . . are intended to achieve the same results . . . [and] are substantively identical.”¹⁹¹ However, *DRC, Inc.* and *Termorio* both show how judicial courts are confused: in fact, federal courts will never be able to achieve a greater uniformity of results under the two Conventions if they continue to use them identically.¹⁹² Because courts use the Conventions inconsistently but also interchangeably, decisions may overlook, disregard, or worse, never even taken into account some of their key differences.¹⁹³

Although the two Conventions do share many arbitral ideals in common, the *Termorio* and *DRC, Inc.* decisions show the danger that future courts may never even reach the Panama Convention in their judgments despite the FAA, Inter-American Convention, and other statutory instruments¹⁹⁴ that support a regional Convention’s use. The New York Convention is one of the most essential arbitral instruments for the recognition and enforcement of international arbitral awards.¹⁹⁵ However, even despite the prominence of the New York Convention, courts should still recognize the essential differences that it has when it overlaps with the Pan-

188. *Compare* *DRC, Inc. v. Republic of Honduras*, 774 F. Supp. 2d 66, 71 (D.D.C. 2011), *with* *Termorio*, 487 F.3d at 933.

189. *DRC, Inc.*, at 71.

190. *Id.*

191. *Id.* (citing *Energy Transp. Ltd. v. M.V. San Sebastian*, 348 F. Supp. 2d 186, 198 (S.D.N.Y. 2004); *Int’l Ins. Co. v. Caja Nacional de Ahorro y Seguro*, 293 F. 3d 392, 396 (7th Cir. 2002)).

192. *Cf. Energy Transp. Ltd.*, 348 F. Supp. 2d at 198 (quoting H.R. Rep. No. 501, 101st Cong., 2d Sess. 4 (1990), *reprinted in* 1990 U.S.C.A.N. 675, 678); *Inter-American Convention on International Commercial Arbitration*, NEXT CLIENT (2011), <http://www.lawlisting.com/alternative-dispute-resolution/inter-american-convention-international-commercial-arbitration/show-article> (showing that using the Panama Convention may result in a more favorable outcome in certain circumstances over using the New York Convention).

193. *See supra* Part IV.A.

194. *See, e.g.*, 9 U.S.C. § 302 (2006).

195. BORN, *supra* note 49, at 2334; HULEATT-JAMES & GOULD, *supra* note 11, at 18-19; KEVIN C. KENNEDY, *Invalidity of Foreign Arbitration Agreement or Arbitral Award*, § 3, *in* AM. JUR. PROOF OF FACTS (3d ed., 1995) (last updated June 2011).

ama Convention.¹⁹⁶ However, depending on the amount in controversy, applying the Panama Convention, in place of the New York Convention, could result in substantially increased administrative costs.¹⁹⁷ The regional character of the Panama Convention helps incorporate the historical approaches to international arbitration from not only a United States perspective but also from a Latin American standpoint.¹⁹⁸ Thus, the recent trend in United States judicial decisions to handle the two Conventions identically illustrates the vital importance of having separate treatment for the two Conventions.

The legislative histories, textual differences, and judicial application between the two documents show that tribunals and courts should, at the very least, compare the Panama and New York Conventions instead of treating them identically. Due to the differences between the two documents, the risks of friction, disparity, and confusion may further develop in the arbitral processes over time. Thus, in order for federal courts and arbitral tribunals to truly achieve “greater uniformity,”¹⁹⁹ they should apply the New York and Panama Conventions separately even if they are “intended to achieve the same result.”²⁰⁰

V. CONCLUSION: THE PANAMA CONVENTION DESERVES ITS OWN SEPARATE TREATMENT

The Panama and New York Conventions are two of America’s leading and best-known international arbitration tools. In order to avoid the friction and confusion that can develop by applying the treaties as one and the same, tribunals and courts should carefully interpret each Convention. Although some of the Conventions’ differences may appear to be inconsequential, their overall, cumulative effect coupled with particular problems in application show that the Panama Convention warrants its own application. While many key provisions in both Conventions remain similar, the conventions are not *per se* identical. In some

196. See *supra* Part IV.A.

197. *Inter-American Convention on International Commercial Arbitration*, NEXT CLIENT, (2012) <http://www.lawlisting.com/alternative-dispute-resolution/inter-american-convention-international-commercial-arbitration/show-article> (last visited Mar. 12, 2012).

198. Compare Rinker, *supra* note 42, at 480, with Bishop & Etri, *supra* note 20, at 11-16.

199. *Energy Transp. Ltd. v. M.V. San Sebastian*, 348 F. Supp. 2d 186, 198 (S.D.N.Y. 2004).

200. *DRC, Inc. v. Republic of Honduras*, 774 F. Supp. 2d 66, 71 (D.D.C. 2011).

circumstances, such differences may even form a strong basis to favor application of one treaty over the other.²⁰¹ Although courts and tribunals want to achieve greater uniformity throughout the field of international arbitration, the two Conventions' variances must be taken into consideration in order to promote the fairest and best outcomes possible.

With these reflections, the applicability and scope of the Panama Convention carries great weight in international commercial arbitration. The Convention's appeal embodies the historical and legal structures of arbitration taken by both Latin America and the United States. Its text helps transform the overall inter-American arbitration process into a living, active document that can be used in a vast array of arbitrations. However, the United States' trend of treating the Panama Convention identically to the New York Convention raises alarm: not only do the Conventions contain various important textual differences, they also confuse United States courts and the arbitral developments in case law. Thus, the Panama Convention not only deserves but should require its own doctrinal distinctiveness in order to best continue the principles appreciated by all of its members.

201. Next Client, *supra* note 198.