OVERVIEW OF ARBITRATION IN LATIN AMERICA

Topical Issues in International Arbitration

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OVERVIEW OF ARBITRATION IN LATIN AMERICA

I. Introduction

This paper is intended to provide a general overview of the development of international commercial arbitration in five Latin American countries -- Brazil, Venezuela, Mexico, Chile, and Argentina. The Latin American attitude towards arbitration has fluctuated over the centuries. At times, arbitration, in lieu of armed conflict, has been used in Latin American countries as a means to resolve disputes between nations. However, the use of arbitration to resolve domestic and international commercial disputes historically has been less favored. As political and socio-economic changes have evolved, the use and popularity of private international arbitration have correspondingly ebbed and flowed, but have never attained the levels of acceptance as seen in some other regions of the world.

As discussed herein, the adoption of international conventions regarding the recognition and enforcement of foreign arbitral agreements and resulting awards (i.e., the New York Convention of 1958 and the Panama Convention of 1970), as well as the passage of modern arbitration laws in various Latin American countries, have erected a structure within which arbitration may function as a viable means for the resolution of international commercial disputes. Nevertheless, despite the recent arrival of this pro-arbitration legal environment, it is submitted that attitudes in general within Latin America may not be as accepting of arbitration as these new treaties and laws would suggest. These lingering attitudes may be described as ones of suspicion, if not outright distrust, of arbitration as a fair and just way of resolving disputes. Such attitudes are rooted in history and manifested in the constitutions and domestic laws of
various Latin American countries. When viewed in their historical context, these residual attitudes concerning the efficacy of arbitration as a means to resolve disputes may not seem surprising. Some of these attitudes and their historical underpinnings will be addressed in this paper.

It may fairly be said that the British and American common law experiences with arbitration began with similar attitudes of suspicion and distrust. However, over time, those attitudes have largely evaporated and the treaties and laws of both Great Britain and the United States have evolved to embrace arbitration, both in theory and practice, as a favored mechanism for the resolution of domestic and international disputes. As upward trends continue to multiply exponentially in the areas of free trade, globalization and cross-border transactions, international arbitration, if for no other reason than by default alone, has grown in use and stature as a preferred vehicle for the resolution of international commercial disputes. Latin America as a major player in the world of international commerce has seemingly made great strides towards the acceptance of arbitration of international commercial disputes. However, only time will tell if the last visages of anti-arbitration sentiments in Latin America have given way to the full acceptance of international arbitration. Until then, it is submitted that prior to doing business in Latin America, one must critically examine the viability of the arbitration of disputes under the laws of any particular Latin American country.
II. **Arbitration of the Venezuela/Guiana Border Dispute – 100 Years in the Making**

Historical events in the 19th and 20th centuries have contributed to the arbitration culture in Latin America. One of the more infamous events was the 1899 arbitration to resolve the border dispute between Venezuela and what was then known as British Guiana. This dispute centered on the control of the mineral-rich territory known as Essequibo.

In 1834, the government of Great Britain commissioned Robert Schomburgk to delineate the boundary between Venezuela and British Guiana. The resulting “Schomburgk Line” claimed an additional 30,000 square miles for British Guiana. In 1841, Venezuela protested this action as alleged British encroachment onto Venezuelan territory. After gold was discovered in the disputed Essequibo territory, Great Britain claimed an additional 33,000 square miles. Not surprisingly, the two countries could not resolve the dispute. Eventually, Venezuela broke diplomatic relations with Great Britain, and petitioned the United States for assistance.

In 1895, in response to a request from then President Cleveland, the United States Congress unanimously passed a measure authorizing the appointment of a boundary commission to resolve the dispute between Great Britain and Venezuela. This precipitated an agreement to submit the dispute to arbitration, and the execution of the Treaty of Washington stating that the outcome of the arbitration will be a “full, perfect, and final settlement of the dispute.”

Each country selected two judges to serve as arbitrators. Great Britain nominated Chief Justice Lord Herschell and Lord Justice Richard Henn Collins. Venezuela nominated Melville Fuller, the Chief Justice of the U.S. Supreme Court, and David Brewer, another U.S. Supreme Court Justice. The four party-appointed arbitrators chose a Russian professor, Frederic de Martens, to serve as President of the Arbitral Tribunal.
Venezuela chose four Americans as counsel in the arbitration, including General Benjamin Harrison, the twenty-third President of the United States, Severo Mallet-Prevost, Gen. Benjamin T. Tracy, and James Russell Soley. Great Britain was represented in the arbitration by Sir Richard E. Webster, Sir Robert T. Reid, G.R. Askwith and Mr. Rowlatt.5

The arbitration took place in Paris in 1899 and the Tribunal issued its ruling on October 2, 1899. The ruling followed the expanded Schomburgk Line, except for a slight deviation awarding the mouth of the Orinoco River and a region of about 5,000 square miles in the southeastern headwaters of the Orinoco River to Venezuela. The ruling offered no rationale. The result of the arbitration was that Great Britain received almost ninety percent of the territory in dispute.6

Despite the agreement that the outcome would be a “full, final and perfect settlement of the dispute,” the Venezuelans were particularly embittered by the result. The controversy was further ignited when Judge Otto Schoenrich published a memorandum concerning the Venezuela-British Guiana Boundary Arbitration in the American Journal of International Law in 1949. Severo Mallet-Prevost, one of the counsel for Venezuela in the arbitration, had left the memorandum with his law partner, Judge Schoenrich, with instructions that it was to be published after his death at the Judge’s discretion.

The memorandum detailed Mr. Mallet-Prevost’s belief that the Tribunal’s decision had rested on international politics, not the legitimacy of the countries’ claims to the disputed territory. The most inflammatory part of Mr. Mallet-Prevost’s memorandum recounted an ex parte conversation he had with the two American arbitrators, Justices Brewer and Fuller. Specifically, the two American arbitrators advised Mr. Mallet-Prevost that Mr. Martens, the
President of the Tribunal, had informed them that Lord Russell and Lord Collins, the British arbitrators, wanted to decide the matter along the Schomburgk Line, which would give British Guiana control of all of the territory in dispute, including the coveted mouth of the Orinoco River. However, Mr. Martens desired to issue a unanimous decision. In order to achieve that goal, a compromise was proposed that would give Venezuela control over the mouth of the Orinoco River and the surrounding 5,000 square miles. If the American arbitrators did not agree with this compromise, Mr. Martens stated that he would side with the British arbitrators and set the boundary at the Schomburgk Line. As Mr. Martens’ vote would create a majority opinion, the American arbitrators were faced with the option of agreeing to the compromise or filing a minority opinion.

This dilemma led the American arbitrators to contact Mr. Mallet-Prevost. According to his memorandum, Mr. Mallet-Prevost believed that the British arbitrators and Mr. Martens had reached their agreement during a two-week holiday that did not include the American arbitrators. The American counsel acting on behalf of Venezuela believed that on the merits Venezuela deserved more of the disputed territory. General Harrison was reportedly incensed over this development. However, feeling the pressure from the three united arbitrators and recognizing the value to Venezuela of controlling the mouth of the Orinoco River and the surrounding territory, the American counsel felt they had no choice other than to accept the proffered compromise. Accordingly, they directed Justices Brewer and Fuller to agree to the deal.⁷

Some contemporary commentators disputed Mr. Mallet-Prevost’s controversial account of the deliberations.⁸ However, this 1949 “deathbed confessional” reignited the century-old boundary dispute. In 1962, Venezuela formally raised questions concerning the
Venezuela/Guiana border with the United Nations. (In 1966, British Guiana received its independence and became known as Guyana). In 1989, the United Nations named a mediator to the dispute.

In 1999, the 100-year anniversary of the decision, the Guyana Foreign Ministry issued a statement upholding its position, and the Venezuelan Foreign Minister said it considered the arbitration to be “null and an irritant.” To this day, Venezuela considers itself to have been “illegally stripped” of the territory in dispute, Essequibo.

The Essequibo arbitration is just one of several historical, political and socioeconomic events that have contributed to Latin America’s hostility toward arbitration. This paper will, however, examine recent developments in several Latin American countries that are designed to promote the use of international arbitrations. These developments will likely encourage foreign companies to do business in Latin America.

III. A Brief Overview of Arbitration Attitudes in The United States

In the early 1900’s, the United States was hostile towards arbitration. However, this attitude began to change in 1925 when the United States Congress enacted The United States Arbitration Act, 9 U.S.C. §§ 1-16, which today is commonly referred to as the Federal Arbitration Act (FAA). Congress enacted the FAA “to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate” and to put arbitration provisions “upon the same footing as other contracts.”

Throughout the second-half of the 20th Century, the American attitude has shifted firmly towards a pro-arbitration stance through legislation and a series of decisions from the U.S. Supreme Court. Specifically, in 1970, Congress amended the FAA by adding Chapter 2, which
provides that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the “New York Convention”) shall be enforced in United States courts. In 1990, Congress again amended the FAA to add Chapter 3, which provides that the Inter-American Convention on International Commercial Arbitration (the “Panama Convention”) shall be enforced in United States courts. The U.S. Supreme Court has continued to issue pro-arbitration opinions interpreting various sections of the FAA. As a result, absent unique and limited exceptions, a foreign arbitral award will most likely be enforced in the courts of the United States.

IV. Arbitration in Latin America

A. Historical Latin American Attitude Toward Arbitration

At times, some Latin American countries have opposed arbitration of international commercial disputes. In addition to events like the Venezuelan/British Guiana arbitration, this attitude was fostered, in part, by so-called “colonialism and gunboat diplomacy.” For example, in 1838 and 1861, France used military action to enforce French citizens’ private claims against the Mexican government. These types of events contributed to the development of what is known as the “Calvo Doctrine.”

The Calvo Doctrine espouses that “governments have a right to be free of foreign intervention of any sort and aliens are not entitled to rights and privileges that are not held by the nationals of a given country.” In addition to “colonialism and gunboat diplomacy,” the development of the Calvo Doctrine has been attributed to large foreign-owned companies exploiting the natural resources of smaller and less politically powerful countries in Latin America. Foreigners doing business in a country adhering to the Calvo Doctrine could only
enforce their legal rights through the local court system. The result was to preclude the use of arbitration to resolve international commercial disputes.

In Latin America, “Calvo Clauses,” small “summations of the Calvo Doctrine,” often appeared in constitutions and treaties, and were typically required in contracts with foreign parties. Today, the popularity of the Calvo Doctrine is declining. In fact, many Latin American countries have rejected the Calvo Doctrine by signing treaties and passing laws expressly permitting alternative methods for resolving legal disputes.16

B. Factors Influencing Latin American Attitudes Toward Arbitration.

As Latin American countries have increasingly embraced free market economics, democracy and foreign investment, many have adopted treaties and passed new laws to create a legal system that would encourage foreign investment. In order to participate in the international commercial community, Latin American countries could not maintain isolationist policies, nor afford to be behind the trend in international commercial arbitration.17

Oil, gas, and other natural resources attract foreign investment. Since the discovery of oil in Latin American in the early 1900’s, Latin American countries have become some of the leading producers and suppliers of oil and gas in the global market. Many investors prefer Latin America to the Middle East because of its educated workforce and relative political stability.18 However, before entering into a contractual relationship with a Latin American party, a foreign company must consider the risks associated with the resolution of disputes under foreign laws in foreign courts.19

International investors may hesitate to contract with a foreign party if a dispute may only be resolved in the other party’s unfamiliar, and perhaps unfriendly, court system.20 International
arbitration is believed to solve many of the problems concerning unfamiliar foreign litigation and assuages international investors’ fears by providing a familiar and easily understood method of resolving disputes. International investors are likely to feel safer investing in a county that recognizes and enforces arbitral awards. However, many of the arbitration laws adopted by Latin America countries are new and have not been fully subjected to review by the courts of those nations. Accordingly, it is unclear whether arbitral awards will be enforced in Latin American countries with the same regularity that they are enforced in the United States.

C. Two Important Steps in the Recognition and Enforcement of Foreign Arbitral Awards in Latin America: The New York and Panama Conventions

1. The New York Convention

The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Award was a fundamental step in the history of international commercial arbitration and has been described as “the single most important pillar on which the edifice of international arbitration rests.” The New York Convention is founded on two key principles. First, all contracting states agree that their courts will defer their own jurisdiction in favor of a valid arbitration clause. Second, contracting states must recognize and enforce any valid foreign arbitral awards without reviewing the underlying merits of the arbitral dispute.

Because the New York Convention clashed with the Calvo Doctrine, most Latin American countries initially did not adopt it. The New York Convention also conflicted with the two-stage arbitration process used in most of the Latin American countries. In addition to the existence of an arbitration agreement, the “cláusula compromisoria,” a post-dispute binding submission agreement, the “compromiso,” had to be completed. The compromiso would typically include a “precise description of the dispute submitted for arbitration, and the identity
of the arbitrators, the parties and their representatives.” If a party refused to agree to the compromiso, the laws of some Latin American countries provided for local court jurisdiction to resolve the dispute, despite the existence of the arbitration clause. The New York Convention does not recognize the distinction between the arbitration agreement (cláusula compromisoria) and the submission agreement (compromiso).25


2. The Panama Convention

Most Latin American countries initially promoted the use of international arbitration through the adoption of the Inter-American Convention on Commercial Arbitration of 1975, also known as the “Panama Convention.”27 The Panama Convention was promulgated under the Organization of American States in 1975, and shared many of the same objectives of the New York Convention.28 In this regard, Article I of the Panama Convention provides that a signatory country must recognize the validity of an arbitration agreement for the resolution of commercial disputes.29 Article IV further provides that a signatory to the Panama Convention must
recognize and enforce foreign arbitral awards from other courts as it would a final judgment in its own courts, subject to the limited exceptions of Article V based on procedural defects or public policy.  


The Inter-American Commercial Arbitration Commission ("IACAC"), which is related to the Organization of American States, was founded the same year as the Panama Convention. IACAC enacted arbitral rules based on the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Under the Panama Convention, the IACAC rules apply to any arbitration agreement within the scope of the Convention, unless the parties expressly provide for the use of different arbitral rules.

D. New Commercial Arbitration Laws in Latin America  

In addition to adopting the New York and Panama Conventions, many Latin American countries have recently adopted laws designed to further promote the use of international arbitration. For example, in 1985, the UNCITRAL Model Law on International Commercial Arbitration was published. While the New York and Panama Conventions provide for the recognition and enforcement of international arbitration awards, the Model Law provides rules to
govern the mechanics of an international commercial arbitration such as the pre-arbitration process and the conduct of arbitral proceedings. In this respect, the Model Law is akin to the United State Federal Arbitration Act.

Several Latin American countries have adopted the Model Law, including Mexico in 1993, Guatemala in 1995 and Peru in 1996. The arbitration laws of Chile and Venezuela are based in part on the Model Law. Additionally, the draft arbitration law in Argentina is based on the Model Law. Other countries have adopted modern arbitral laws that are not based on the Model Law, including, Brazil in 1996, Colombia in 1996, and Costa Rica in 1997.

In 2002, the four Member States of the Mercado Comun del Cono Sur -- Brazil, Argentina, Paraguay and Uruguay -- adopted the Mercosur Agreement on International Commercial Arbitration. In general, the Mercosur Agreement, which has also been extended to associate members Chile and Bolivia by separate agreement, is intended to provide an agreement for the conduct of international arbitration. However, the application and effectiveness of the Mercosur Agreement remains uncertain. For example, it is unclear how Brazil’s Arbitration Act of 1996, discussed below, will be impacted by the Mercosur Agreement.34

E. Recent Arbitration Developments in Latin American Countries

1. Brazil

Brazil was one of the last Latin American countries to accept international commercial arbitration.35 However, in recent years, Brazil has shifted towards the use of international commercial arbitration. Specifically, Brazil adopted the Panama Convention in 1995 and enacted a new Arbitration Act in 1996. Several years later, in 2002, Brazil became one of the last Latin American countries to adopt the New York Convention.
The Brazilian Arbitration Act (the “1996 Act”) is based on various aspects of the UNCITRAL Model Law, the Spanish Arbitration Act of 1988, the New York Convention and the Panama Convention. Unlike the UNCITRAL Model Law, the 1996 Act does not distinguish between domestic and international arbitration. The 1996 Act, which has survived a lengthy constitutional challenge, addresses all aspects of arbitration, from the arbitration agreement itself to the enforcement of arbitral awards.36

Many questions remain under the 1996 Act. For example, it is unclear whether a “compromiso” is still required. The language of the 1996 Act suggests that a compromiso is unnecessary if the arbitration clause, the cláusula compromisoria, provides the procedure for the appointment of the arbitral tribunal, or refers to institutional arbitral rules which provide such procedure. If, however, a compromiso is necessary, the 1996 Act provides that a court may sign it for a party refusing to do so.37 Some courts in Brazil have held that an arbitration clause providing for arbitration under the ICC arbitration rules is enforceable without the need of a compromiso.38

In December 2004, Constitutional Amendment No. 45 to the Brazilian Constitution, also known as “Judiciary Reform,” shifted jurisdiction over the recognition and enforcement of foreign arbitral awards from the Brazilian Supreme Court to the Brazilian Superior Court of Justice (the “STJ”). Under Article 105 of the Brazilian Constitution, the STJ has original jurisdiction over the recognition and enforcement of foreign judgments.

The first opinion following Judiciary Reform was issued in May 2005. In that case, the petitioner, a Swiss company, sought the recognition and enforcement of an English arbitration award against a Brazilian party issued pursuant to the rules of the Liverpool Cotton Association
The Brazilian party challenged the action on the grounds that because the underlying contract was not signed, the parties did not agree to arbitrate. Without an agreement to arbitrate, the Brazilian party further argued that the 1996 Act and the New York Convention were inapplicable and the Brazilian court could not enforce the award. The STJ, however, enforced the English award on the grounds that the facts showed the parties’ intent to enter into an arbitral agreement due to their behavior during the arbitral proceedings. This decision gives hope that future foreign arbitral awards will be recognized and enforced in Brazil.

2. Venezuela

In the 1980s, Venezuela opened its economic sectors to foreign investors. In 1992, Presidential Decree 2,095 ended most barriers to foreign investment in Venezuela. As Venezuela opened itself to foreign investment, it adopted new laws regarding international commercial arbitration.

In 1985, Venezuela ratified the Panama Convention, and subsequently enacted domestic laws allowing arbitration of specific disputes. For example, Presidential Decree 138 of April 1994, regarding Venezuelan National Public Works and Service Concessions (the “Concession Decree”), provides that controversies and disputes between Venezuela and the concessionaire may be submitted to arbitration. The 1993 Accord of Congress Approving the Association Contracts for the Exploration of Natural Gas with Multinational Companies (the “Cristobal Colon Project Law”), and the 1995 Accord of Congress that Regulates Participation of Private Parties in the Oil and Gas Industry (the “Opening Law”), designate arbitration under the arbitration rules of the ICC as the only vehicle to resolve a dispute related to a contract executed
under these laws. Ten years after adopting the Panama Convention, Venezuela adopted the New York Convention in 1995.

In 1998, the Venezuelan Congress enacted the Commercial Arbitration Law (the “Venezuelan Arbitration Law”). The Venezuelan Arbitration Law is based on the UNCITRAL Model Law, but does not distinguish between international and domestic arbitration. The Venezuelan Arbitration Law governs Venezuelan commercial arbitration procedures in their entirety and enforces foreign awards as long as the contested issue does not concern real estate located in Venezuela. In addition, certain issues cannot be arbitrated under the Venezuelan Arbitration Law, including matters that are against public policy, criminal matters, matters directly related to state, public, or governmental entities’ scope of authority, and matters that have been resolved by a final court judgment.  

The Venezuelan Arbitration Law provides that Venezuelan state-owned entities may submit to arbitration. However, if any branch of the Venezuelan government owns or controls over fifty percent of the capital of a particular company, corporate authorization and the written consent of the appropriate supervisory ministry must be obtained to enter into an arbitration agreement. If approval is not obtained, the agreement to arbitrate may be invalid. If a state-owned company agreed to arbitration prior to the passage of the Venezuelan Arbitration Law in 1998, approval is not required. An agreement to arbitrate with a state-owned entity must specify the type of arbitration agreed to and the procedures for the appointment of at least three arbitrators.  

In August 1999, the Venezuelan Supreme Court upheld the constitutionality of a clause in the Congressional Accord of 1995, which provided that certain disputes with the state-owned oil
company, Petroleos de Venezuela (‘PdVSA’), could be submitted to arbitration outside of Venezuela under the arbitration rules of the ICC. In December 1999, Venezuela adopted a new Constitution, which expressly recognized arbitration, conciliation and mediation as alternative dispute resolution mechanisms and provides that the law shall promote them. Under the new Constitution, the Congress and Supreme Court were automatically eliminated and the Constituent Assembly, under control of President Hugo Chavez, created replacements. Accordingly, it is unclear whether the August 1999 pro-arbitration decision of the former Venezuelan Supreme Court will be upheld by the new Court.

Two years later, in March 2001, President Chavez issued Instructive No. 4, which set forth a method of approving public interest contracts to be executed by the Republic of Venezuela. The objective of Instructive No. 4 is to “regulate the internal review mechanism of public interest contracts to be executed by the Republic, particularly in connection with the inclusion of international arbitration clauses.” All ministries must submit drafts of public interest contracts to be executed by the Republic, along with the opinion of the ministries’ General Counsel, to the Venezuelan Attorney General for review. The Attorney General must then issue an opinion on the legality of the arbitration clause under Article 151 of the Venezuelan Constitution, which provides that disputes arising under public interest contracts must be resolved by the Venezuelan courts. The draft contract and the accompanying Attorney General opinion must then be delivered to President Chavez for his approval.

It is important to note that Instructive No. 4 does not have the authority of law within the Venezuelan legal system, and failure to follow its provisions may not invalidate an arbitration agreement. Also, its legality may be challenged. However, Instructive No. 4 may provide a way
to prevent Venezuelan-owned companies from entering into contracts providing for the use of international commercial arbitration.49

In sum, the state of international arbitration in Venezuela is in flux. While Venezuela has adopted the New York and Panama Conventions and new arbitration laws, it is unclear how the executive branch and the courts will enforce these laws.

3. **Mexico**

Mexico was one of the first Latin American countries to adopt the New York Convention in 1971 and the Panama Convention in 1978. In 1993, Mexico amended its arbitration laws by adopting the UNCITRAL Model Rules. The Mexican Arbitration Law, which applies to both international and domestic arbitration, has a few unique features. Unlike the UNCITRAL Model Law, Mexico approaches arbitral awards from countries that are not signatories to the New York or Panama Conventions in the same manner as arbitral awards from signatory countries.50

Mexico followed the typical Latin American system requiring an arbitration agreement, the cláusula compromisoria, and the post-dispute submission to arbitration, the compromiso. However, the ratification of the New York Convention in 1971 and the enactment of the Commercial Code in 1989 ended the requirement of a compromiso after a dispute arose. Accordingly, an arbitration clause is sufficient to compel arbitration.51 With respect to contracts with the Mexican state-owned oil company, Petroleos Mexicanos (PEMEX), the “Organic Law” of PEMEX has been amended to provide that PEMEX can submit to international arbitration and to the application of foreign laws.52

Mexico’s adoption of the Panama Convention, the New York Convention and the Model Law has signified a pro-international arbitration position and rendered it a popular location for
conducting international arbitrations. Mexico has established an increasingly popular arbitration centre, the “Centro de Arbitraje de México.” Further, the Mexican judiciary has issued opinions recognizing and enforcing international arbitration agreements and awards.

4. Chile

Chile adopted the New York Convention in 1975 and the Panama Convention in 1976. Most recently, in September 2004, the Chilean Congress adopted an arbitration law that is based, in part, on the UNCITRAL Model Law. The law was adopted by the Chilean Congress specifically to address the issue of international arbitration, and does not apply to domestic arbitration. The Chilean Arbitration Law applies only to international commercial disputes in which the seat of the arbitration is located within Chile. The Chilean Arbitration Law further provides that it will not affect any local law that prohibits certain disputes from being submitted to arbitration. Among other things, the Chilean Arbitration Law recognizes the validity of an agreement to arbitrate, provides for the application of due process, and allows limited involvement by the judiciary.

Given the fact that the Chilean Arbitration Law has not been subjected to significant judicial scrutiny, it is too early to determine whether it will result in a continued shift towards the use of international commercial arbitration in Chile.

5. Argentina

The Argentine Federal Arbitration Rules are contained within the Argentine Federal Code of Procedure for Civil and Commercial Matters. The Argentine Federal Arbitration Rules recognize arbitration as a “special version of a court procedure,” rather than an independent method of dispute resolution. Further, the Argentine Federal Arbitration Rules retain the
historical requirement that the parties sign a post-dispute arbitration submission, the
compromiso. Like the states in the United States, Argentine provinces may adopt their own
codes of procedure. Because the Argentine Arbitration Rules apply to all of the provinces, there
is the possibility of conflicts between the federal and provincial arbitral laws.\textsuperscript{58}

Since 1990, four attempts to adopt a modern arbitration law in Argentina based on the
UNCITRAL Model Law have failed. A new bill for the adoption of the UNCITRAL Model Law
for both domestic and international arbitration was introduced in Parliament in 2004.\textsuperscript{59} The
Parliament has not yet approved this law. Accordingly, the future of international commercial
arbitration in Argentina remains uncertain.\textsuperscript{60}

V. Future of Arbitration in Latin America

In 2004, 11.41\% of all parties involved in cases registered with the ICC were from Latin
America. (30 parties from Argentina, 20 parties from Brazil, 8 parties from Chile, 37 parties
from Mexico, 3 from Venezuela). Out of 192 parties from Latin America and the Caribbean, 11,
or 5.7\%, were state or “parastatal” entities.\textsuperscript{61}

A survey of large international arbitrations that were resolved between January 2003 and
June 2005, or that continued to be disputed in June 2005, reveals several notable cases with Latin
American parties, with some particularly relating to natural resources.\textsuperscript{62}

- Conproca, S.A. de C.V. (Mexico), a joint venture of SK Engineering and
  Construction (Korea) and Siemens AG (Germany) claims that Pemex, Mexico’s
  state-owned oil company, delayed, disrupted, and made variations on an order to
  upgrade an oil refinery in Cadereyta, Mexico. Pemex has made counterclaims for
defective work. The total claims are $1,400,000,000 with the ICC in Mexico
  City.

- ChevronTexaco has filed with the American Arbitration Association in New York
  asking the Republic of Ecuador and its state oil firm, Petroecuador, to cover legal
fees and any judgment resulting from a suit brought by Ecuadorian tribes people against ChevronTexaco in an Ecuadorian trial court for environmental damage to the Amazon basin. The total claim is $1,000,000,000.

- UEF Araucaria Ltda. (UEFA), backed by investors from North America and Brazil, was awarded a contract to build and operate a gas-fired power plant by Copel Geraco S.A (COPEL), a Brazilian public utility company. After alleged interference by the Brazilian state of Parana, COPEL ended payment, and UEFA then terminated the contract and filed for arbitration. COPEL has appealed to the local court system to end the arbitration. The arbitration is taking place with the ICC in Paris and total stakes are $830,000,000.

- The joint venture of Fluor Corporation and Inelectra S.A., have brought a series of claims to the ICC in New York over a contract to build the Hamaca petroleum upgrader for a consortium including Petroleos de Venezuela S.A., Chevron Texaco and ConocoPhillips. In February 2004 the claimant won a partial award of $36 million in a dispute over soil conditions. The panel has yet to decide the principal claims, arising out of the national Venezuelan oil strike of 2002-03. The total stakes are $690,000,000.
The future of arbitration in Latin America is promising. The International Court of Arbitration had three times as many arbitrations with Latin American and Caribbean parties in 2000 than in 1992. The ability of foreign nationals to enter into enforceable arbitration agreements with Latin American parties will likely increase as the rules of arbitration become more modernized. Latin American countries committed to international commercial arbitration will facilitate the integration of their economies into the global marketplace.

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Silene Ramirez, *Venezuelan Minister to Visit Disputed Guyana Area*, REUTERS LTD. (July 20, 2001).


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Gilles Trequesser, *Venezuela Ups the Ante in Border Flap with Guyana*, REUTERS LTD. (July 26, 2000).


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1 The purpose of this paper is not to provide an in-depth study of the history and current status of arbitration throughout Latin America. As set forth in the List of Sources appended to this paper, there are many excellent articles and treatises that furnish a detailed and thorough analysis of this topic. Rather, this paper is intended to alert one to some of the many issues that should be evaluated when considering doing business in Latin America, and, in particular, the viability of dispute resolution through arbitration.


5 Schoenrich, supra note 2 at 525-26.

6 Id. at 526.

7 Id. at 528-530.


9 Gilles Trequesser, Venezuela Reiterates Claim to Territory in Guyana, REUTERS LTD. (Oct. 3, 1999).


15 Id. at 548.

16 Id.

17 Nigel Blackaby; David M. Lindsey, and Alessandro Spinillo, Overview of Regional Developments, in INTERNATIONAL ARBITRATION IN LATIN AMERICA 1 (Nigel Blackaby; David M. Lindsey, and Alessandro Spinillo, eds., Kluwer Law International 2002).

18 James L. McCulloch and Christina Maria Abascal Deboben, The Foreign Corrupt Practices Act and Other Legal Considerations Relevant to the Oil and Gas Industry in Latin America, 77 Tul. L. Rev. 1075, 1076 (2002-03).

19 Blackaby et al, supra note 17, at 1-2.
Bilateral investment treaties (“BITs”) entered into between contracting states create rights in nationals who invest in a host state. Generally, under the terms of a BIT, an aggrieved investor may seek redress against a contracting state through ad hoc arbitration under the UNCITRAL Arbitration Rules or an institutional arbitration before the International Centre for the Settlement of Investor Disputes (ICSID) as provided for in the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). A discussion of BITs in Latin America is beyond the scope of this paper. See generally Bernardo M. Cremades, Resurgence of the Calvo Doctrine in Latin America, 7(10) BUS. LAW INT’L 53 (2006).

Id. at 5.

Id.

The Inter-American Convention on International Commercial Arbitration (The Panama Convention) Preamble (January 30, 1975); Blackaby et al, supra note 17, at 5.


Id. at 6.

35 João Bosco Lee, Brazil, in INTERNATIONAL ARBITRATION IN LATIN AMERICA 61 (Nigel Blackaby; David M. Lindsey, and Alessandro Spinillo, eds., Kluwer Law International 2002).

36 Id. at 62-63.

37 Blackaby et al, supra note 17, at 9.

38 See Cremades, supra note 21, at 62 n. 31.


40 Nevertheless, Brazil’s new legislation regarding public private partnerships (PPPs) signals a retreat from a pro-international arbitration view. In fact, the legislation prohibits the referral of any PPP dispute to international arbitration, limiting dispute resolution to domestic courts or arbitration. See Cremades, supra note 21 at 62-63.


42 Id. at 223, 227-28, 237.

43 Id. at 235.

44 Fulkerson, supra note 14 at 560-62.


46 Fulkerson, supra note 14 at 563.

47 Weininger and Lindsey, supra note at 41, at 235, citing Art. 1 of Instructive No. 4.

48 Id. at 235-36.

49 Id.

50 Claus von Wobeser, Mexico, in INTERNATIONAL ARBITRATION IN LATIN AMERICA 155, 155-56, 159 (Nigel Blackaby; David M. Lindsey, and Alessandro Spinillo, eds., Kluwer Law International 2002). Fulkerson, supra note 14 at 566.

51 von Wobeser, supra note 50 at 162-63.

52 Id. at 189.
53 Id. at 190-91.

54 Blackaby et al, supra note 17, at 9.

55 von Wobeser, supra note 50 at 190-91.


58 Id. at 519.

59 Kleinheisterkamp, supra note 56, at 6-7.

60 As a consequence of Argentina’s recent economic crisis, the courts and government of Argentina have begun taking measures counter to a pro-arbitration stance. Cremades, supra note 21, at 60-62, 69-71.


63 Blackaby et al, supra note 17, at 13-14.