

# Polygamy of Treaties in Arbitration — A Latin American and MERCOSUL Perspective

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## ***I.. Arbitration and the Ideal of Coordination of the System***

Arbitration is the natural method to solve disputes in the international scenario <sup>(749)</sup>, particularly followings the 80s with the globalization of the economy. Until the last decade arbitration was practically restricted to West Europe and the U.S., however the growth in international trade led to the need for many other countries to adopt and regulate this form of settling controversies <sup>(750)</sup>. Pursuant to the laws and treaties that were established, arbitration has flourished in Latin America and specially Brazil.

A good legal foundation does not per se suffice. The development of arbitration depends on the dissemination of the institute and the support of the local courts that ultimately construe and determine the limits thereof. And, finally, legal doctrine serves as a supporting and fostering instrument.

Treaties and model laws envisage that the international community shall treat the arbitration award in a similar way. This ideal of coordination is found in several international documents, as may be observed, for example, in the explanatory notes of the Model Law of UNCITRAL: page "253"

«2. The Model Law constitutes a sound and promising basis for the desired harmonization and improvement of national laws (...). 3. The form of a model law was chosen as the vehicle for harmonization and improvement in view of the flexibility it gives to States in preparing new arbitration laws. It is advisable to follow the model as closely as possible since that would be the best contribution to the desired harmonization and in the best interest of the users of international arbitration, who are primarily foreign parties and their lawyers» <sup>(751)</sup>.

Hence, if there is an arbitration clause, it is expected that the Judiciary of all States would refuse to rule on the merits of the case and refer the parties to arbitration. Likewise, issued an arbitration award that is consistent with the clause convening to submit to arbitration, with the right of defense and internationally public order duly respected, the party that prevailed in the arbitral proceeding is expected to satisfy its credit at any country.

A basic interest of the international community is, therefore, a uniform and coordinated treatment of arbitration. Regardless of how difficult it may be to attain a complete uniformization, this is an ideal to be pursued.

Within this perspective that the coordination of the system is a goal, the following part of this paper will analyse the conflicts between treaties and the attempt to harmonize the treatment of the arbitration award abroad <sup>(752)</sup>.

## ***II.. Guiding Principles of the Analysis of the Concurrence of Treaties***

In the 20th century, there has been a proliferation of treaties, even in the arbitration field which, given the absence of coordination among the preparatory work, could result in conflicting provisions. This *phenomena* of so many treaties has been coined as «maladie de croissance» pursuant to globalization and the attempt of harmonization in several fields of law <sup>(753)</sup>.

The existence of rules (clauses) of compatibility inserted in the treaties is quite common and, hence, any concurrence must be resolved initially through an analysis of such rules.

If the rules on compatibility are insufficient, two rules of interpretation stand out: *lex posterior derogat priori* and *lex specialis derogat generali*. To these two a third should be added, which is the prevalence of the regional convention over the global convention <sup>(754)</sup>. Doctrine introduced a forth guiding principle in regard to private law treaties: *the rule of maximum effectiveness*.

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Majoros correctly defends the maximum effectiveness rule insofar as the private law treaties are intended to solve their problems at the point of intersection of national and international law. However, this intersection point does not lead, necessarily, to the conflict of treaties, and the attempt of efficient coordination should be praised:

«Les conventions internationales en matière de droit privé et la science qui a pour mission de résoudre leurs problèmes, se situent au point d'intersection, au carrefour, au confluent des grandes disciplines. Grâce à leur caractère spécifique, elles se trouvent en même temps au carrefour des ordres juridiques (international et national), au point d'intersection des pouvoirs, au point de rencontre des sujets de droit distincts. Davantage peut-être que n'importe quelle autre science, c'est une "discipline au point d'intersection". Mais le carrefour n'est pas le lieu de carambolages. *L'intersection n'engendre pas la confrontation mais la coopération, pas le heurt mais la rencontre*: tout en réservant à ces questions un examen plus détaillé dans la section relevant de la théorie du droit, reprenons ici l'idée de Jean Bodin et les développements que l'ont suivie: "*Dans le contentieux des conventions internationales en matière de droit privé, se réalisent un concours et une coopération efficaces sans pareils des ordres juridiques*» <sup>(755)</sup> (emphasis added).

Majoros sustains that the rule of maximum efficiency should precede any other way of analyzing the matter of conflict among treaties. The other methods, based on the chronology and specificity (regionality) criteria may also be found, but are not mandatory: «Mais chaque fois que fait défaut ce bénéfice du confort du cumul des rattachements pour résoudre les conflits des traités portant réglementation des matières rattachées au critère de l'efficacité, *la règle de l'efficacité maximale prime les autres règles de conflits*» <sup>(756)</sup>.

Rezek stresses the reasonableness of adopting the criteria of posteriority and speciality when the sources of production of the rules are the same. If the sources are different: «There is no hierarchical imbalance between the two conflicting treaties; and principles such as *lex posterior...* and *lex specialis...*, when the sources of production of the rules are different (...), are totally useless» <sup>(757)</sup>.

The justification—which I share—for the maximum effectiveness principle to prevail over the others (speciality and posteriority), is the pursuit of coherence in the treatment of treaties that have goals. Thus, the principle applies in certain cases, such as international arbitration.

Indeed, the international treaties on arbitration seek essentially to facilitate the circulation and recognition of international awards. Given that all have the same purpose, there is no need for invalidating one in detriment of others. The treaty that is more favorable to the recognition of the award should be applied.

In the words of Van den Berg:

«More recently, case law <sup>(758)</sup> and doctrine have developed a third principle: *la règle d'efficacité maximale*. This principle of maximum efficacy, replacing where appropriate the two traditional page "255" ones, stands for the proposition that the treaty which upholds validity in a given case is the one which is to be applied. In the case of arbitration, the principle of maximum efficacy means that if an award is unenforceable under one treaty which could be applied, but enforceable under another which could also be applied, the other treaty will be applicable, irrespective of whether it is an earlier or later treaty, and irrespective of whether it is more general or specific» <sup>(759)</sup>.

Considering that all arbitration treaties and, particularly, on the recognition and enforcement of foreign and international awards have the same ambition, instead of addressing the matter under the focus of which should prevail, doctrine adopts the expression *compatibility*<sup>(760)</sup>.

Rezek sustains, up to a certain extent consistent with the foregoing, that the State will elect to apply the treaty that has greatest political and notoriety relevance, which —*in casu*— always leads to adopting the Convention of New York in the case of arbitration<sup>(761)</sup>.

We will analyze, in further depth, each of the possible concurrences among treaties and how to solve same applicable in Latin America and Mercosul, through: (i) compatibility rules and (ii) proper construction of the most efficient treaty.

### **III.. Compatibility Clause in the Global Context (Genève 1923/27 vs New York)**

In the early 20th century arised the Genève Conventions of 1923 and 1927<sup>(762)</sup>, the two first major conventions of global range on the matter, under the scrutiny of the United Nations, primarily intended to warrant the effectiveness of the arbitration commitment and to promote the recognition of the international awards in other countries. The *Protocol on Arbitration Clauses* of 1923 was intended to provide a binding effect to the arbitration clause to exclude governmental jurisdiction and enable the enforcement of arbitration awards in the country where it was issued<sup>(763)</sup> and the Protocol of 1927 was intended to recognize the award abroad.

The Convention of New York on the Recognition and Enforcement of Foreign Arbitration Awards of 1958<sup>(764)</sup> represents one of the cases of great success in International Private page "256" Law and was ratified by 142 countries<sup>(765)</sup>, certainly contributing to the development of the arbitration culture worldwide.<sup>(766)</sup> The intention of this treaty, when it was convened, was to improve the circulation of the arbitration awards so that arbitration could be adopted as an efficient mechanism to settle disputes in international trade. What was sought was the possibility of plain and swift recognition<sup>(767)</sup>.

The final text of the Convention of New York applies to foreign awards and those that are considered non-national in the country in which recognition is pleaded. With the addition of the expression non-national, the scope of application was greatly broadened. The Convention also eliminated the two tier *exequatur* and the burden of proof of the claimant that pleads recognition. Additionally, the negative and positive effects of the arbitration clause were established with the Judiciary's obligation to refer the parties to arbitration. Moreover, the conditions for the non-recognition are exhaustive and do not include review of the merits. In procedural aspects it privileged the parties' will, adopting the law of the seat only in the absence of agreement.

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A very important feature is that it recognized that only the country of the place of arbitration, or the law of which was to be applied, are the ones that have jurisdiction over a claim to set aside the award — a ruling from any other country, whether of the parties or of the venue where the contract was performed, shall not be considered by the country in which the recognition of the foreign award is sought<sup>(768) (769)</sup>.

Comparing the Conventions of Genève of 1923 and 27 and of New York, article VII.2 of the Convention of New York addresses the relation between the two treaties:

«The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention»

Hence, concurrence will never exist inasmuch as the Conventions of Genève of 1923 and 1927 no longer are effective pursuant to the Convention of New York.

For the countries that have not presented a reserve on reciprocity, the New York Convention of New York will always apply. In countries where there is a reserve of reciprocity, the Conventions of Genève of 1923 and 1927 may be adopted in the country recipient of the award, even if such country has ratified the Convention of New York, if the country of the venue is not a signatory thereof. This is a highly unlikely scenario considering that the Convention of New York has been ratified by so many countries.

#### ***IV.. Compatibility Clause in the Inter-American Scenario (Panama vs Montevideo)***

The Interamerican Convention on International Commercial Arbitration, also known as the Convention of Panamá, of 1975, and effective as of June 15, 1976, currently binds 19 countries<sup>(770)</sup>, including the countries of the Mercosul treaty, and it is open for signing of all page "258" countries of the America or others. It was drafted in the first Interamerican Conference on International Private Law-CIDIP<sup>(771)</sup>.

Given that when the Interamerican Convention was ratified Brazil had not yet ratified the Convention of New York, the adoption thereof<sup>(772)</sup> was an important step to consolidate the legislation on arbitration in Brazil.

A point to analyze is why Latin American, instead of adhering to other global treaties on the several themes of International Law, prefers to treat them regionally. The reason for such a position is the understanding that the cultural, political, social and economic differences justify a segregated analysis.

However, several interamerican texts are based on those that have a global scope, discussed in the International Private Law Conference in Hague<sup>(773)</sup>, demonstrating the need to rethink the regional position<sup>(774)</sup>. Fortunately, the participation of Latin American has grown in the global forums, especially because the Latin American countries will only be able to protect their interests through more active engagement<sup>(775)</sup>.

In addition to the Convention of Panama, there is the Convention of Montevideo of 1979 on the Extraterritorial Effectiveness of Foreign Rulings and Arbitration Awards, the scope of which, as the name itself indicates, is the recognition of foreign rulings, arbitration awards and jurisdictional decisions in the Member States. This convention became effective 14 June 1980, in accordance with its article 23, and currently binds ten countries<sup>(776)</sup>, page "259" including the Mercosul countries, and it is open for signing to all countries of the Americas or any others. As occurred in the Convention of Panamá, Brazil signed this Convention on May 8, 1979 and only ratified it more than 15 years later<sup>(777)</sup>.

While the Convention of Panama is limited to trade issues, the Convention of Montevideo has a broad field of application, covering civil, commercial and labor issues. The inclusion of arbitration awards in the Convention of Montevideo is heavily criticized among scholars. The Convention of Montevideo unduly treats similarly arbitration awards to court decisions, imposing the same conditions for recognition. This is mistake committed by the representatives of the countries that participated in the preparatory work inasmuch as the rules that apply to court ruling do not apply to arbitration rules, hence the reason that it should not apply to arbitration awards<sup>(778)</sup>.

Worse, the Convention of Montevideo was drafted after the Convention of Panama and it was also received in Brazilian law after the Convention of Panama.

In attempt to solve the issue, the Convention of Montevideo contains a compatibility clause (article 1, second part):

«The rules of this Convention shall apply, in regard to arbitration awards, in all that is not addressed in the Interamerican Convention on Commercial Arbitration signed in Panama on 30 January 1975» (free translation)

Jan Kleinheisterkamp stresses that the Conventions of Panama and Montevidéo were drafted on totally different premises, insofar as the latter subjects the arbitration award to the same treatment of court decisions, with the burden of proof to the person that requests recognition. The Convention of Panama envisaged precisely the elimination of any incorrect treatment of the arbitration award and to dissipate the hostility of the Latin American countries in regard to arbitration. According to him, «The general finding is, therefore, that the two OAS-Conventions are — from their conceptions — practically incompatible with each other» <sup>(779)</sup>.

The best interpretation of the relationship between them is that the Convention of Montevidéo is subordinated to the Convention of Panama in all aspects regarding arbitration awards. As the Convention of Panama already establishes the elements for recognition and page "260" enforcement of the arbitration award, this is the one that should be applied, discarding article 2 of the Convention of Montevidéo.

Accordingly, as Clávio Valença <sup>(780)</sup> mentions, article 30, paragraph 2 of the Convention of Vienna on Treaty Law may be used, which also conducts to the supremacy of the Convention of Panama: «Article 30. Application of Successive Treaties on the Same Matter: 2. When a treaty stipulates that it is subordinated to a former or subsequent treaty or that it should not be considered incompatible with this or that treaty, the provisions of the latter shall prevail» <sup>(781)</sup>.

In addition and irrespective of the compatibility clause, comparing the two Conventions, the Convention of Panama should always prevail, for being a specific rule <sup>(782)</sup> over the Convention of Montevidéo, in addition to being more efficient for the circulation of arbitration awards (principle of maximum effectiveness).

João Bosco Lee advocates that the Convention of Montevidéo could be used in arbitrations not involved by the Convention of Panama since it applies in a broader field, and in the provisions on formal aspects of the claim for recognition inasmuch as the Convention of Panama does not have any rules thereon <sup>(783)</sup>.

## ***V.. Compatibility Clause in the Mercosul Context (Las Leñas vs Buenos Aires Agreement)***

There are two treaties in the Mercosul context that are relevant for the study of commercial arbitration (not involving States). The first is the Protocol of Las Leñas of 1992 on Cooperation and Jurisdictional Assistance in Civil, Commercial, Labor and Administrated Matters <sup>(784)</sup>. As the very title indicates, it is focused on jurisdictional assistance, not properly arbitration, i.e. basically cooperation in summons, subpoenas, production of evidence, among others, beginning with the rogatory letter sent to the central authorized institution in each country.

It has a chapter dedicated to the «Recognition and Enforcement of Rulings and Arbitration Awards» that repeats the text of the Treaty of Montevidéo <sup>(785)</sup>. This Protocol also should page "261" not have been extended to arbitrations for that it lacks expertise on such field and disregard basic arbitration principles, such as the competence-competence principle (which should have been inserted instead of article 22 which makes sense in regard only to court decisions <sup>(786)</sup>).

This Protocol contains a «certain» compatibility clause which allows the application of other treaties (article 35): «This Protocol shall not restrict the provisions of the conventions that were previously signed on the same matter between Member States, *provided that there is no conflict in the provisions*» (our emphasis — free translation). However, disguised in the intention of allowing the use of other conventions, the Protocol of Las Leñas provides that it should prevail in the event of conflict. Actually, it is a rule that confirms its supremacy and not a rule of compatibility.

As a consequence, the Protocol of Las Leñas presents the same problems of the Convention of Montevidéo in regard to the conditions for recognizing arbitration awards, treated as if they were court rulings.

In 1998 arises the Agreement on International Commercial Arbitration of the Mercosul, which became effective in Brazil as of June 2003<sup>(787)</sup>, thus after the Convention of New York<sup>(788)</sup>. A practically identical agreement was also signed between MERCOSUL, Chile and Bolivia on July 23, 1998.

The Agreement of Buenos Aires was based on the Model Law of UNCITRAL and on Brazilian law and its main goal was to improve the arbitration system in the other members of the Mercosul<sup>(789)</sup>, particularly Argentina and Uruguay, the laws of which are still page "262" outdated<sup>(790)</sup>. Notwithstanding the noble intention of fostering arbitration in the Southern Region, the agreement is characterized by a-technicities and heavily criticized by scholars<sup>(791)</sup>, arising from the concessions that often are inherent to the process of negotiation of treaties in the international scenario<sup>(792)</sup>.

Similarly to the Protocol of Las Leñas, article 26.2 of the Agreement of Buenos Aires provides that the agreement shall not limit the provisions of conventions addressing the same matter, provided that same do not provide to the contrary.

The Agreement of Buenos Aires does not address the recognition and enforcement of foreign arbitration awards, providing the following compatibility clause, which determines the applying of other Conventions (article 23):

«In order to enforce the foreign arbitration award shall apply as pertinent the provisions of the Interamerican Convention on International Commercial Arbitration of 1975; the Protocol of Jurisdiccional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Law of the MERCOSUL, approved by decision of the Council of the Common Market no. 5/1992 and the Interamerican Convention on Extraterritorial Effectiveness of Foreign Rulings and Arbitration Awards of Montevideú of 1979». (free translation).

Actually, the issue of the recognition of a foreign arbitration award is excluded from the Agreement of Buenos Aires by reference to other treaties. The representatives of the countries could have made a reference to the Convention of New York, even if it was not ratified by all countries when it was drafted (1998). Furthermore, the Agreement of Buenos Aires was and still is heavily criticized for having created an interpretative confusion in the Mercosul context<sup>(793)</sup>.

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Comparing the treaties mentioned in the compatibility clause and considering the fact that all Mercosul countries have already ratified the Convention of New York, the Convention of Panama or of New York should prevail based on the principle of speciality and of the maximum effectiveness. A comparison of both is analyzed below.

## ***VI. Convention of New York vs. Protocol of Panama/Montevideú***

As may be observed, all countries of Latin America eventually ratified the Conventions of Panama and New York.

Roque Caivano elaborated a chart comparing these conventions<sup>(794)</sup>. Initially, the similarities are hereby transcribed:

- «— La metodología y estructura general de las Convenciones de Nueva York y Panamá son similares:
- no fijan límites en su ámbito de aplicación por razón de la nacionalidad, domicilio o residencia habitual;
- reconocen a los laudos la fuerza de sentencia y vedan el establecimiento de normas locales discriminatorias o más gravosas en contra de los laudos extranjeros;
- impiden al juez del "exequátur" revisar el fondo de lo decidido en el laudo y sólo lo autorizan a verificar si el mismo viola el orden público local; contienen previsiones similares

respecto de las causales por las cuales puede denegarse el reconocimiento y ejecución de los laudos;

- cuando se haya pedido entre el juez del lugar donde el laudo se dictó (o ante el juez conforme a cuya ley procesal se dictó) la anulación o suspensión, ambas Convenciones dejan al juez del “exequátur” la libertad de aplazar la ejecución o — si lo considera apropiado — proseguir con el trámite pidiendo garantías apropiadas a la parte que ha solicitado el reconocimiento y ejecución;
- a diferencia de la antecedente Convención de Ginebra, presumen la validez del laudo y ponen a cargo de la parte que resiste el reconocimiento o la ejecución la prueba de tales causales;
- además de las normas específicas referidas al reconocimiento y ejecución de los laudos, incursionan en el tema del acuerdo arbitral y lo tratan de manera similar: aceptan la validez del acuerdo arbitral para futuras divergencias (cláusula compromisoria) sin necesidad de celebrar compromiso arbitral y flexibilizan la noción de “acuerdo escrito”, extendiendo este concepto aun al intercambio de correspondencia»<sup>(795)</sup>.

The differences according to Roque Caivano are as follows: page "264"

- «La Convención de Nueva York tiene pretensiones de universalidad, al estar abierta a la firma de todos los países. La de Panamá es, en principio, una Convención regional, pensada para el ámbito interamericano: fue puesta a la firma de los países miembros de la Organización de Estados Americanos (OEA), aunque expresamente menciona que “quedará abierta a la adhesión de cualquier otro Estado.”
- La Convención de Panamá excede lo estrictamente atinente al reconocimiento y ejecución de laudos arbitrales, abarcando aspectos tales como el nombramiento de los árbitros o las reglas de procedimiento arbitral, temas que no se encuentran en la Convención de Nueva York.
- Ambas Convenciones se ocupan de la validez del acuerdo arbitral. La de Nueva York aclara que el mismo debe ser “concerniente a un asunto que pueda ser resuelto por arbitraje”. La de Panamá no formula esta precisión, aunque se limita su aplicación a cuestiones de naturaleza comercial, las que en términos generales son arbitrales.
- La Convención de Nueva York dispone que la expresión “sentencia arbitral” comprenderá no sólo las sentencias dictadas por árbitros nombrados para casos determinados, sino también las dictadas por los órganos arbitrales permanentes a los que las partes se hayan sometido. La de Panamá no establece explícitamente qué debe entenderse por sentencia arbitral.
- La Convención de Nueva York determina expresamente qué se considerará sentencia arbitral extranjera. La Convención de Panamá no especifica esta cuestión.
- La Convención de Nueva York extiende su ámbito de aplicación a las sentencias arbitrales que no sean consideradas como sentencias nacionales en el Estado en que se pide su reconocimiento y ejecución. La de Panamá no contiene previsión en este sentido.
- La Convención de Nueva York establece la facultad de los Estados parte de limitar su aplicación a base de reciprocidad. La de Panamá es más amplia: elimina el régimen de reciprocidad convencional, por lo que su ámbito de aplicación no se circunscribe a las sentencias arbitrales dictadas en territorio de otro Estado contratante, lo que proyecta su aplicación a todos los laudos dictados más allá de las fronteras del Estado receptor»<sup>(796)</sup>.
- La Convención de Panamá limita su aplicación “ratione materiae” a diferencias surgidas con relación a un negocio de naturaleza comercial. La de Nueva York, en cambio, es en principio aplicable a litigios nacidos de relaciones jurídicas — contractuales o no — con independencia de su naturaleza comercial, si bien admite la potestad de que los Estados, al ratificarla, limiten su aplicación a litigios considerados comerciales por su derecho interno»<sup>(797)</sup>.

Possibly an arbitration award issued in an international commercial arbitration (requirements under the Convention of Panama) held in a country that has ratified the Conventions of Panama and New York may also be included in the scope of the Convention of New York, sufficing for

such purpose to plead recognition in another country that has also ratified these two Conventions. At this point arises the discussion as to which should prevail.

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Van den Berg<sup>(798)</sup> suggests the study of the matter in three ways: (i) the articles of the Convention of New York; (ii) rules on conflict between treaties and (iii) the articles of the Convention of Panama.

As previously discussed, the New York Convention is quite liberal in regard to the relation with the other treaties and internal laws. The rule more favorable to the recognition shall prevail (article VII.1).

There is no provision in the Convention of Panama that corresponds to the compatibility clause established in article VII.1 inasmuch as the reference to «established in this regard by international Treaties» made in article 4 concerns the procedure of enforcement and recognition of the award, not the cases of denial of recognition<sup>(799)</sup>.

When the U.S. ratified the Convention of Panama, a peculiar reserve creating the rule of the «majority of the parties' was inserted»; accordingly the parties could pick the Convention to apply and, in the lack of this, if the majority of the parties to the arbitration are citizens of a country signatory of the Convention of Panama, this is the convention that should prevail in detriment to the Convention of New York<sup>(800)</sup>.

Aside from the U.S.'s reserve mentioned above, the fact is that the maximum effectiveness interpretation rule is the most interesting one under the Latin American viewpoint. There are no major differences between the Convention of New York and of Panama, except for the subsidiary application of the International Commercial Arbitration Commission (CIAC — Article 3 of Panama Convention establishes<sup>(801)</sup>). This section is criticisable as it implies that a changed can be done by a private entity but it is interesting and useful under the viewpoint of a region that is still developing the arbitration culture<sup>(802)</sup>.

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On the other hand the text of the Convention of New York is superior in some aspects: the obligation of referring the parties to arbitration, scope of application, conditions that should be met by the party by pleads recognition, and the text of Article VII.1.

Jan Kleinhesterkamp understands that if the arbitration is held in one of the countries that signed the Convention of Panama, this is the Convention that should prevail in detriment to the Convention of New York for being *lex specialis*<sup>(803)</sup>. According to him, the Convention of Panama was not intended to replace or compete with the Convention of New York, but rather simply locally solve the problem of recognition of arbitration awards. Also according to him, the fact that the Convention of New York allows the adoption of other treaties on the matter that are more favorable may be construed as permission for regional solutions.

Kleinhesterkamp's position is not in line with the effectiveness that underlies the ratification of every treaty on this matter. Therefore, according to this principle of maximum effectiveness, the treaty that is more favorable to recognition should be applied.

Moreover, the interpretation of the principle of the maximum effectiveness inserted in the Convention of New York will enable Latin American countries to have internal laws more favorable to the recognition and enforcement of arbitration awards, attracting international arbitrations to pick their cities as the place of arbitration.

The principle of maximum effectiveness should also be applied because it is also a principle in line with the desired coordination of the system, internationally accepted through the ratification of the Convention of the Convention of New York (article VII.1) in 142 countries.



The Convention of New York, compared to the Convention of Panama, may not be used, under the scenario sustained in this paper, in at least two cases:

- (i) if the award is issued in the country-venue where it shall be enforced (and depends on the judiciary's control for such effect). Otherwise, if the venue is abroad, the foreign award shall fall in the scope of the Convention of New York.
- (ii) if the event of validity of the award in an arbitration that adopted article 3 of the Convention of Panama (CIAC rules).

Thus, there is no conflict and rather coordination between the two conventions, *prevailing in a certain case the one that is more favorable to the recognition of the award.*

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The conflict between the Conventions of Panama and of New York was tested in the Termorio case. Summarizing the main facts, in 1997 the company Termorio S.A. E.S.P (Termorio) executed with the company Electrificadora del Atlantico S.A. E.S.P (Electranta) — a governmental company whose stock is controlled by the Colombian government —, a contract for the sale of electric power in which Termorio agreed to produce electric power and Electranta to purchase it. Two addendums followed: one in January 1998 addressing the dispute resolution clause and the second on June 24, 1998. Pursuant to the allegation that Electranta was not complying with its duties, an arbitration proceeding was opened before the Court of Arbitration of the International Chamber of Commerce (ICC) in Barranquilla, Colombia. The Panel of Arbitrators issued an award condemning Electranta to pay more than US\$ 60 million to Termorio.

In August 2002 Colombia's State Council («*Consejo de Estado*») canceled the award on the grounds that the clause violated Colombian law for not such law did not allow the parties, in a domestic arbitration, to adopt the rules of the Court of Arbitration ICC. Pursuant to the cancelation of the arbitration award, Termorio and the company LeaseCo. Group, LLC, investor of the first, attempted to recognize the award in the U.S. (District of Columbia) in a claim filed against Electranta and the Colombian government, without success.

In May 2007 the Circuit Court of Appeals of Columbia upheld the position that had already been adopted in *Baker Marine* and *Bechtel*. The Court stressed that the issue involved solely Colombian interests, for it involved Colombian parties, Colombian law, an agreement executed in Colombia and arbitration and litigation in Colombia. In view of that, the Court held that the *Consejo de Estado* was, indeed, the competent authority for analyzing the claim for the annulment of the award, according to article V.1.(e) of the New York Convention and that it was not in a position to determine whether the *Consejo de Estado's* ruling was correct or not.

Even though the Court of Columbia reaffirmed the American policy in favor of arbitration (*Mitsubishi Motors case*), such Court highlighted that one of the reasons for refusing to recognize awards provided for in the New York Convention is precisely the award being annulled where it was rendered, that is, in the seat of the arbitration [article V.1.(e)], and that if the annulment was disregarded, the party that obtained it would have to defend itself in several countries where recognition of the award would be sought, despite having being annulled. This would undermine one of the main principles of the New York Convention, which sets forth that the award «does not exist» if annulled where rendered.

Termorio sustained that the Panama Convention should prevail precisely because most of the parties to the arbitration were countries that had ratified it, under the terms of the American reservation. The District Court of Columbia held that the Panama Convention incorporated by reference the provisions of the New York Convention, therefore being unnecessary the debate over the application of the Panama Convention. The Court finally resolved the issue based on the New York Convention, also dealing with its internal law vis-à-vis section VII.1 of the Convention, as follows:

«We need not decide whether 9 U.S.C. § 302 incorporates the New York Convention, as opposed to other provisions of law related to the New York Convention, because the relevant provisions of the Panama Convention and the New York Convention are substantively identical page "268" for purposes of this case and neither party challenges the District Court's analysis. We therefore resolve this matter with reference to and using the language of the New York Convention» <sup>(804)</sup> .

In short, the District Court of Columbia was able to coordinate the application of both Conventions without even having to make reference to the maximum effectiveness principle to decide upon their conflict. This was possible because the Court recognized their identical content. It seems that the Court of Columbia chose to refer to the New York Convention for its greater «political appeal and notoriousness» <sup>(805)</sup> .

Yet, if the recognition involves a subject matter that exceeds the scope of the Panama Convention, such as a labor issue, it is necessary to evaluate a potential competition between the Montevideo and the New York Conventions. In a case like this, the New York, and not the Montevideo Convention, shall be applied for the countries, such as Brazil, that have not presented a commercial reservation to the New York Convention. Besides, the New York Convention is more effective and more specific. On the Interamerican level, the Montevideo Convention shall be deemed revoked in relation to the recognition of arbitral awards or applicable only when it does not conflict with the New York and the Panama Conventions.

### **VII.. New York/Panama Convention vs. Buenos Aires/Las Leñas Agreement**

As mentioned above, on a Mercosur level there was reference, on the compatibility clause, to the treaty of Las Leñas and to those on the interamerican level.

There was no reference to the New York Convention possibly because not all of the Mercosur countries had ratified it by the time the Buenos Aires Agreement was drafted, in 1998, and a reference could, hypothetically, damage the Mercosur treaty legislative approval process.

We have already mentioned a second «certain» compatibility clause, which, in fact, is a supremacy clause (article 26.2):

«This Agreement shall not restrict the provisions of the conventions in force over the same subject matter between Member States, as long as they are not in conflict with it». (free translation)

Such provision does not damage the application of the New York Convention —once again, the only one not mentioned in the Buenos Aires Agreement— for it does not generate contradiction, but rather coordination with the Panama Convention.

Moreover, the Panama and New York Conventions shall always be considered specific instruments as regards the Las Leñas Protocol, for the later deals with several other issues besides the arbitral award.

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Regardless of the interpretation principles of maximum effectiveness and *lex specialis*, due to the fact that Brazil was the last country to ratify the New York Convention, after the Las Leñas Protocol, the New York Convention has also become the later treaty on the Mercosur level, in accordance with articles 30.3 and 59 of the Vienna Convention on the Law of Treaties.

In a nutshell, Mercosur countries shall deem the Las Leñas Protocol revoked concerning the recognition of arbitral awards or applicable only when it is not in conflict with the New York and the Panama Conventions. Over this issue, Professor Grigera Naón states the following:

«However, since then Brazil —the other Mercosur country— has ratified the New York Convention. Accordingly, the New York Convention has become *lex posterioris* to the Las Leñas Protocol in all Mercosur member countries because the ratification on the convention by all such countries was completed *after* their ratification of the said Protocol. Consequently, in light of Articles 30 (3) and 59 of the Vienna Convention, the member countries may either consider the Las Leñas Protocol terminated as far as the conditions for recognition and enforcement of arbitral awards is concerned because of the blatant incompatibility of the provisions of both treaties on this matter, or only applicable in that respect to the extent not incompatible with the provisions of the New York Convention, including its Article VII that permits the preferential application of legislation or treaty provisions more favourable to the recognition and enforcement of arbitral awards in effect in the country where the award is sought to be relied upon» <sup>(806)</sup> .

Thus, in regard to the recognition of arbitration awards, the Protocol of Las Leñas does not apply vis-à-vis the Conventions of Panama and Nova Iorque, for that <sup>(807)</sup> :

- (i) Panama and New York prevail pursuant to the applying of the maximum effectiveness principle;
- (ii) Panama and New York prevail for being specific rules (only apply to arbitration) and Las Leñas is a general rule;
- (iii) New York prevails for being a subsequent rule in the Mercosul context.

Summarizing, in the Mercosul countries, as regards the conditions for the recognition and enforcement of reports, either the provisions of the Convention of New York or those of the Convention of Panama apply, always the most favorable to recognition. Again, instead of conflict the key word is coordination and effectiveness.

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### **VIII.. Conclusion**

Despite of the proliferation of treaties on arbitration in the region, clearly they are all interested in easing the recognition of international awards.

In the analysis of concurrence, the first interpretation guideline is the clause of compatibility that usually exists in those treaties. Secondly, the maximum efficiency principle, which although not expressly set out in the Convention of Viena is recognized in doctrine and particularly applicable to the theme of arbitration for being an international recognized principle of law adopted in 142 countries.

Following these two criterions (and also of the *lex posteriori* and *lex speciali*), we may conclude that:

- at the global level the Convention of New York applies to all awards that are to be enforced in countries that have no reservation on reciprocity, such as Brazil;
- at the interamerican level, the Convention of Montevideú will not be applicable when compared to the Panamá Convention and would only apply in regard to the formalities for the recognition and in any arbitrations that exceeds the scope of the Convention of Panama, as for example in labor matters. However, an arbitration that exceeds the scope of the Panama Convention may fall in the scope of application of the Convention of New York. In the unlikely comparison between the Conventions of Montevideú and New York, it is the latter that should prevail for being more efficient, specific and for having been the last one that was introduced in the Mercosul region. In other words, at the interamerican level, the Convention of Montevideú should be considered revoked in regard to the recognition of arbitration awards or applicable only where it does not conflict with the Conventions of New York and of Panama;
- furthermore, at the interamerican level, either the Convention of Panama or the Convention of New York (which contains article VII.1) shall be applied, whichever eases the recognition of

the international award;

- at the Mercosul level, the Agreement of Buenos Aires does not apply as it does not contain provisions on the theme of recognition and enforcement and its provisions on primary control are acceptable; and
- furthermore, at the Mercosul level, the Protocol of Las Leñas should be considered revoked in regard to the recognition of arbitration awards or applicable only where it does not conflict with the Conventions of New York and of Panama.

Graphically, in regard to the recognition of international and foreign arbitration awards, the foregoing may be summarized as follows:

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	<b>Genève 1923</b>	<b>New York 1958</b>	<b>Panamá 1975</b>	<b>Montevideú 1979</b>	<b>Las Lenas 1996</b>	<b>Buenos Aires 1998</b>
<b>Genève 1923</b>	NA	New York 1958	NA	NA	NA	NA
<b>New York 1958</b>	New York 1958	NA	New York and Panama	New York 1958	New York 1958	New York 1958
<b>Panamá 1975</b>	NA	New York and Panama	NA	Panamá 1975	Panama 1975	Panama 1975
<b>Montevideú 1979</b>	NA	New York 1958	Panama 1975	NA	Panama 1975 or New York 1958	Panama 1975 or New York 1958
<b>Las Lemas 1996</b>	NA	New York 1958	Panama 1975	Panama 1975 or New York 1958	NA	
<b>Buenos Aires 1998</b>	NA	New York 1958	Panama 1975	Panama 1975 or New York 1958		NA

\* NA = non-applicable

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<sup>748</sup> President of CBAr — Comitê Brasileiro de Arbitragem (Brazilian Arbitration Committee). Partner at LOBaptista Advogados. PhD and Master Degree on Private International Law at the University of São Paulo — USP. Professor of Arbitration at GVLaw.

<sup>749</sup> Fouchard, Philippe. *L'Arbitrage Commercial International*. Paris, Dalloz, 1965.

<sup>750</sup> Fouchard, Philippe. *L'Arbitrage et la mondialisation de l'économie*. Écrits. Comité Français de L'Arbitrage, 2007 (published on 1999), p. 473 et seq.

<sup>751</sup> Explanatory notes of the Model Law of UNCITRAL. Online electronic documents via internet <URL: [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/2006-54671\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/2006-54671_Ebook.pdf)>, p. 15, accessed 05.11.2009.

<sup>752</sup> Paulsson heavily criticizes the primary and secondary control system. See: Paulsson, Jan. Note sur Termorio. U.S Court of Appeal, District of Columbia, May 25, 2007. *Revue de L'Arbitrage*, p. 559 to 565.

<sup>753</sup> Majoros, Ferenc. *Les Conventions Internationales en matière de Droit Privé*. Pedone, Paris, vol. I, 1976, p. 71.

<sup>754</sup> Lee, João Bosco. *Arbitragem Comercial Internacional nos Países do Mercosul*. Editora Juruá, 2002, p. 280.

<sup>755</sup> Majoros, Ferenc. *Les Conventions Internationales en matière de Droit Privé*. Pedone, Paris, vol. I, 1976, p. 91.

<sup>756</sup> *Op. cit.*, p. 253.

- <sup>757</sup> Rezek, José Francisco. *Direito dos Tratados*. Forense, Rio de Janeiro, 1984, p. 458.
- <sup>758</sup> Soc. Denysiana vs. Soc. Jassica. Tribunal Fédéral Suisse, 1.<sup>a</sup> Corte Cível. *Revue Critique de Droit International Privé*, 1985, n.º 3, p. 551 — 553. Summary: «Convention de New York du 10 juin 1958 — Sentence arbitrale — Exequatur — 1.º. Conflit avec le Traité Franco-Suisse du 15 Juin 1869. — Règle de l'efficacité maximale. — Application des dispositions les plus favorables — 2a. Contrariété avec les dispositions plus favorables du N.CPC. — Même Solution. »
- <sup>759</sup> Van Den Berg, Albert Jan. «The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?» *Arbitration International*, Vol. 5, n.º 3 (1989), p. 228.
- <sup>760</sup> Nascimento E Silva, G.E. Apresentação. In: Casella, Paulo Borba; Araujo, Nadia et al. *A Convenção Interamericana sobre Arbitragem Comercial Internacional, in Integração Jurídica Interamericana — As Convenções Interamericanas de Direito Internacional Privado (CIDIPs) e o Direito Brasileiro*. São Paulo, Editora LTR, 1998, p. 14.
- <sup>761</sup> Rezek, *Op. cit.* note 754, p. 460.
- <sup>762</sup> Brazil only ratified the Convention of Genève of 1923, internalizing it through Decree 21.187 of March 22, 1932.
- <sup>763</sup> «Article 3 — Each contracting State undertakes to warrant the enforcement, by its authorities and in conformity with its national laws, of the arbitration awards issued in its territory, pursuant to the preceding articles».
- <sup>764</sup> Internalized in Brazil through Decree 4.311 of July 23, 2002.
- <sup>765</sup> The signatory countries are, in French: Afghanistan, Afrique du Sud, Albanie, Algérie, Allemagne. Antigua-et-Barbuda, Arabie saoudite, Argentine, Arménie, Australie, Autriche, Azerbaïdjan, Bahamas, Bahreïn, Bangladesh, Barbade, Bélarus, Belgique, Bénin, Bolivie, Bosnie-Herzégovine, Botswana, Brésil, Brunéi Darussalam, Bulgarie, Burkina Faso, Cambodge, Cameroun, Canada, Chili, Chine, Chypre, Colombie, Costa Rica, Côte d'Ivoire, Croatie, Cuba, Danemark, Djibouti, Dominique, Egypte, El Salvador, Émirats arabes unis, Equateur, Espagne, Estonie, États-Unis d'Amérique, Ex-République yougoslave de Macédoine, Fédération de Russie, Finlande, France, Gabon, Géorgie, Ghana, Grèce, Guatemala, Guinée, Haïti, Honduras, Hongrie, Îles Cook, Îles Marshall, Inde, Indonésie, Iran (Rép. Islamique d»), Irlande, Islande, Israël, Italie, Jamaïque, Japon, Jordanie, Kazakhstan, Kenya, Kirghizistan, Koweït, Lesotho, Lettonie, Liban, Libéria, Lituanie, Luxembourg, Madagascar, Malaisie, Mali, Malte, Maroc, Maurice, Mauritanie, Mexique, Moldova, Monaco, Mongolie, Monténégro, Mozambique, Népal, Nicaragua, Niger, Nigéria, Norvège, Nouvelle-Zélande, Oman, Ouganda, Ouzbékistan, Pakistan, Panama, Paraguay, Pays-Bas, Pérou, Philippines, Pologne, Portugal, Qatar, République arabe syrienne, République centrafricaine, République de Corée, République démocratique populaire lao, République Dominicaine, République tchèque, République-Unie de Tanzanie, Roumanie, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Rwanda, Saint-Marin, Saint-Siège, Saint-Vincent-et-les Grenadines, Sénégal, Serbie, Singapour, Slovaquie, Slovénie, Sri Lanka, Suède, Suisse, Thaïlande, Trinité-et-Tobago, Tunisie, Turquie, Ukraine, Venezuela (la République bolivarienne du), Viet Nam, Zambie, Zimbabwe. In: Signatory countries of the Convention of New York of 1958, accessed online at [http://www.uncitral.org/uncitral/fr/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/fr/uncitral_texts/arbitration/NYConvention_status.html), on 11.05.2009.
- <sup>766</sup> For years it has been discussed if there is a need for drafting a new Convention (or an additional Protocol) to advance in the development of arbitration and treat the problems that have been identified in the course of time, such as: limitation of the expression «written agreement» set out in article 2, the non-establishment of provisory measures, provisions on the recognition of arbitration awards in the countries where same issued and, in the part that is of interest to this study, the revision of section V.1(e) which regulates one of the cases of denial of recognition is the suspension or cancellation of the award in the country where it issued or in the country whose law was applied.
- <sup>767</sup> E/AC.42/1, January 21st, 1955, p. 3. Greece already stated that: «Nevertheless it should be noted that the success of arbitration depends entirely on the possibility of simple and prompt enforcement of the award, and in this respect the existing provisions of the international law are still inadequate» (emphasis added). In: Travaux préparatoires 1958 — Convention on the Recognition and Enforcement of Foreign Arbitral Awards and final drafts in English and French, accessed online at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_travaux.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_travaux.html), on 01.10.2007.
- <sup>768</sup> An example is the case Pertamina vs KBC — Karaka Bodas Company. The seat of the

arbitration was Switzerland, according to the UNCITRAL rules. In 2000, after the rendering of an award against Pertamina and another company to pay KBC US\$ 261,166,654.92, Pertamina sought the annulment of the award in Switzerland, where it was denied, and latter filed a suit requesting the annulment of the award in Jakarta, Indonesia, where its request was finally granted. As the annulment did not take place on the judicial courts of the seat of the arbitration, the award was recognized in the United States. In: Karaka Bodas Company L.L.C. vs Persusahaan Pertambangan Minyak Dan Gas Bumi Negara a.k.a. Pertamina; 264 Federal Supplement, Second Series (S.D. Tex. 2003), pp. 490-502; 2003 U.S. Dist. LEXIS 14439, the rulings took place on April 22, 2002, July 22, 2002, July 17, 2002, and June 18, 2003. Yearbook Commercial Arbitration, vol. XXVIII (2003), pp. 908-964.

<sup>769</sup> There are rare cases where the annulment is sought before the judicial courts of the country whose law was applied in the arbitration. The Convention clearly indicates that the control of the arbitration shall be made by the courts of the seat of the arbitration.

<sup>770</sup> According to the Organization of American States» website, the 19 Member States the following are (the dates refer to signature, ratification and deposit, respectively): < Argentina (15/03/1991-03/11/1994-05/01/95RA); Bolivia (02/08/1983-08/10/1998-29/04/99RA); Brazil (30/01/1975-31/08/1995-27/11/1995 RA); Chile (30/01/1975-08/04/1976-17/05/1976 RA); Colombia (30/01/1975-18/11/1986-29/12/1986 RA); Costa Rica (30/01/1975-02/01/1978-20/01/1978 RA); Ecuador (30/01/1975-06/08/1991-23/10/91RA); El Salvador (30/01/1975-27/06/1980-11/08/1980 RA); Guatemala (30/01/1975-07/07/1986-08/20/1986 RA), Honduras (30/01/1975-08/01/1979-22/03/1979 RA); Mexico (27/10/1977-15/02/1978-27/03/78 RA); El Salvador (30/01/1975-27/06/1980-11/08/1980 RA); United States of America (09/06/1978-10/11/1986-27/09/1990 RA); Guatemala (30/01/1975-07/07/1986-20/08/1986 RA); Honduras (30/01/1975-08/01/1979-22/03/1979 RA);; Nicaragua ( 01/30/1975-07/15/03 -10/02/2003 RA); Panama (30/01/1975-11/11/1975-17/12/1975 RA); Paraguay (26/08/1975-02/12/1976-15/12/1976), Peru (21/04/1988-02/05/1989-22/05/1989 RA); Dominican Republic (18/04/1977-11/02/2008-07/07/08 RA); Uruguay (30/01/1975-29/03/1977-25/04/1977 RA); Venezuela (30/01/1975-22/03/8-16/05/1985 RA), as accessed online at URL:<http://www.oas.org> **Error! Hyperlink reference not valid.**>, on 05.11.2009.

<sup>771</sup> For introductory remarks on the convention, see: Polania, Adriana. «Inter-American Commercial Arbitration, General Introduction». *International Handbook on Commercial Arbitration*, J. Paulsson (ed.), Suppl. 37, January, 2003.

<sup>772</sup> Internalized in Brazil through Decree 1.902, of May 9, 1996.

<sup>773</sup> Brazil became a member on February, 2001. In: Hague Conference on Private International Law. accessed online at <http://www.hcch.net>, on 07.05.2007.

<sup>774</sup> Garro, Alejandro. «Unification and Harmonization of Private Law in Latin America». *The American Journal of Comparative Law*, vol. 40, n.º 3, 1992, pp. 596 —597. See also pp. 613-614: «There has been a traditional reluctance or even hostility towards the adoption of international conventions prepared by non-regional institutions. Traditionally, this unarticulated distrust has been mostly based on the belief that those international instruments favored the interests of industrialized countries at the expense of the developing countries. This attitude seems to be changing (...)».

<sup>775</sup> *Op. cit.*, p. 614.

<sup>776</sup> According to the Organization of American States» website, the Member States are the following (the dates refer to signature, ratification and deposit, respectively): Argentina (01/12/1983-07/11/1983-01/12/1983 RA), Bolivia (02/08/1983-15/05/1998-08/10/1998), Brazil (08/05/1979 —31/08/1995-27/11/1995 RA), Colombia (08/05/1979-24/06/1981-10/09/1981 RA), Ecuador (08/05/1979-05/05/1982-01/06/1982 RA), Mexico (02/12/1986-11/02/1987-12/06/1987 RA), Paraguay (08/05/1979-05/07/1985-16/08/1985 RA), Peru 08/05/1979-09/04/1980-15/05/1980 RA), Uruguay (08/05/1979-12/02/1980-15/05/1980 RA), Venezuela (08/05/1979-30/01/1985-28/02/1985 RA), as accessed online at URL:<http://oas.org>, on 01.03.2009.

<sup>777</sup> The Legislative Decree 93, of June 20, 1995, approved the Convention and it became internally binding with the enactment of Decree 2.411, of December 2, 1997.

<sup>778</sup> Lee, João Bosco. «A Convenção do Panamá sobre Arbitragem Comercial Internacional de 1975: existência e vicissitudes do sistema interamericano de Arbitragem Comercial Internacional». In: *Reflexões sobre Arbitragem — In memoriam do Desembargador Cláudio Vianna de Lima*, LTR, 2002, São Paulo, p. 565.

<sup>779</sup> Kleinheisterkamp, Jan. «Conflict of Treaties on International Arbitration in the Southern Cone». In: Kleinheisterkamp, Jan; Lorenzo, Gonzalo. *Avances del Derecho Internacional Privado en América Latina — Liber Amicorum Jürgen Samtleben*. Montevideu, Uruguay,

Fundación de Cultura Universitaria, 2002, p. 682.

<sup>780</sup> Valença Filho, Cláudio de Melo. *Poder Judiciário e Sentença Arbitral*. Curitiba, Editora Juruá, 2002, p. 203.

<sup>781</sup> Portuguese version of the Brazilian Ministry of Foreign Relations» website, accessed online at at <http://www2.mre.gov.br/dai/dtrat.htm>, on 05.11.2009.

<sup>782</sup> Jan Kleinheisterkamp also shares this view. *Op. cit.*, p. 685: «From this perspective, an at least somewhat satisfying interpretation will thus only be found by the consequent and strict application of the remaining general rule of *lex specialis derogat generali*:».

<sup>783</sup> João Bosco Lee, see *Op. cit.* on footnote 751, pp. 251-252.

<sup>784</sup> 2.067, of November 12, 1996.

<sup>785</sup> a) Article 20 shall be highlighted, for it establishes the following: «The judicial decisions and arbitral awards to which the previous article makes reference to shall have extraterritorial effectiveness on Member States whenever they gather the following conditions: a) they are in accordance with the external formalities necessary for them to be deemed authentic in their State of origin; b) that they, as well as their attachments, are duly translated into the official language of the State in which their recognition and enforcement is sought; c) that they were rendered by a competent judicial organ or arbitral tribunal, according to the laws of the requested State concerning international jurisdiction; d) that the party against whom the decision is sought to be enforced has been properly summoned and has its right to defend itself assured; e) that the decision has become *res judicata* and/or is enforceable in the State in which it was rendered; f) that they clearly are not in conflict with public policy principles of the State in which their recognition and/or enforcement is sought». (free translation)

<sup>786</sup> Article 22 states that judicial decisions or arbitral awards shall not be recognized if the decision is incompatible with a previous or simultaneous decision from the requested State or if in this State a proceeding has been initiated «involving the same parties, based on the same facts and having the same subject matter, before any judicial authority of the requested party, previously to the submission of the dispute to the authority that rendered the decision whose recognition is sought» (free translation). Article 22, regrettably, can validate the improper conduct of a party that has initiated a judicial proceeding, despite the existence of an arbitration clause, before the opposing party initiated the arbitration. Meanwhile, the Las Leñas Protocol states that this award shall not be recognized. What we can expect is that, facing a situation similar to the one described, judicial courts dismiss any judicial proceedings brought to that effect as a consequence of the negative effect of the arbitration clause.

<sup>787</sup> Decree 4.719 of June 4, 2003.

<sup>788</sup> The Buenos Aires Protocol, of August 5, 1994, over international jurisdiction concerning contractual issues, provided for the possibility of the parties agreeing to submit their disputes to arbitration, on its article 4.2.

<sup>789</sup> Lee, João Bosco. «L'Arbitrage Commercial International dans de Mercosur: L'Accord de Buenos Aires de 1998». *Revue de L'Arbitrage*, 2004, n.º 3, pp. 567-568. The author recalls that the method chosen by the Mercosur countries to harmonize their laws was by concluding a treaty, while Europe had tried, through the 1996 European Convention of Strasbourg, to adopt a model law on arbitration, which was not successful due to the inclusion of several national particularities, never having entered into force. The author therefore concludes that a Model Law for the Mercosur countries would face the same difficulties.

<sup>790</sup> *Op. cit.* pp. 575-582.

<sup>791</sup> Blackaby, Nigel; Lindsey, David; Spinillo, Alessandro. *International Arbitration in Latin America*. Kluwer Law International, 2002, Holanda, pp. 276-279.

<sup>792</sup> The problems mentioned are of three types: (i) a complex article over the treaty's field of application, which can result on its extraterritorial application without the involvement of any party from Mercosur countries and even if the seat of the arbitration is not located in one of the Mercosur Member States; as well as being applied in case a party is not from a Member State, but the opposing party is and the seat of arbitration is, too; (ii) the lack of references in the Agreement to the arbitration clause being sufficient to initiate the arbitration, which is debatable in Uruguay and Argentina, where a further agreement (*compromisso arbitral*) has to be executed by the parties to that effect, even if there is a valid arbitration clause; and (iii) the unclear wording over the applicable law, since article 10 refers to «private international law and its principles», as well as to «international trade law», without further explaining the meaning of those vague expressions, when it could have easily chosen a clearer wording entitling the parties to chose any applicable law or principle to settle their disputes. Presidential Decree 4.719 of June 4, 2003 has a comment, on its article 1, in respect to article 10, as some sort of

explanatory note, stating that article 10 shall be interpreted in order to allow the parties to freely choose the laws and principles applicable for the settlement of the dispute to which that article makes reference to, provided that they do respect the international public policy.

<sup>793</sup> Casella, Paulo Borba; Gruenbaum, Daniel. «Homologação da Sentença Arbitral Estrangeira Anulada». *Revista de Arbitragem e Mediação*, ano 3, vol. 9, p. 237: «O Acordo de Buenos Aires é a maior prova da babel que reina, impondo exercícios hercúleos de interpretação para que consiga imaginar que monstro disforme e incompreensível sairá da conjugação de três convenções internacionais que jamais fizeram o esforço de serem compatíveis entre si».

<sup>794</sup> Caivano, Roque J. «Reconocimiento y Ejecución de Laudos Arbitrales Extranjeros». In: Adriana Noemi, coord. *Arbitragem Comercial Internacional*. São Paulo, Ed. LTR, 1998. pp.138-187.

<sup>795</sup> Caivano, *Op. cit.*, pp. 166-167.

<sup>796</sup> Caivano recalls that there are authors who state that two different levels of reciprocity could be demanded: first, that the award was rendered in a Member State, and second that the proceeding involved nationals of the Convention's Member States. CAIVANO, *Op. cit.*, p.168, footnote 55.

<sup>797</sup> Caivano, *Op. cit.*, pp. 167-168.

<sup>798</sup> Van Den Berg, *Op. cit.*, pp. 227-228. See also: NORBERG, Charles Robert. Inter-American Commercial Arbitration, General Introduction. *International Handbook on Commercial Arbitration*, J. Paulsson (ed.), Suppl. 26, fevereiro de 1998; Polania, Adriana. Inter-American Commercial Arbitration, General Introduction. *International Handbook on Commercial Arbitration*, J. Paulsson (ed.), Suppl. 37, January, 2003. See also: Hasher, Dominique. «Enforcement of Arbitral Awards — the New York, Panama and Montevideo Conventions. International Commercial Arbitration in Latin American», *ICC Special Supplement*, 1997, Paris, pp. 107-112.

<sup>799</sup> «The decisions or arbitral awards that cannot be contested according to the law or to the procedural laws applicable shall be deemed as definitive judicial decisions. Their enforcement or recognition can be sought as if they were judicial decisions rendered by ordinary national or foreign courts, in accordance with the procedural laws of the country where their enforcement is sought and with the provisions over that matter established by international treaties.» According to the Decree 1.902, of May 9, 1996.

<sup>800</sup> «1. Al menos que entre las partes en un acuerdo sobre arbitraje exista un compromiso expreso en contrario, cuando se cumplan los requisitos para la aplicación tanto de la Convención Interamericana sobre Arbitraje Comercial Internacional como de la Convención sobre el Reconocimiento y la Ejecución de Sentencias Arbitrales Extranjeras, si la mayoría de dichas partes son ciudadanos de un Estado o Estados que han ratificado o hayan adherido a la Convención Interamericana y sean Estados miembros de la Organización de los Estados Americanos, se aplicará la Convención Interamericana. En todos los demás casos se aplicará la Convención sobre el Reconocimiento y la Ejecución de las Sentencias Arbitrales Extranjeras. (...)». URL:<http://www.oas.org/juridico/spanish/firmas/b-35.html>, on 01. 24.2007.

<sup>801</sup> «In the absence of an express agreement between the Parties to that effect, the arbitration shall be conducted accordingly to the procedure of the International Commission on Commercial Arbitration.», according to the Decree 1.902, of May 9, 1996.

<sup>802</sup> Van Den Berg, *Op. cit.*, p. 226.

<sup>803</sup> Kleinhesterkamp, Jan. «Conflict of Treaties on International Arbitration in the Southern Cone». In: Kleinhesterkamp, Jan; Lorenzo, Gonzalo. *Avances del Derecho Internacional Privado en América Latina — Liber Amicorum Jürgen Samtleben*. Montevideu, Uruguai, Fundación de Cultura Universitaria, 2002, p. 678: «Good reason's speak for the simple solution of the general rule of conflict of treaties *lex specialis* derogat generali. The UN-Convention clearly allows additional multilateral and bilateral agreements on the same matter, which — in view of the UN-Conventions universal pretense — can be interpreted as giving space to regional solutions within their specific scope of application. Here is were the above drawn conclusion on the Panama-Convention's scope of application, narrowed down to authentic Inter-American constellations, fits in tightly: its aim is not to compete with the UN-Convention's universality but —corresponding to the principle of subsidiarity— to offer a local solution for local problems. In the Arbitration is a genuine Inter-American one, the Panama-Convention will prevail as *lex specialis* over the UN-Convention».

<sup>804</sup> Termorio S.A. E.S.P. and LeaseCo Group, LLC vs Electranta S.P. et Al., Appeal from the United States District Court of the District of Columbia, n.º 03cv02587, n.º 06-7058, rendered on May 25, 2007, p. 9 of the decision.



<sup>805</sup> Rezek, see *Op. cit.* on footnote 758.

<sup>806</sup> Grigera Naón, Horácio A. Grigera. «Arbitration and Latin America: Progress and Setbacks. 2004 Freshfields Lecture». *Arbitration International*, vol. 21, n.º 2, pp. 169-170.

<sup>807</sup> Jan Kleinhesterkamp mentions that article 25.3. of the Buenos Aires Agreement provides for the subsidiary application of the principles and rules of the UNCITRAL Model Law and, thus, sustains that the application of the Model Law shall also prevail in case the provisions of the treaties are found to be in conflict, for it aims at offering its users a solution when the legal provisions do not lead to a proper answer. Summing up: «At the end of the day, this means a clear decision by the contracting States in favor of what the UNCITRAL Model Law stands for: the internationally accepted standard for arbitration as founded by the UN-Convention». See *Op. cit.* on the footnote, p. 697.

Fonte: <http://www.kluwarbitration.com/document.aspx?id=KLI-KA-1039013-n>

Em 29/10/2010