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The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?

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I. INTRODUCTION

THE traditional hostility towards arbitration and, in particular, international arbitration in Latin America appears to be on the wane. A new trend was heralded by the Inter-American Convention on International Commercial Arbitration, which was adopted by the Governments of the Member States of the Organisation of American States (OAS) in Panama on 30 January 1975 (the 'Panama Convention').[1] The Panama Convention came into effect on 16 June 1976 and has been adhered to by some 11 Latin American countries. Ratification is apparently pending in the United States, where the proposed implementing legislation would consist of a new chapter of Title 9 (Arbitration) of the United States Code.[2]

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (the 'New York Convention')[3] is now 30 years in existence. The New York Convention has been adhered to by 80 States, 17 of which are Latin American. Ratification is reportedly pending in Venezuela.

The status of adherence to both Conventions in the Western Hemisphere is as follows:

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1 OAS/Ser.A/20 (SEPF); reprinted in 14 I.L.M. 336 (1975).

2 Bill S. 2204 to implement the Inter-American Convention on International Commercial Arbitration was introduced in the 100th Congress by Senator Clairborne Pell. In the fall of 1988, after the Senate had passed the bill, Congress adjourned without passage of the bill by the House. Apparently the bill will be reintroduced in 1989.

3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, 330 U.N.T.S. 38 (1959 no. 4739).

Country	*New York (1958)*	*Panama (1975)*
Argentina	x	
Canada	x	
Chile	x	x
Colombia	x[4]	x
Costa Rica	x	x
Cuba	x	
Dominica	x	
Ecuador	x	
El Salvador		x
Guatemala	x	x
Haiti	x	
Honduras		x
Mexico	x	x
Netherlands Antilles	x	
Panama	x	x
Paraguay		x
Peru	x	
Trinidad & Tobago	x	
United States	x	
Uruguay	x	x
Venezuela		x
(21)	(17)	(11)

It is said that the Panama Convention 1975 'was carefully drawn up so as to be fully compatible with the New York Convention 1958.'[5] This statement raises the question what may be the *raison d'être* of the Panama Convention in view of the New York Convention. Another question is whether both Conventions can co-exist. Before examining these questions, it may be helpful to describe briefly the New York and Panama Conventions.

4 By a decision of the Supreme Court of Colombia of 7 October 1988, the New York Convention was declared not to be applicable in Colombia. The Convention was approved by Law No 37 of 1979. That Law was sanctioned by the Minister of the Interior as Delegate in the President's absence and came into force on 25 December 1989. In the decision of 1988 the Supreme Court held that the Delegate Minister in the absence of the President has no authority to sanction laws approving international treaties and that, as a consequence, Law No 37 of 1979 was unconstitutional. See *International Financial Law Review* (April 1989), p. 45.

5 Ch. Norberg, 'General Introduction to Inter-American Commercial Arbitration', in *International Handbook on Commercial Arbitration* (Suppl. 7, 1987) p. 3.

II. NEW YORK CONVENTION 1958[6]

The New York Convention contemplates two basic actions. The first action is the recognition and enforcement of foreign arbitral awards, *ie,* arbitral awards made in the territory of another (Contracting) State. This field of application is defined in Article I. The general obligation for the Contracting States to recognise such awards as binding and to enforce them in accordance with their rules of procedure is laid down in Article III. A party seeking enforcement of a foreign award needs to supply to the court (a) the arbitral award and (b) the arbitration agreement (Art. IV). The party against whom enforcement is sought can object to the enforcement by submitting proof of one of the grounds for refusal of enforcement which are limitatively listed in Article V(1):

(a) invalidity of the arbitration agreement;
(b) violation of due process;
(c) excess by the arbitrator of his authority;
(d) irregularity in the composition of the arbitral tribunal or arbitral procedure;
(e) award is not binding or suspended or set aside in country of origin.

Furthermore, a court may refuse enforcement of its own motion if the subject matter is not capable of settlement by arbitration or violates the public policy under its law (Art. V(2)).

If the award is subject to an action for setting aside in the country in which, or under the law of which, it is made ('the country of origin'), the foreign court before which enforcement of the award is sought may adjourn its decision on enforcement (Art. VI).

Finally, if a party seeking enforcement prefers to base his request for enforcement on the court's domestic law on enforcement of foreign awards or bilateral or other multilateral treaties in force in the country where he seeks enforcement, he is allowed to do so by virtue of the so-called more-favourable-right provision of Article VII(1).

The second action contemplated by the New York Convention is the referral by a court to arbitration. Article II(3) provides that a court of a Contracting State, when seized of a matter in respect of which the parties have made an arbitration agreement, must, at the request of one of the parties, refer them to arbitration, unless the agreement is 'null and void, inoperative or incapable of being performed.'

In both actions the arbitration agreement must satisfy the requirements of Article II(1) and (2) which include, in particular, the requirement that the agreement be in writing.

6 See, generally, the author of this article, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (Deventer, 1981). See also by the same author the *Commentary on Court Decisions* which appears annually in the *Yearbook Commercial Arbitration.*

III. PANAMA CONVENTION 1975

The provisions of the Panama Convention can briefly be described as follows. Where relevant, they are discussed in more detail in Part IV.

Article 1 validates a submission agreement (existing disputes) as well as an arbitration clause (future disputes) with respect to a commercial transaction. The agreement must be in writing:

> The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.

This definition of an agreement in writing is similar to the one given in the New York Convention.[7]

Article 1 therefore eliminates the need to draw up a submission agreement once the dispute has arisen even if an arbitration clause already exists between the parties.[8] It should be noted that a number of arbitration laws in Latin America does not recognise the enforceability of an arbitration clause, which is considered an agreement to agree (*pactum de contrahendo*) and require that after the dispute has arisen the parties execute a submission agreement (*compromiso*). The Panama Convention supersedes this requirement which originates from French law before 1925. The New York Convention has in any case the same effect of superseding such requirement.[9]

Article 2 provides that arbitrators shall be appointed in the manner agreed upon between the parties and that the appointment may be delegated to a third party. These provisions are not expressly contained in the New York

7 Art. II(2) of the New York Convention provides: 'The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.' It is generally assumed that this definition also includes telex (and, indeed, telefax) communications, see *The New York Arbitration Convention of 1958, supra,* n. 5, p. 204.

8 Norberg, *supra,* n. 4, p. 4.

9 *The New York Arbitration Convention of 1958, supra,* n. 5, p. 134. In an article appearing in Volume 5 Issue Number 2 of *Arbitration International*, Mr Horatio Grigera Naón advances the opinion that the New York and Panama Convention would not have the effect of abolishing the requirement of the *compromiso* in case of an arbitration clause. This opinion is at odds with the text of the New York Convention. Article II (1) of the New York Convention provides specifically: '*Each* Contracting State *shall recognise* an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen *or which may arise* between them . . .' See also Article 1 of the Panama Convention. This language does not leave room for the conclusion of a *compromiso* once the dispute has arisen. If the requirement were to apply and a party would refuse to sign the *compromiso,* how could a Contracting State maintain that it fulfills its treaty obligation to 'recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen *or which may arise* between them?' Of course, the abolition of the requirement applies only to arbitration agreements falling under the Convention (*ie,* 'international' arbitration agreements); the Conventions do not have the effect of amending domestic arbitration law.

Convention, but they can be deemed to be implied in Article V(1) (d).[10] They are of particular interest to those Latin American countries where limitations are put on agreements regarding the method of appointing arbitrators.

Article 2 adds that nationals or foreigners may be arbitrators. The background of this provision is that in some Latin American countries foreigners are not allowed to act as arbitrators (such as Argentina and Colombia, which recently abandoned this prohibition).

Article 3 contains the provision that, in the absence of an express agreement of the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission (IACAC).

Article 5 sets forth the grounds for refusal of enforcement of the award which are almost identical with the grounds for refusal of enforcement listed in Article V of the New York Convention.

Article 6 is also virtually identical with Article VI in the New York Convention relating to adjournment of enforcement proceedings pending setting aside or suspension proceedings in the country of origin.

Articles 7–13 are common treaty provisions. Similar provisions can be found in Articles VIII–XVI of the New York Convention.

IV. DIFFERENCES BETWEEN THE NEW YORK AND PANAMA CONVENTIONS

Although the Panama Convention is modelled after the New York Convention, a number of differences should be noted. The four most important ones (field of application, referral by courts of arbitration, conditions to be fulfilled by the petitioner and the applicability of the IACAC Rules) are discussed below.

(a) *Field of Application*

The New York Convention applies to the enforcement of arbitral awards made in another State (Art. I(1)). According to Article I(3), a State may limit the Convention's applicability to the enforcement of arbitral awards made in another *Contracting* State. This so-called reciprocity reservation has been adopted by two-thirds of the Contracting States. Article I(3) also provides that a State may reserve the application of the Convention to legal relationships which are considered as commercial under the national law of that State. This so-called commercial reservation has been adopted by approximately one-third of the Contracting States.

10 Art. V(1)(d) of the New York Convention provides for refusal of enforcement of awards where: 'The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.'

In contrast, the Panama Convention does not provide for any express definition of its field of application. Insofar as the enforcement of awards is concerned, it may be assumed on the basis of an appropriate interpretation that an award will fall under the Convention if:

(1) the award relates to an international arbitration, and
(2) the award relates to a commercial transaction, and
(3) the award is made in the territory of another State, and
(4) possibly, conditions of reciprocity are met.

(i) Internationality

The requirement of internationality can be inferred from the title of the Convention: 'Inter-American Convention on *International* Commercial Arbitration'. This raises the question when an arbitration can be considered to be international. Three recent statutory definitions may be compared in this regard:

A rather vague definition is given by the French International Arbitration law of 1981. Article 1492 of the New French Code of Civil Procedure provides:

> Arbitration is international if it implicates international commercial interests.

A more precise definition is given by the new Swiss law on international arbitration. Article 176(1) of the Federal Statute on Private International Law reads:

> The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

Finally, a detailed definition is given by the UNCITRAL Model Law on International Commercial Arbitration. Article 1 provides:

(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.
(2) The provisions of this Law, except Arts. 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.
(3) An arbitration is international if:
  (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
  (b) one of the following places is situated outside the State in which the parties have their place of business:
    (i) the place of arbitration as determined in, or pursuant to, the arbitration agreement;
    (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
  (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.
(4) For the purposes of paragraph (3) of this article:
  (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
  (b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

All these definitions have, to varying degrees, the inherent problem that in certain situations it may be doubted whether a case falls under the definition. In contrast, the New York Convention does not require that the award relate to an international arbitration. It simply applies to any award made in another (Contracting) State, whether the arbitration is considered as international or domestic.

(ii) Relationship to a commercial transaction

The requirement that the award relate to a commercial transaction is laid down in Article 1 of the Panama Convention which validates arbitration agreements 'with respect to a *commercial* transaction.' In addition, the Convention's Title refers to 'international *commercial* arbitration.'

As observed above, the New York Convention permits a Contracting State to adopt the commercial reservation contained in Article I(3). Unlike the New York Convention, which specifies that the word 'commercial' is to be determined under the national laws of the State making the reservation, the Panama Convention is silent on the applicable law. Presumably, the same rule as in the New York Convention applies in case of the Panama Convention.

(iii) Made in another State

An award must have been made in another State for enforcement under the Panama Convention. This requirement can be inferred from the provisions of Article 5 concerning the grounds for refusal of enforcement. These provisions refer to the 'State in which the decision was made' (Art. V(1) (a); see also Arts. V(1) (d) and (e)) an expression which would be redundant if the award were made in the State within which enforcement is sought. It may be, however, that this expression will be interpreted more extensively to the effect that it also includes awards made within the State in which the award is made.

(iv) Reciprocity

The requirement of reciprocity operates at least two levels. First, a State Party might apply the Panama Convention only to awards made in a State which is also Party to the Convention. In this sense, the reciprocity would be the same as the reciprocity envisaged by the first reservation of Article I(3) of the New York Convention discussed above.

Second, a State Party might apply the Panama Convention only if the arbitration and award concern a relationship between natural or legal persons who belong to (different) State Parties. Such a requirement is not imposed by the New York Convention which applies to any arbitral award made in another (Contracting) State, irrespective of whether the parties to it come from (different) Contracting States. This type of reciprocity appeared, for example,

in the Geneva Protocol on Arbitration Clauses of 1923[11] and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.[12]

It is unclear whether the two levels of reciprocity are implied in the Panama Convention. The reference to 'Inter-American' in the Convention's Title may suggest so. In the context of Article 4, which is discussed below, Mr Norberg observes that 'the recognition provisions of the [Panama] Convention restate the judicial principles of reciprocal enforcement of foreign arbitral awards in the Western Hemisphere as earlier provided in the Treaties of Montevideo and in the Bustamante Code.'[13] In addition, Article 7 provides that the Convention shall be open for signature by the Member States of the O.A.S. On the other hand, Article 9 mentions that the Convention shall remain open for accession by any other State. Furthermore, unlike the New York Convention (Arts. I(3) and XIV), the Panama Convention nowhere mentions the word 'reciprocity'.

For all practical purposes, however, it is safe to assume that reciprocity, in particular the reciprocity at the first level mentioned above, will be applied by the courts in the States Party to the Panama Convention in view of the traditional Latin American tendency to protect national interests and to require reciprocity. In fact, the very adoption of the Convention itself - next to the New York Convention - constitutes an indication that the Convention is, in principle, to be applied in the region of the Americas only.

Both levels of reciprocity are laid down expressly in the proposed legislation implementing the Panama Convention in the United States.[14] The first level is provided in Section 304 which reads:

Recognition and enforcement of foreign arbitral decisions and awards; reciprocity.
Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognised and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

The second level is provided in Section 305, (discussed in Part V below):

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organisation of American States, the Inter-American Convention shall apply.

(b) *Referral by Court to Arbitration*

One of the two basic actions contemplated by the New York Convention is the referral by the court to arbitration. To this effect, Article II(3) of the New York Convention provides:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one

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11 See 27 L.N.T.S. 158 (1924).
12 92 L.N.T.S. 302 (1929-30).
13 Norberg, *supra*, n. 5, p. 4.
14 *Supra*, n. 2.

of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

This provision imposes the obligation on the courts in the Contracting States of the New York Convention to stay their proceedings and to refer the parties to arbitration. This action is mandatory. In contrast, under a number of national laws, such as English law, courts enjoy a discretionary power whether or not to stay court proceedings brought in violation of an arbitration agreement.

Such provision is absent in the Panama Convention. This absence is regrettable since it may undermine the effectiveness of the Panama Convention at the outset of an arbitration. It will thus depend, in principle, on the law of the country where court proceedings are brought whether the proceedings will, at the request of a party, be referred to arbitration.

However, an obligation similar to the one expressly laid down in Article II(3) of the New York Convention may be deemed to be implied in Articles 1–3 of the Panama Convention relating to the validity of the arbitration agreement, the agreed method of appointing arbitrators, and the arbitral proceedings, respectively. The effect of these provisions is likely to be that a court in a State Party to the Panama Convention before which a case is brought with respect to which the parties have agreed to an arbitration falling under the Convention must decline jurisdiction to hear that case if a party invokes the arbitration agreement.

This interpretation is apparently followed by the United States. The proposed legislation implementing the Panama Convention provides in Section 303:

> *Order to compel arbitration; appointment of arbitrators; locale.*
> A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.
> In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Art. 3 of the Inter-American Convention.

(c) *Conditions to be Fulfilled by the Petitioner*

Article IV of the New York Convention reads:

> 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
> (a) The duly authenticated original award or a duly certified copy thereof;
> (b) The original agreement referred to in Art. II or a duly certified copy thereof.
> 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article IV is set up to facilitate the enforcement of the award by requiring a minimum of conditions to be fulfilled by the party seeking enforcement (*ie*, the petitioner). The petitioner need only supply the arbitration agreement and award, and if these documents are in a foreign language, a translation thereof. Compliance with these conditions is *prima facie* evidence entitling the petitioner to enforcement of the award. It is then up to the other party to prove that enforcement should not be granted on the basis of the grounds listed restrictively in Article V(1) of the New York Convention.

The Panama Convention does not contain any provisions similar to Article IV of the New York Convention. This omission leaves parties in the dark as to which conditions they should fulfil when seeking enforcement of an award under the Panama Convention.

It can be assumed that the petitioner need not prove the matters listed in Article 5(1) of the Panama Convention containing the grounds for refusal of enforcement. Article 5(1) opens with the sentence that enforcement may be refused if the party against whom enforcement is sought proves the grounds for refusal of enforcement. Consequently, the petitioner need not prove these grounds.

In the absence of other provisions in the Panama Convention, the question which conditions are to be complied with by the petitioner are probably to be determined on the basis of the law of the country where the award is invoked and, possibly, provisions of (other) international treaties.

In this connection, Article 4 of the Panama Convention may be quoted:

> An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.

The first sentence lays down the principle that the merits of the arbitral award may not be re-examined by the enforcement court, a principle also firmly established under the New York Convention.[15] The second sentence refers in the first place to the procedure according to which enforcement is to take place. A similar provision, though more refined, can be found in Article III of the New York Convention.[16] Article III of the New York Convention is also interpreted to be a basis for application of the law of the forum to those aspects incidental to enforcement which are not regulated by the Convention.[17] The same interpretation could be followed with respect to Article 4 of the Panama Convention.

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15 *The New York Arbitration Convention of 1958, supra,* n. 5, p. 269.

16 Art. III of the New York Convention provides: 'Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.'

17 *The New York Arbitration Convention of 1958, supra,* n. 5, p. 240.

The reference in Article 4 of the Panama Convention to the 'provisions of international treaties' is not entirely clear.[18] If the New York Convention falls under this phrase, the conditions to be fulfilled by the petitioner under Article IV of the New York Convention can be applied provided that the award also comes within the scope of this Convention (see Part V below). International treaties concluded in the Western Hemisphere may also qualify for such residual application. Here, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, adopted at Montevideo on 8 May 1979 (the 'Montevideo Convention')[19] should be mentioned in particular.

Article 1(2) of the Montevideo Convention provides that: 'The rules of this Convention shall apply to arbitral awards in all matters not covered by the Inter-American Convention on International Commercial Arbitration, signed in Panama on 30 January 1975'. The main provisions of the Montevideo Convention are Articles 2 and 3. Article 2 sets forth the conditions under which judgments and arbitral awards have extraterritorial validity. According to Article 3, the party seeking enforcement must supply, *inter alia*, the following documents:

(a) a certified copy of the award;
(b) a certified copy of the document proving that the defendant has been summoned in due legal form substantially equivalent to that accepted by the law of the State where the award is to take effect, and that the parties have had an opportunity to present their case; and
(c) a certified copy of the document stating that the award is final or has the force of *res judicata*.

Compared with the conditions required by Article IV of the New York Convention according to which the party seeking enforcement has to supply only the original of the arbitration agreement and the arbitral award or certified or authenticated copies thereof, the above conditions required by the Montevideo Convention would appear to be more demanding. It should, however, be observed that conditions (b) and (c) of Article 3 of the Montevideo Convention, which are to be proven by the party *seeking* enforcement, are to a certain extent similar to the grounds for refusal of enforcement mentioned in Article 5(1)(b) and (e) of the Panama Convention, which are to be proven by the party *against whom* the enforcement is sought. This raises the question whether

18 The *travaux préparatoires* do not shed much light on this reference. It was proposed by the delegate of Chile and adopted without any discussion. See *Actos y Documentos de la Conferencia Especializada Interamericana sobre Derecho Internacional Privado* (CIDIP), Vol. I, OEA/Ser.K/XXI.1 (22 May 1975) p. 219. Only the delegate of Brazil observed that he understood that expression as 'se trata, como es obvio, de tratados internacionales que estén en vigor entre ambas partes' (*ibid.*, p. 221).

19 The Montevideo Convention 1979 is reproduced in 18 I.L.M. (1979), p. 1224. This Convention entered into force on 14 June 1980.

conditions (b) and (c) must be considered as 'matters not covered' by the Panama Convention, within the meaning of Article 1(2) of the Montevideo Convention.

(d) *Applicability of the IACAC Arbitration Rules*

A rather unusual treaty provision, which has no counterpart in the New York Convention, is to be found in Article 3, reading:

> In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.

The IACAC Arbitration Rules, as amended in 1978, are virtually identical with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) of 1976.[20]

Article 3 is very important for Latin America where local laws on arbitration contain many types of provisions which may impede a smooth functioning of the arbitration. Article 3 establishes that the agreement of the parties on arbitration matters ranks first and that in the absence of such agreement the arbitration is to be conducted in accordance with the modern IACAC Rules which are specifically geared to international arbitration. In neither case, do the local rules of procedure apply since provisions in treaties prevail over them.

It should be noted that the provisions in the IACAC Rules are not limited to the arbitral proceedings but also include provisions on the method of appointing arbitrators (Arts. 6–8). The effect of Article 3 of the Panama Convention then is that, in case the parties have not agreed on a method of appointing arbitrators, the method laid down in the IACAC Rules is to be followed. Such effect constitutes the logical complement to Article 2 of the Panama Convention which provides that the parties are free to agree on the method of appointing arbitrators. If no such agreement is made, Article 3 comes to rescue by implying that the method of appointment laid down in the IACAC Rules shall be applied.

Doubt remains, however, whether the above supremacy over national arbitration laws in regard to the appointment of arbitrators and the arbitral proceedings is fully achieved. Article 5(1) (d) of the Panama Convention provides that enforcement of an award may be refused if the party against whom enforcement is sought proves:

> that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place.

20 The IACAC Rules are reproduced in III *Yearbook Commercial Arbitration* (1978) p. 231 and in Annex II to Norberg, *supra*, n. 5. The UNCITRAL Rules are reproduced in II *Yearbook Commercial Arbitration* (1977), p. 161, with a commentary by P. Sanders, *ibid.*, p. 171.

According to this provision, the agreement of the parties on the constitution of the arbitral tribunal or the arbitral procedure ranks first, but in the absence of such agreement these matters are to be held 'in accordance with the law of the State where the arbitration took place.' The result may be that national laws will still be applied with respect to the appointment of arbitrators and the arbitral proceedings in the absence of an agreement of the parties on these matters, although Article 3 provides that in such a case the IACAC Rules are to be applied. Considering the provisions of Article 3, this phrase in Article 5(1)(d) should have read 'in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.' An interpretation which might solve this discrepancy may be to consider the provisions of Article 3 of the Panama Convention to form part of the law of the State where the arbitration took place and, hence, that the IACAC Rules replace national laws in cases falling under the Convention.

The supremacy of the IACAC Rules is, however, still jeopardised by a provision in the Rules itself. Article 1(2) provides:

> These Rules shall govern the arbitration, except that where any of these Rules is in conflict with a provision of the law applicable to arbitration from which the parties cannot derogate, that provision shall prevail.

Consequently, in those cases where the provisions of local arbitration law regarding the appointment of arbitrators or the arbitral proceedings are of a mandatory nature, they must be followed and any provision in the IACAC Rules derogating therefrom cannot be applied.

It is almost unprecedented that an international treaty would give regulatory powers to a private organisation which is not controlled by any Government. Thus, future amendments of the IACAC Rules are not subject to any form of control notwithstanding the fact that these amendments will constitute treaty law. This aspect of the Panama Convention was too progressive for the United States which, accordingly, limited the extent of Article 3 of the Convention in Section 306 of the proposed implementing legislation as follows:

> (a) For the purpose of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Art. 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on 1 January 1978.
> (b) In the event that the rules of procedure of the Inter-American Commercial Arbitration Commissions are modified or amended in accordance with the procedures for amendment of the rules of the said Commission, the Secretary of State, by regulation in accordance with Sect. 553 of Title 5, United States Code, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this Chapter.

V. CONCURRENT APPLICABILITY OF NEW YORK AND PANAMA CONVENTIONS

When enforcement of an award made in another State is sought, the award may fall under both the New York and Panama Conventions. Such situation may, for example, arise if the award is made in a State which is Party to both the New York and Panama Conventions and enforcement is sought in a State which is also Party to both the New York and Panama Conventions (this is currently the case for Chile, Colombia,[21] Costa Rica, Guatemala, Mexico, Panama, Uruguay, and, perhaps soon, the United States). Similarly, if the arbitration agreement is invoked in court proceedings brought in violation of that agreement, both Conventions may be applicable. In these situations the question may arise which Convention is to be applied. The relevance of this question is twofold. First, the New York Convention provides a clearer regulation for enforcement of foreign arbitral awards and referral to arbitration than the Panama Convention which, as observed above, contains a number of lacunae in this respect. Second, if the Panama Convention applies, the IACAC Rules are to be followed unless the parties have agreed on the appointment of the arbitrators and the arbitral procedure.

The question as to which Convention applies should be examined under three sets of provisions: (1) the provisions of the New York Convention, (2) the rules of conflict of treaties, and (3) the provisions of the Panama Convention.

The New York Convention is quite liberal concerning its relationship with other treaties. To this effect, Article VII(1) contains a so-called compatibility provision and a more-favourable-right provision.[22] The compatibility provision lays down as a general rule that the Convention shall not affect the validity of multilateral or bilateral agreements concerning the enforcement of arbitral awards entered into by the States Party to the New York Convention. The more-favourable-right provision adds to this that a party may base his request for enforcement of the award on other treaties in force in the country where enforcement is sought.

As regards conflicts of treaties, the two traditional main principles are *lex posterior derogat priori* and *lex specialis derogat generali*. More recently, case law and doctrine have developed a third principle: *la règle d'efficacité maximale*. This principle of maximum efficacy, replacing where appropriate the two traditional ones, stands for the proposition that the treaty which upholds validity in a given case is the one which is to be applied.[23] 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

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21 See *supra*, n. 4.

22 Art. VII(1) of the New York Convention reads: 'The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.'

23 See, generally, F. Majoros, *Les Conventions internationales en matière de droit privé* (Paris 1976).

earlier or later treaty, and irrespective of whether it is more general or specific.

The compatibility and more-favourable-right provisions in the New York Convention can be considered as a reflection of the principle of maximum efficacy. The principle can therefore be said to be implied in the Convention itself. Moreover, the main purpose of the Convention to facilitate enforcement can equally be held to be in accordance with this principle.[24]

The Panama Convention is silent on the question of its relationship with earlier or later treaties. It does not contain a compatibility provision nor a more-favourable-right provision as can be found in Article VII(1) of the New York Convention, except that it refers to execution in accordance with 'provisions of international treaties in Art. 4.' Leaving this unclear reference aside, the question is open whether in cases of concurrent applicability the New York Convention or the Panama Convention is to be applied. The traditional principle of conflict of treaties *lex posterior* would point to an applicability of the Panama Convention.

This traditional approach is reflected in the proposed legislation implementing the Panama Convention in the United States. Section 305 reads:

> When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:
> (1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organisation of American States, the Inter-American Convention shall apply.
> (2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 shall apply.

As a consequence, if, for example, in a contract between a Mexican and a US party arbitration is agreed to, but no agreement is made on the appointment of the arbitrators and the arbitral procedure, the arbitration must be conducted in accordance with the IACAC Rules. If this rule is ignored, enforcement of the ensuing award may be refused under the Panama Convention. The New York Convention might have yielded a more positive result. That result could be achieved by applying the more modern rule of conflict of treaties of maximum efficacy.

It is to be noted that Section 305 of the proposed US implementing legislation allows parties to agree otherwise. Such an agreement may, for example, consist of agreeing on the application of the New York Convention in those cases where otherwise the Panama Convention would be applicable. Parties would seem to

24 Art. 30 of the Vienna Convention on the Law of Treaties of 23 May 1969, does not seem to offer a solution for the New York Convention in this respect. See *The New York Arbitration Convention of 1958, supra*, n. 5, pp. 91–92.

have an interest in doing so in view of the uncertainties and omissions in the Panama Convention.

VI. CONCLUSIONS

At the beginning of this article, the question was raised whether the Panama Convention is compatible with the New York Convention. The answer is a reserved yes. The Panama Convention in general does not conflict with the New York Convention. However, the Panama Convention does not contain provisions regarding its field of application, the referral by a court to arbitration, and the conditions to be fulfilled by the party seeking enforcement of the award. The applicability of the IACAC Rules of Procedure in the absence of an agreement of the parties on the appointment of arbitrators and the arbitral procedure is to be welcomed in view of the provisions in a number of local laws in Latin America which do not enhance an expedient arbitral process. Nonetheless, the supremacy of the IACAC Rules over local law is not certain.

In this article, the question was also posed whether both Conventions can co-exist. In cases of concurrent applicability, no major conflict between both Conventions would seem to arise, except with respect to the applicability of the IACAC Rules. Such conflicts may be resolved by the rule of conflicts of treaties of maximum efficacy. In view of, for example, the proposed legislation implementing the Convention in the United States, it is, however, more likely that the Panama Convention, being the later treaty, will be applied.

The final question was: What is the *raison d'être* of the Panama Convention? Legally, the Convention seems to be redundant in view of the New York Convention, save perhaps for the applicability of the IACAC Rules. But, in this author's opinion, the problem of outdated local arbitration laws, for which the IACAC Rules are purported to be a replacement, can be better solved by adopting a model law on international commercial arbitration. The UNCITRAL Model Law of 1985 can now be used for this purpose.[25]

A comment in 1975 on the adoption of the Panama Convention stated that 'Latin Americans, generally, are rather secluded in their world outlook' and that 'they trust global organisations less than they trust themselves.'[26] With respect, I dare to take issue with that comment, certainly in 1989. More Latin American countries have now adhered to the global New York Convention than to the regional Panama Convention and Latin Americans participate increasingly on a world wide level in international arbitration. Within this perspective, the Panama Convention can be considered to constitute a bridgehead to international arbitration in general and the New York Convention in particular. □

25 The UNCITRAL Model Law is reproduced in XI *Yearbook Commercial Arbitration* (1976), p. 379.

26 J. Lliteras, 'The Panama Convention Strengthens Arbitration in the Americas,' in *Inter-American Arbitration*, IACAC (1975 2nd quarter), p. 2.