

Analysis of the Procedure for the Recognition and Execution of Foreign Arbitral Awards in MERCOSUR

Análisis del procedimiento para el reconocimiento y la ejecución del laudo arbitral extranjero en el MERCOSUR

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Abstract

This research considers the current situation for the settlement of investment disputes in MERCOSUR member states. To achieve greater results, the current international legislation has established principles and a broad range of procedures that must be implemented on the trade bloc member states regarding the recognition and execution of foreign arbitral awards. This study applies a descriptive qualitative method. The findings of this study show that there are still some obstacles for the development of investment arbitration, despite its recognition in the current legislations. In this sense this work recommends harmonizing the legal procedures for the institution of arbitration and implementing a Supranational Arbitration Court inside MERCOSUR to increase and make effective the institution of international commerce in the region.

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Resumen

Esta investigación contempla la situación actual del arbitraje de inversiones en los estados miembros del MERCOSUR. Con el propósito de alcanzar mejores resultados, la legislación internacional actual ha establecido principios y un amplio abanico de procedimientos que deben ser implementados en el bloque comercial de los estados miembros en materia de reconocimiento y ejecución de los laudos arbitrales extranjeros. Este estudio aplica el método cualitativo descriptivo. Los hallazgos de este trabajo evidencian que aún subsisten obstáculos para el desarrollo del arbitraje, a pesar de su reconocimiento en la legislación actual. En este sentido, el presente trabajo recomienda armonizar el procedimiento legal de la institución del arbitraje y propone implementar una Corte de Arbitraje Supranacional dentro del MERCOSUR, para incrementar y hacer efectiva la institución del comercio internacional en la región.

Palabras clave: arbitraje de inversiones / MERCOSUR / reconocimiento y ejecución / laudos arbitrales extranjeros / procedimiento legal / Corte de Arbitraje Supranacional.

1. Introduction

Within the Latin American context, the international arbitration scene lately has been subject to various changes. In principle, the Latin American countries protected themselves from receiving foreign investments and did not regulate or even include normative provisions on arbitration and this has led to a negative impact on the practice of international arbitration. This is the case with the inclusion of the Calvo

doctrine, regarding investments, as a clause within the Latin American civil law codes.

The Calvo doctrine, according to García Mora (1950, p. 206), established that foreign investors had to settle their disputes following the national rules of the state where the investment took place and based on its dispute resolution mechanisms. Through the insertion of this clause, the Latin American countries tried to avoid the excesses caused by diplomatic protection from developed countries.

With the globalization of the markets and the massive injection of foreign capital during the last half of the twentieth century, Latin America saw itself forced to introduce the practice of international arbitration as an alternative mechanism for resolving disputes. Therefore, the recognition of arbitral awards in the region was initially obtained with the regulation of this institution within its constitutional norms, the adhesion to various international instruments and the creation of specific norms on the subject. Despite the legislative recognition achieved in the field of international commercial arbitration, barriers still exist for the development of this institution in Latin America.

In the case of the South American trade bloc, Mercado Común del Sur (MERCOSUR), it is necessary to refer the applicability of its rules of arbitration. One of the peculiarities that directly affect the procedure for the recognition and execution of foreign arbitral awards is the absence of a supranational character on MERCOSUR legislation.

While Bolivia, Brazil, Paraguay and Uruguay give priority to their national legislation, Argentina grants precedence to the international treaties. These divergences are evidence of the weakness of MERCOSUR to realize its objectives. Despite the lack of homogeneity on the internal rules of arbitration of the member states, the need to produce a uniform regulation within MERCOSUR is acknowledged, with the aim that its rules get vested with obligations and do not remain as mere theory. The main objective of this study is to provide a detailed ruling description of

the procedure for the recognition and execution of foreign arbitral awards in the MERCOSUR member states.

This thesis will be divided into three main chapters, as well as an introduction and a conclusion. The first chapter will deal with the process for the recognition and execution of the foreign arbitral awards in MERCOSUR, with a review on the internal regulations of each member state. The second chapter will refer to the conditions and limits for the recognition and execution of the foreign arbitral awards in MERCOSUR. Finally, the last chapter will provide an overview of the obstacles and challenges regarding the recognition and execution of the foreign arbitral awards in the trade bloc.

We must take into consideration that the conventions and national legislations on arbitration adopted by MERCOSUR member states include some ambiguous and incomplete provisions, for which it is necessary to analyze the merits of the dispute to suggest the best way to follow for the recognition and execution of foreign arbitral awards, creating in some cases new jurisprudence in case of lack of legislation.

2. The procedure for the recognition and the execution of the foreign arbitral awards in MERCOSUR

2.1. International legislation on the subject

The process for the recognition and execution of the foreign arbitral awards in MERCOSUR member states presents a complex system composed of both national and international laws. Braghetta states that “treaties and model laws envisage that the international community shall treat the arbitration award in a similar way” (2010, p.1).

MERCOSUR member states are bonded with the following international instruments regarding the recognition and execution of foreign arbitral awards: the New York Convention of 1958, the Inter-American Convention on International Commercial Arbitration of 1975 (also

known as the Panama Convention -CIDIP I-), the Washington Convention on the settlement of investment disputes of 1965 (ICSID) and the UNCITRAL Model Law of 1985.

It is important to point out that the Inter-American Convention on the General Principles of Private International Law (CIDIP II), applies in a complementary way to supplement what CIDIP I establish. Thus, CIDIP II and the MERCOSUR Agreement on the recognition and execution of foreign awards will not be analyzed in this work, since both refer to the requirements for the recognition and execution of foreign arbitral awards established by CIDIP I. The international arbitration legislation on the Member States of MERCOSUR can be summarized in the following table:

Member State	Adoption of the UNCITRAL Model Law	Accession to the Panama Convention (CIDIP I)	Accession to the New York Convention	Accession to ICSID Convention
Argentina	Adopted 2018	Mar.1983	Mar.1989	Oct. 1994
Brazil	No, but new law in 1996	Aug.1995	July 2002	----
Paraguay	Adopted 2002	Dec.1976	Oct 1997	Feb.1983
Uruguay	Adopted 2018	Mar.1977	Mar.1983	Sept.2000
Bolivia (Country in process of being incorporated)	Adopted 1997	Jan. 1989	Apr.1995	-Adoption 1995 -Withdrew 2007.

Source: Own elaboration.

a) The New York Convention of 1958

The New York Convention of 1958 had a slow process of adoption by the Latin American countries. Moreover, only one of the member states of MERCOSUR (Argentina) adopted it during the first year it was concluded. The rest of the members adopted it several years later.

The procedure for obtaining the recognition of the awards is indicated in Art. III of such convention, which states that each contracting state will recognize the authority of a judgement and will grant it in accordance with the procedural rules observed in the territory where the decision is invoked.

With regard to the proof for obtaining the recognition and due enforcement of the award, Art. IV of the New York Convention of 1958 provides that the requesting party must provide at the time of the request: a) the original sentence, duly authenticated, or a copy of the original that meets the conditions required for authenticity; b) the original of the agreement referred to in Art. II, or a copy that satisfies the conditions required for authenticity.

Article IV of the Convention continues by stating that:

where the award or agreement is not made in an official language of the country where the sentence is invoked, the party requesting the recognition and enforcement of the sentence must submit a translation of these documents into that language. The translation must be certified by an official or sworn translator, or by a diplomatic or consular agent.

The previous three requirements seek to simplify the process of proving the existence of an award. In this context, it can be inferred that there is a presumptive obligation to recognize the foreign arbitral awards, based on the *pre-enforcement* approach of this instrument.

Even though during the last period the *culture of arbitration* has been promoted thanks to increasing investments that have been carried out inside MERCOSUR, still the member states avoid neglecting the state's fundamental interests to achieve effective implementation of the awards. However, to arrive into an effective pre-enforcement approach, the jurisdictional control must have a minimum intervention. Generally, inside developing countries where the administration of justice is weak, the courts oppose arbitration due to a lack of effectiveness and intern corruption inside Latin-American Courts of Justice.

b) Washington Convention of 1965

The convention on the settlement of investment disputes between states and nationals of other states (ICSID) has been adopted by MERCOSUR members, apart from Brazil and Bolivia (the latter renounced the convention on May 2007). The resistance that some states presented to adopting ICSID may be due to the following reasons.

In the specific case of Brazil, the resistance to adopting international arbitration on investments stands on the fact that

it is the state itself or some of its entities that are involved. On the other hand, it is argued that if the direct recourse to an international instance is given to a foreign investor, this would be granted as privileged treatment with respect to nationals, who must resort in any case to the national courts in case of conflict (Brill & Nijhoff, 2016, p.114).

Additionally, in the matter of investments, the countries of MERCOSUR have often raised the issue of the conflict with human rights. The author Polanco (2016, p.1) discusses that the relationship between international investments and human rights represents a problematic issue for all of the Latin American states, which must balance the fulfillment of their international obligations under human rights instruments, with the protection of investors' interests guaranteed by international investment instruments.

For example, in the 2016 Philip Morris v. Uruguay case, it occurred that the new Uruguayan legislation, called Single Presentation Regulation (SPR), required textual and graphical anti-smoking warnings to be printed on the lower half of cigarette packs and prohibited the use of variants of any brand. In this situation, Philip Morris company had to remove from their packages *Light*, *Blue* and *Fresh Mint*, keeping *Marlboro Red* only. This case

brought to centre-stage the right to health in investment arbitration in the context of the examination as to whether tobacco-control measures introduced by Uruguay in compliance with international agreements amounted to expropriation under a Bilateral Investment Treaty ('BIT') (Feria-Tinta, 2017, p. 614).

After all, with its new packaging legislation, Uruguay was not only complying with its national law and its international legal obligations in the matter of public health but also was acting in good faith. Therefore there could not be indirect expropriation for the investment of trademarks in this case.

Another notorious case in the international arena regarding human rights, took place in the future MERCOSUR member state, Bolivia. Its city of Cochabamba has long lacked an adequate water system; almost half of its population still did not have running water by the year 2000. This is how Bolivia entered negotiations with the Bechtel Corporation, after forming a consortium, resulting in a forty-year agreement for the exclusive provision of water services to the city of Cochabamba.

Immediately upon the signing of the concession agreement, water tariffs increased by more than 100% and the Bolivian government wanted to expropriate the drinking water and sanitation facilities constructed by the Bechtel Corporation. The author De Gramont (2006, p.3) states that the case was presented before the ICSID by the Bechtel Corporation; Bechtel and its co-investor, Abengoa, finally agreed to abandon

the case for a token payment equal to thirty cents due to the social pressure that the Bolivian people presented with the so-called *Water War*.

In this case, water rates increased dramatically in between, but there was also a desire for profit that created the conditions for a large-scale social conflict that affected not only the users of water, but also the whole Bolivian population when a military intervention occurred. The fact of speculating on the right to water carries out a violation of other human rights at the same time, which is inadmissible.

Almost all the MERCOSUR member states (except Uruguay, which is well-known for offering quality services) are rich with natural resources, but for different political, social and economic reasons, these are distributed unequally. The magnitude of income generated by the exploitation of Latin American natural resources often leads to corruption cases by foreign investors, provoking the violation of human rights. Therefore, arbitration is the best way to resolve conflicts between parties if human rights are involved.

By the way, in the matter of human rights, the United Nations Guiding Principles on Business and Human Rights (UNGPs) from 2011 can be used as a guideline in the field of business and human rights as business enterprises are under increased pressure to ensure that human rights are respected throughout their operations. It is also possible to find legislation on the matter in MERCOSUR member state's constitutional texts, as they protect the State's interests and all its international conventions.

Additionally, in relation to the recognition and execution of foreign arbitral awards, the Washington Convention Art. 53 states:

The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this convention. (Article 53, Washington Convention, 1965).

Sommer (2011, p. 6) has pointed out that an arbitration award issued by the ICSID provides a title comparable to a local final judgment. Therefore, it does not become reviewable or appealable by national laws, even if it is subject to restrictions that may exist in the matter of forced execution of judicial sentences against the state (Art. 55, ICSID).

It is important to note that the binding nature established by Art. 53 of the Washington Convention only refers to pecuniary obligations and not to any other kind of obligation. This differentiation is based on the idea that other types of obligations may not exist in every country but, pecuniary obligations are present in every state.

c) The Panama Convention of 1975

The Panama Convention has unified the main provisions from the American continent regarding international commercial arbitration, such as the Montevideo treaties and the Bustamante Code. Its ratification is open to all members of the Organization of American States and has been ratified by more than half of the American countries, including the MERCOSUR member states.

This Panama convention matches with the New York Convention by pursuing the recognition and execution of arbitral awards, as emphasized in its Art. IV:

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.

Unlike the New York Convention of 1958, which in article IV indicates the requirements that must be fulfilled by the party that requests the recognition and execution of the arbitral award, the Panama Convention of 1975 does not state any specific requirement for this procedure. In fact, such regulation remains subject to the national laws where the recognition of the award is required. Although

the Panama Convention has lagged behind in its implementation, given the constant and growing universalization that the New York Convention has had, by counting the latter with a vast doctrinal development and a significant collection of judicial failures that will serve the judges of the region of valuable antecedents for when they have to apply it (Cantuarias, p. 25, 2007),

the Panama Convention has certain characteristics that distinguish it from the New York Convention that will be reviewed below.

The fact that the Panama Convention is specific in commercial matters and meets the necessary parameters to harmonize the procedure for the recognition and execution of foreign arbitral awards in the Americas according to this region's requirements, makes it useful inside the MERCOSUR region.

d) MERCOSUR International Commercial Arbitration Agreement of 1998

By means of a legislative decree in the year 2000, the Argentinean National Congress approved the text of the Agreement on International Commercial Arbitration of Mercosur, concluded in Buenos Aires, on July 23rd of the year 1998 (Mercosur Arbitration Agreement or AAM).

The mentioned agreement has been signed by the four-member states that were part of MERCOSUR by the year 1998 (Argentina, Brazil, Paraguay and Uruguay). This instrument does not establish a supranational institution to govern the arbitration. Furthermore, it refers to the Panama Convention of 1975 to cover all the legal gaps in matters of procedure, appointment, challenge, replacement of arbitrators, as well as execution and recognition of the foreign arbitral awards.

e) UNCITRAL Model Laws

UNCITRAL Model laws are meant to offer an ideal pattern or standards that represents an important model in contemporary arbitration practice. The objective of these rules, as stated by Born (2012, p.29),

was to create a predictable procedural framework for international arbitration that was acceptable to common law, civil law and other legal systems, as well as to capital-importing and exporting interests.

Thus, in 1985, the wave of new arbitration laws in Latin America was based on the publication of the UNCITRAL Model Law on international arbitration. In the specific cases of Bolivia, Brazil and Paraguay, these countries have mixed some of the provision of the Model Law with concepts and existing practices in their respective systems. Recently, Argentina and Uruguay have published new legislation on arbitration.

However, there are still some obstacles for two member states of the MERCOSUR regarding the implementation of the Model Law. The so-called *Acción de Amparo Constitucional* (writ of security) in Bolivia, by which parties can effectively bring a constitutional mechanism as a means of immediate interlocutory appeal in arbitration matters and interfere with the execution of the foreign arbitral award. Meanwhile, as stated by Arentsen (2014), in Brazil, the related action of the so-called “*Mandado de Segurança*” (writ of security) has also been effectively used against arbitral awards.

In any case, there continue to be significant issues about the future impact of Latin American constitutional law on international commercial arbitration, specifically on the issues of scope of arbitrability, the enforceability of choice-of-law clauses, and limitations of appeals.

2.2. Legislative regulations of the subject in National Laws

MERCOSUR is composed of four sovereign member states: Argentina, Brazil, Paraguay and Uruguay. The Protocol of Accession of Bolivia to MERCOSUR was signed by all of the States Parties in 2015 and is currently in the process of being incorporated by the congresses of the States Parties. Venezuela was a member until it was suspended in December 2016 due to the political crisis that faces the country.

Therefore, the following legislations will be reviewed: Argentina, Bolivia, Brazil, Paraguay, and Uruguay.

a) Argentina

Argentina is one of the Latin American States in which most international arbitration procedures have been filed. This country has recently regulated the institute with the International Arbitration Law 27.449 from July 4th 2018. In the past, numerous drafts have been presented to its Congress (*Congreso de la Nación*) and arbitration has been regulated within Provincial Civil Codes of Procedure, jurisprudence and by adopting international arbitration treaties.

The procedure for the recognition of arbitral awards in Argentina begins with the exequatur that is regulated by the rules of the applicable Provincial Civil Code of Procedure. Instead, if the recognition and execution are requested by the federal courts of the country or in the city of Buenos Aires, the rules of the Civil-Commercial Procedural Code of the Nation (CPCCN) will be applicable.

Once the judicial sentence granted by the exequatur has been obtained, the requesting party must initiate the procedure of execution of the said judgment before the Argentinean Court (*Corte Suprema de Justicia de la Nación*), otherwise, they cannot have legal effect or acknowledgment in Argentina.

To obtain the execution of the sentence is necessary to comply with a series of requirements established in Articles 102 and 103 of the Arbitration Law 27.449 (the original sentence or its copy duly authenticated and translated if it is not in Spanish). By means of the aforementioned article, the award should: have the status of *res judicata*, emanate from a competent arbitral tribunal, follow the due process principle, and fulfill the principles of public order of Argentinean law. All these requirements will be analyzed in detail in the next chapter.

b) Bolivia

Bolivia adopted Law 1770 on Arbitration and Conciliation for the first time in 1997, following the guidelines of the UNCITRAL Model Law. Thus, the Supreme Court of Justice of the Nation will receive the request to recognize and enforce foreign arbitral awards presented by the interested parties.

In 2015, Bolivia introduced the new Law 708 on Conciliation and Arbitration, which guarantees foreign, national or mixed investments made in Bolivia. If there are any disputes or controversies arising from any investment, Bolivian national laws will be applied. Conciliation and arbitration will be based in the Bolivian territory; however, hearings and other proceedings may be held abroad.

Meanwhile, Aguirre (2010, p. 99) refers that the Political Constitution of the State (2009) regulates implicitly and expressly in favor and against arbitration in Bolivia. Article 366 of the Bolivian Constitution establishes the prohibition of applying for international arbitration in the matter of hydrocarbons, even if it does not prohibit the arbitration institution. This legal provision has a political background linked with the privatization of public companies that came into force under the government of Evo Morales.

Together with the privatization of the companies in Bolivia, an investment law came into force. The new regulation declared that Bolivian investments would have priority over foreign investments. This provision leads to the revision of bilateral investment treaties that grant foreign investments the so-called *national treatment*. Even if Bolivia has signed twenty-four bilateral investment treaties and the Constitutional text recognizes a new economic policy, Article 320 II of its text represents an economic regression by implementing the Calvo Doctrine for the institution of arbitration.

As a result, transnational companies dedicated to hydrocarbons activity in Bolivia are forced to submit their conflicts to the Bolivian arbitration

system without the chance to act before foreign arbitral tribunals, according to this constitutional provision, the Law 516 for Investments Promotion and the Law 708 on Conciliation and Arbitration.

To sum up, the exacerbated nationalist approach of the Bolivian Constitution will place the country in a difficult situation in the international arena, mainly because a state cannot invoke a rule of its domestic law or its constitutional text to justify the non-compliance of its own international instruments on arbitration.

c) Brazil

During the twentieth century, Brazil was known as the *black sheep* of Latin America as it lagged the rest of the region concerning international arbitration regulations. The author Braghetta (2010) refers that many Latin-American countries instead of adhering to global treaties on the several themes of International Law, some years ago preferred to treat them regionally. The reason for such a position was the understanding that the cultural, political, social and economic differences justify a segregated analysis (Braghetta, 2010, p. 4). Indeed, Brazil's institutional hostility towards international arbitration was not completely overcome until 2002, when it finally adopted the New York Convention.

In Brazil, the regulation on arbitration is included in its Law 9307 concerning national and international arbitrations. On this matter, Article 35 of this law indicates that:

In order to be recognized and enforced in Brazil, the foreign arbitral award must be validated by the Superior Court of Justice (Superior Tribunal de Justiça), which is the higher court of justice dealing with matters of federal law. (Camargo, 2010, p. 172).

Such an effect is accomplished with the *exequatur* procedure. This procedure has been maintained in the new Civil Procedure Code Law 13.105 of 2015, specifically in its articles 960 to 963.

After the arbitral award is recognized by the Superior Court of Justice, the foreign arbitral award must be executed under Law 9307, which

expressly provides that the procedure for validation of international arbitration awards must follow the rules of the Code of Civil Procedure. The code of Civil Procedure submits the validation of arbitral awards to the same procedure as that for the validation of foreign judgements. (Camargo, 2010, p.173).

However, in matters of investments, conforming to Fontoura (2015, p. 877), Brazil continues to be a non-signatory country of the ICSID. Private investors put money in only to obtain profit and not for any other purpose. They are prepared to take greater risks for business, which is interesting for the establishment of new companies. However, with the magnitude of investments, it is also expected that, after paying the fees, investors will be able to maintain them. If they acquire the property of the goods they have bought, they expect to be entitled to them. It is the feeling of insecurity about these aspects that was the cause of bitter experiences in the past.

d) Paraguay

Paraguay adopted the UNCITRAL Model Law within its Law 1879 (2002), in order to make its rules understandable and acceptable to people from different cultures and legal traditions but also to serve both national and international arbitration. This law makes a differentiation between national and international arbitration, not only setting the Republic of Paraguay as an attractive seat to carry out international dispute settlements, but also to draw interests of foreign investors.

The execution of foreign arbitral awards in Paraguay are subject to Article 45 of its arbitration law. An arbitral award, according to this article, regardless of the state in which it has been issued, will be recognized as binding and will be executed upon the presentation of a written request to the competent judicial authority.

International commercial arbitration in Paraguay is also mentioned in Law 117 of 1991 regarding investments, recognizing in its Article 9 that national and international arbitrations will be developed “in accordance with relevant national and international legal standards.” Moreover, Law 194 of 1993, concerning international agency contracts, representation and international distribution, also allows for arbitration in Articles 7 and 10.

e) Uruguay

International arbitration was first recognized in Uruguay 120 years ago, when in 1889 the Treaty of International Procedural Law (CIDIP I) was approved in the city of Montevideo during the first South American Congress on International Private Law.

In 1988, the General Code of the Process was approved in Uruguay by Law 15.982, making specific reference to the execution of foreign arbitral awards in its article 502. This provision indicates that the awards issued by foreign arbitral tribunals may be executed in Uruguay in accordance with the provisions of the treaties or laws regarding enforcement of foreign judgments, as applicable.

Although Uruguay is very advanced in recognition of international conventions and highly respects the arbitration institute, it did not have a regulation on arbitration until 2018, a key year for the development of Arbitration in Uruguay. The new Law 19.636 on arbitration is a modified version of the UNCITRAL Model Law. The new regulation distinguishes between commercial and investment arbitration. According to Articles 40 and 41 of Law 19.636 an arbitral award will be recognized as binding and will be executed upon the presentation of a written request to the competent judicial authority after the presentation of the original sentence or copy duly authenticated and a translation in case they are not written in Spanish.

3. Conditions and limits for the recognition and execution of foreign arbitral awards in MERCOSUR

In order to recognize the arbitral award, is necessary to comply with the following requirements, based on the international instruments recognized by the MERCOSUR state members: (a) a valid arbitration agreement, (b) the fulfillment of due process, (c) the arbitrability of the issue, and (d) the validity of the arbitral award.

3.1. The single conditions for the recognition and execution of the foreign arbitral awards in MERCOSUR

a) The validity of the arbitral agreement

The New York Convention of 1958 establishes in its Article II that:

Each Contracting State shall recognize 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 in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Therefore, the written agreement of arbitration for the MERCOSUR member states (and all the states that have signed the New York Convention), based on the expert on International Arbitration, Gary G. Born, should complete a series of requirements to be valid, these are:

- Agreement to binding arbitration as a subjective element

International commercial arbitration is consensual: unless the parties have validly agreed to arbitrate a dispute, the tribunal has no authority to resolve that dispute. This principle is embodied in the convention and the laws of all developed states. A corollary of the consensual nature of arbitration is the un-

enforceability of awards that are unsupported by a valid arbitration agreement. (Born, 2012, p. 384).

Thus, it is necessary to have a voluntary agreement of the parties in which they bind themselves in advance to observe the terms of the award. Moreover, no matter the results of the arbitral decision, its effect is a calculated risk which the parties have seen fit to assume.

- Scope of the arbitration agreement

Special attention should be given to the terms describing the scope of the disputes to be arbitrated. If the parties intend to arbitrate all disputes, including legal relationships deriving from the main contract, the arbitration clause should specify this in its text. The scope of the arbitration agreement can be drafted into an extensive or restricted form.

On this point, it is wise to draft international arbitration clauses as broadly as possible to catch all disputes having any connection with the parties' dealings. It is usually better to avoid –except in fairly compelling circumstances– efforts to exclude particular types of disputes from arbitration. (Born, 2013, p.40).

- Selection of an arbitral seat

Traditionally, the seat of arbitration is regarded as crucial in international arbitration. Selection of one seat over another might have significant consequences for the parties in the arbitration process, such as an impact on the applicable arbitral procedure and the outcome of the process due to different laws applied in the relevant proceedings (Lindsey, 2016, p. 99).

The arbitral decision shall be rendered according to the procedural laws that govern in the seat of arbitration. Often, the seat is in the city where the hearings take place, or it could also be the same legal jurisdiction from the governing law of the contract.

- Use of an arbitral institution and its rules

“If institutional arbitration is desired, the parties must choose an arbitral institution and refer to it in their arbitration clause” (Aguirre, 2010, p. 99). Institutional arbitration is characterized by entrusting the arbitration administration to a specialized institution by agreement of the parties. Numerous consequences derive from the selection of the arbitral seat, which could include the selection of the procedural law and the selection of national courts. For arbitration, the most requested institution is the International Chamber of Commerce.

For its part, in an ad hoc arbitration, the arbitrators are appointed by the parties, that will establish the rules so that the arbitration can be carried out properly. MERCOSUR member states need to constitute an arbitral institution that is internationally renowned, to attract foreign investors and increase business.

- Appointment, number, and qualifications of the arbitrators

Article 11 of the UNCITRAL Model Law refers to the appointment of arbitrators by saying that:

The parties are free to agree on a procedure of appointing the arbitrator or arbitrators (...) Failing such agreement, (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator.

The selection of the arbitrators is known to be one of the most critical issues in any arbitration. As can be inferred, the parties are free to agree to the appointment of arbitrators, and the arbitration shall consist of three arbitrators. What is more, an appointing authority may keep a register of arbitrators and mediators, which may be accessed by the public.

The same article continues “(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon the request of a party, by the court or other authority specified in

article 6.” Furthermore, the possibility of choosing an arbitrator is a key element of party autonomy in arbitration. It differentiates arbitration from litigation, where the parties cannot choose the judge.

Language of the arbitration

Article IV (2) of the New York Convention says that:

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 a language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

In this matter, it is important to clarify that the arbitration agreement generally specifies the language with which the arbitration procedure shall be carried out. In the absence of this, the institutional rules authorize the arbitral tribunal to choose the language in which the process will take place.

- Formalities, capacity and validity

The New York Convention establishes a presumptive obligation to recognize international arbitration awards. Consequently, the convention intends to facilitate the recognition of the arbitral awards and does not demand extensive requirements. The New York Convention makes express reference to the legislation of the single countries.

As previously discussed, the requirements for the recognition of the arbitration awards are practically the same in the different member states (the original sentence duly authenticated, or its copy, the original of the agreement referred, or a copy that satisfies the conditions required for authenticity, and the translation of the arbitral award if it is not in the official language of the country where the recognition is requested).

The capacity of the parties, according to McLaughlin (1986, p. 250), is to conclude a valid international arbitration agreement by which they

will be governed. Therefore, the requirements seek to simplify the process of proving the existence of arbitral awards, always based on the *pre-enforcement* approach of the convention.

- Choice of law clause

The law chosen by the parties may govern the arbitration agreement. The international business contracts do not necessarily contain a specific choice of law clauses for the arbitration agreements because this agreement is a separate contract that generally establishes its own law.

The author Gary Born (2001, p. 2) expresses it this way:

The freedom of parties to choose the law governing their relations is reflected in a wide range of international conventions. In some cases, one or more of these international agreements will be directly applicable and will supply the rule of decision for the arbitral tribunal.

b) The fulfillment of the due process

The due process, also considered as the mandatory rules of the judicial process, serves to determine the recognition and enforcement of the foreign arbitral awards. Sometimes, the violation of law also infringes on the international public policy and not just the laws of the place or country where the violation occurred.

Therefore, the due process implies the stipulation of procedures, which will have as a final aim, the development of a set of guarantees that seek to protect the citizen and ensure a correct and fair administration of justice. Due process in MERCOSUR strives to ensure that the member states have proper conditions within the process and the rights of both parties are equally respected where it is necessary to arrive at a solution.

The Court of Justice of the state, where the arbitral award should be recognized, must administrate justice in a reasonable time according to the type of process and the legislation of the country.

c) The arbitrability of the issue

The notion of arbitrability, according to Pike and Lustig (2016), refers

to whether an issue must be litigated in court or can be arbitrated instead. This issue comes up when an arbitration agreement requires that two parties arbitrate an issue and one of the parties does not want to be forced to arbitrate. This is often very important for commercial issues and corporate litigation issues.

Thus, when signing a contract with an arbitration agreement, the parties shall consent to arbitrate instead of going to litigate in court. The national laws set (with different formulations) the limits of the subject matter to arbitration, excluding those matters that are not subject to the availability of the parties. This means that arbitration matters do not have unavailable rights as its object. Consequently, the wider the contractual autonomy recognized by the legislator, the wider the arbitrability of the issue in dispute.

d) The validity of the arbitral award

There is an alleged validity of the arbitral award established in Article 34 (2) of the UNCITRAL Model Law, whilst Articles 35 and 36 of the Model Law state that the awards should be recognized, except for where specified exceptions apply. This validity is presumed for the recognition and confirmation of the international arbitral awards.

Furthermore, the recognition and execution of foreign arbitral awards may be refused if the requirements of the arbitration agreement are lacking. Some of the conditions for the validity of the arbitral awards refer to the arbitrability of disputes, the capacity of the parties, and the definition of the object of arbitration.

3.2. Limits for the recognition and execution of foreign arbitral awards in MERCOSUR. The notion of public order.

The notion of public order is clearly expressed in each legal system reflecting the essential values of a society in a specific time. Therefore, it can be interpreted as a mechanism by which the state represses individual interests that may attempt to go against the general essential interests. It is necessary to differentiate between internal public order and international public order, in fact, socioeconomic or cultural elements can interfere in the internal public order that is different in the international public order.

There are still divergences with the doctrine of the public order in the international context besides the terminological problem and the various expressions of it. This situation constitutes a threat to international relations in the field of conflict of laws. Thus, while in democratic countries public opinion will prevail, in dictatorial regimes the will of the dictator will succeed.

On certain occasions, public order was considered as limiting the will of the parties. However, this principle is one of the most important in private international law. In most cases, the internal public order of the Latin American countries transgresses international public order. This situation arises in cases such as *Rusoro Mining Ltd vs. the Bolivarian Republic of Venezuela* (Case No. ARB(AF)/12/5), when Venezuela approved a decree providing for the state control of the property and the mining rights of all gold producing companies, affecting the company's investments in the state.

Another example of the transgressions of international public order in MERCOSUR member states occurred in Argentina with the case of *El Paso Energy International Company vs. República Argentina* (Case No. ARB(AF)//03/15). In this case, the Argentine government went through a crisis with the devaluation of the currency that affected the

contracts with the American company, changing the terms of the contract and causing the loss of large amounts of money.

These examples show in general terms the situation of MERCOSUR member states in relation to the effective recognition and enforcement of arbitral awards in the Southern Cone. Statistics demonstrate the active role that the institution of international arbitration has achieved in the Latin American continent, however, they also reveal the large number of pending cases in the region. To achieve a real change in the matter of regional trade, it is important to homogenize MERCOSUR legislation, argument that will be analyzed in the following paragraph.

4. Current obstacles and challenges for the future

a) The necessity of legislative harmonization in the matter of arbitration on the trade bloc

The circumstances of international arbitration in the MERCOSUR trade bloc have changed dramatically during the last quarter of the century. However, even if the countries are commercially joined together, a legislative harmonization is still necessary to achieve the normal functioning and development of the member states policies, aimed at strengthening international relation agreements between the member states with the purpose of expanding integration policies.

Many commentators, therefore, have seen the necessity for creating a series of instruments to facilitate the formulation and adoption of measures for member states to achieve the purpose harmonization in accordance with Article 1 of the Treaty of Asunción.

The compromise assumed, in terms of legislative harmonization in Article 1 of the Treaty of Asunción, must be led by the cultural identity and the people that make up the integrated MERCOSUR space to achieve a balance between the need to solve the legislative disparities

in matters of arbitration without altering the essence of the social features that constitute MERCOSUR member states.

On the other hand, within the concept of legislative harmonization, it is possible to distinguish between different processes for the unification of the rules. The first process comes with the sanction of various conventions, treaties and specific agreements that regulate the matter on a substantial form and that make part of International Private Law. With the other process, it is possible to find the issues regarding International Private Law, regulated and resolved by the internal law of each member state party, as indicated by the respective conflict of law rules.

Homogeneous legislation on arbitration in the MERCOSUR bloc is not an impossible mission and is a useful tool for strengthening the integration on the bloc.

b) Constitution of a Supranational Arbitration Court in MERCOSUR

The MERCOSUR trade bloc has not implemented an international or supranational court like the European Court of Justice. MERCOSUR urgently needs a reform of its institutions to handle disputes and the insertion of a Supranational Arbitration Court inside the trade bloc to increase and make effective the institution of international commerce in the region. The characteristic of a supranational jurisdictional body is that of being independent in the exercise of its competences concerning the member states of the MERCOSUR bloc, creating them through the framework treaty or a constitutive treaty.

This independence, states the author Ruiz (1999, pp. 31-32), is fundamental in any jurisdictional body, national or supranational, which refers to the individuals who represent the organ, its members or magistrates, needing to be away from any power or strange force that tries to influence this organ's decision.

5. Conclusions

Considering what has been stated above, one of the main reasons for the backwardness of the Latin American countries on arbitration is the slow development of the economy in this continent in comparison with developed countries. Therefore, exporters and investors from North America or Europe are in a better position to impose the terms of contracts than the corporations of Latin America.

Moreover, Europe and North America have well-organized institutions to administer arbitration and none like these exist in Latin America. As a result, all disputes regarding MERCOSUR member countries are resolved abroad since the region still did not implement a supranational arbitration court, because there is still not a real political and economic union. The implementation of this institution on arbitration would increase the experience and the number of conflict resolutions in international trade within the region.

Currently, MERCOSUR is going through a difficult socio-economic crisis that slows down the main objectives of the trade bloc. The suspension of Venezuela from the bloc is evidence of the permanent instability that MERCOSUR faces since its birth, due to the political changes in the Southern Cone. Born as an economic integration project between Brazil and Argentina, MERCOSUR has become a union for development under the terms of the Treaty of Asunción since 1991.

To improve international commercial relations and achieve MERCOSUR as a joint project, each country member should first solve its own domestic problems. There is currently a confusion caused by the numerous arbitral conventions in the same subject matter (the New York Convention, the Montevideo Convention, the Panama Convention and the Las Leñas Protocol). Not only this, but also the lack of provisions that differentiate the preference in the applicability of these arbitral conventions regarding the recognition and execution of arbitral awards, are a problem for the bloc. The Las Leñas Protocol (which

seeks to establish its own supremacy) and the Montevideo Convention do not cover international commercial arbitration.

In the case of MERCOSUR, the bloc is at a stage of having its identity, in which it must decide what type of regional organization expects to be. On the one hand, it must decide if its purpose is to achieve an integration of states that have not fully harmonized their legislations (in this specific case the mechanisms for the settlement of dispute resolution), on the other hand, if it should rather aim to an organization that, at least as far as the interpretation of law is concerned, is capable of doing so in a common and imperative way for all the member states.

The integration process can only have a real consistency, above all stability and duration, if it will be given a sufficiently solid institutional and legal framework. The challenge consists in the creation of stable structures, with enough aptitude to resist the assault of the crises and the erosion of time.

The picture in the case of international disputes in this trade bloc tends to be always administered in foreign countries outside MERCOSUR. Even if MERCOSUR legal rules were framed according to the model of legal rules in UNCITRAL, the resemblance is, in many cases, merely formal. In communities with a different traditions, social structures, economies and ways of life, the requirements of good faith are not weighed nor appreciated as they may be in industrialized countries where commerce and industry are held in high consideration.

The challenge for developing countries that constitute MERCOSUR trade bloc is to welcome arbitration under such conditions considering these countries have a different development, group interest and vision of the world. Experience, furthermore, is conclusive: when a dispute arises between two litigants, one from South America and one from a developed country, the arbitrators, in most cases, make their decision in favor of developed countries. This is because Latin American countries involved in international trade are expected to conform to the

usages of the trade, although the commercial practice is based on principles and values of the western world.

In fact, the repeated exceptions of jurisdiction and some negative precedents in relevant countries such as Brazil and Argentina, have had a rather negative impact on the international arbitration community. To the point that it was recommended to avoid choosing cities in Latin America as the place of arbitration in contracts with Latin American public or state entities.

Currently, judicial intervention persists in the institution of arbitration. It is necessary to take judicial measures, such as the so-called anti-suit injunctions for MERCOSUR member states, to limit the judicial intervention and to prioritize the unavailability of the public interest. For sure, in response to the deficiencies of the system a need for adaptation of the methods of resolving conflicts to a more equitable mechanism and representative of different interests is required in the region.

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