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Arbitration in South America–with Special Regard to the Appointment and Challenge of the Arbitrator

Abstract. The present study discusses some important questions on arbitration in Latin-America focusing on the issue of appointment and challenge of arbitrators. The author attempts to describe some characteristic features of arbitration in Latin-America paying particular attention to the impact of the Calvo Doctrine and Calvo Clause. The author also discusses the significance of the so-called compromiso (or in Portuguese: compromisso). The author gives a detailed analysis on the appointment and challenge of arbitrators in the legal system of Argentina, Brazil, Chile and Mexico, highlighting also some leading cases in this issue. The study enumerates some important arbitration institutes in these countries, as well. The author puts emphasis on introducing the legal regulation on arbitration of the foregoing countries taking into consideration the legal tradition, which might have significant influence on the present legislation and legal practice, as well. As the law on arbitration in some of the foregoing countries in many aspects follow the regulations of UNCITRAL Model Law, the author tries to compare the analyzed acts with the UNCITRAL Model Law, which served and serves as a guideline for arbitration law in several countries of Latin America.

Keywords: international commercial arbitration, Latin America, UNCITRAL Model Law, Appointment and Challenge of Arbitrator

I.

It is obvious that the South American legal systems, specifically the development of private law were influenced to a high extent by the European legal traditions–including Roman law.[1] The international commercial arbitration,

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[1] For the subsequent history of Roman law in South America, see: Hamza, G.: *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján* [Trends of the Development of Private Law in Europe. The Role of

the dispute resolution method[2] which won particular popularity in the European and American legal systems in the previous century, however, remained playing different role in the Latin American region in the recent past and to some extent in the present time.

Alejandro M. Garro in his essay published in the 1980's puts that South American legislation does not provide favourable conditions for arbitration.[3] As it is noted by Claudia Frutos-Peterson in a publication in 2002, it is long established within the field of international law that the Latin American region is unwilling to use this dispute resolution system. In Frutos-Peterson's view, the legislation related to international commercial arbitration is not as "healthy" as it could be.[4] Taking into consideration these remarks, in the present study I deal with the South American commercial arbitration focusing on certain issues concerning the appointment and challenge of the arbitrator, considering the novel tendencies of legislation. In this essay I also analyse the regulations of Argentina, Brazil, Chile and Mexico separately.

If we scrutinize the history of international commercial arbitration it may seem odd to state that international commercial arbitration is often applied between the foreign investor and the host state, or one of the entities of the host state or a business domiciled in the host state. This can be interpreted together with the traditional advantages of commercial arbitration.[5] Foreign investors, however, can only resort to international commercial arbitration as an alternative dispute resolution method if the appropriate legal conditions are

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the Civilian Tradition in the Shaping of Modern Systems of Private Law]. Budapest, 2002. 275–276. For the relationship between the Latin American legal systems and Roman law see: Catalano, P.: A ma is élő római jog: a világ nagy jogrendszerei és a római jog [Roman Law Still Existing Nowadays: The Most Important Legal Systems and Roman Law]. In: *Tanulmányok a római jog és továbbélése köréből. I.* Budapest, 1987–1988.

[2] As it was noted by Iván Szász in an interview: *"It has an eminent national and international career [i.e. commercial arbitration] which is still going on."* See: http://vg.hu/index.php?apps=cikk&cikk=116366.

[3] Garro, A. M.: Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America. *Journal of International Arbitration,* 1 (1984) 320.

[4] Frutos-Peterson, C.: *International Commercial Arbitration in Latin America: As Healthy as It Could be?* See: www.texasadr.org/intlarb.cfm.

[5] For the advantages of arbitration particularly see: Gellért, Gy.: *Új törvény a választottbíráskodásról* [New Act on Arbitration]. *Magyar Jog,* 45 (1995) 451–452. From the subsequent Hungarian literature about the international commercial arbitration and its importance, see: Horváth, É.–Kálmán, Gy.: *A nemzetközi eljárások joga, különös tekintettel a választottbíráskodásra* [Law of International Procedures, Especially Arbitration]. Budapest, 1999; Vörös, I.: *A nemzetközi gazdasági kapcsolatok joga* [Law of International Commercial Relations]. III. Budapest, 2004. 266–275.

available. The legal systems in South America are not homogeneous–in spite of the considerable linguistic similarity. We can state, however, that South American legal systems were averse to foreign investors up until the latest legislation.

We can ascertain that the theoretical basis for this phenomenon is the so-called *Calvo Doctrine*. The Doctrine was established by Carlos Calvo, a diplomat and legal scholar in Argentina in the 19th century.[6] The Calvo Doctrine says that foreign investors shall be under the jurisdiction of the country where they invest into, therefore they shall be subject to the same judgement as persons domiciled in that country. Bernardo M. Cremades–who drew attention to the re-emergence of the Calvo Doctrine–summarized the importance of the Doctrine as follows: (i) the host state is requested by international law only to provide similar treatment to foreign investors and domiciled persons, (ii) the activities of foreign investors are governed by international law, (iii) the courts of the host state have exclusive jurisdiction over the disputes of the foreign investors.[7] It is obvious that the Calvo Doctrine did not serve the emergence of the international arbitration. The fact that the Doctrine did not only influence the commercial legislation of the South American states, but even certain constitutions also, illustrates the high impact of the Calvo Doctrine. The Mexican constitution of 1917 provides that–concerning their properties in Mexico–foreign investors cannot invoke the aid of their own government. Regarding the fact that Mexico is a member of the North American Free Trade Agreement (NAFTA), this provision shall not be applied in relation to the member states of the agreement. It shall be noted that Luis Maria Drago also went along with the Calvo Doctrine. Drago–who was a diplomat, lawyer and foreign minister in Argentina–established the *Drago Doctrine* which prohibited the aggressive efforts of foreign states to recover debts.[8]

The Bolivian constitution still contains the provision which provides that natural persons and undertakings are under the Bolivian jurisdiction; therefore they cannot claim any extraordinary treatment or diplomatic protection.[9] The constitution of Colombia provides the same. By interpreting these regulations we can observe that it was the Calvo Doctrine and the subsequent legislation

[6] See: Calvo, C.: *Le droit international théorique et pratique*. Paris, 1896.

[7] See: Cremades, B. M.: Resurgence of the Calvo Doctrine in Latin America. *Business Law International,* 7 (2006) 54.

[8] In this regard see: Grigera Naon, H. A.: Arbitration and Latin America: Progress and Setbacks. *Arbitration International,* 21 (2005) 135.

[9] For the texts of the constitutions of the Latin American states visit www.georgetown.edu.

that substantially hindered the implementation of international commercial arbitration in the Latin American states.

Resulting from the Calvo Doctrine the so-called Calvo Clause was adopted in transactions related to foreign investments. This clause explicitly emphasized in the contracts that any dispute shall be settled by the *fora* of that state, based on the domestic legislation.[10] The omission of the Calvo Doctrine was reached with certain bilateral agreements which were concluded in order to promote foreign investments. These agreements made it possible to stipulate arbitration in contracts. However, the influence of the Calvo Doctrine can be observed in early bilateral agreements too. For instance, one of such agreements (concluded by Argentina), provides that arbitration can only be commenced if a local court has already decided the case; or a particular period of time passed after a lawsuit had been initiated, and the court did not reach a judgement.[11] This rule regarded the exhaustion of the opportunities for legal remedy provided by the state as a prerequisite of commencing arbitration. This rule is fundamentally contradictory to the purpose of the international commercial arbitration or the arbitration in general.

The influence of the Calvo Doctrine can be observed in relation to the Andea Treaty which was concluded on 30th November, 1977 by Bolivia, Colombia, Ecuador, Peru and Venezuela. Its purpose was the regulation of foreign investments. Decision Nr. 24 regarding the treaty excluded the application of foreign laws and the jurisdiction of foreign courts, including arbitral tribunals, concerning foreign investments and the reception of foreign technologies.[12]

II.

These bilateral agreements, the conclusion of certain international treaties and their ratification, moreover the practic e resulting from them essentially contributed to the adaptation of arbitration in the Latin American region.[13]

[10] About this usage of Calvo Clause see: Sornarajah, M.*: The Climate of International Arbitration. Journal of International Arbitration,* 2 (1991) 70 –71.

[11] See: Cremades, B. M.: Disputes Arising Out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues. *Dispute Resolution Journal,* 20 (2004) May–July.

[12] See: Sanders, P.: *Quo vadis arbitration? Sixty Years of Arbitration Practice.* The Hague, 1999. 42.

[13] Many South American countries ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) convened in

The importance of the Panama Treaty (1975) and the MERCOSUR Agreement (1985)–which regards the international commercial arbitration–shall be emphasized. The fact that most South American countries ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) has also great importance.[14]

The purpose of the Inter-American Convention on International Commercial Arbitration (Panama Convention) concluded on 30th January, 1975 was to eliminate the obstacles which hindered the spread of international arbitration. The following conditions in the legislation were regarded as hindrances: (i) the courts refused to enforce those agreements that contained stipulation of arbitration for disputes occurring later; (ii) there were many ways to oppose the arbitral awards, which created an obstacle for enforcement; (iii) foreign persons were prohibited or prevented from acting as arbitrator;[15] (iv) the requirement to include the stipulation of arbitration in a public instrument (i.e. authentic act).[16] It is obvious that these circumstances and requirements made the application of arbitration, moreover the recognition and enforcement of arbitral awards more onerous. These issues were capable of causing funda)–mental harm to the parties.

Among the international agreements we emphasize the importance of the Inter-American Convention Concerning the Extraterritorial Effect of Judge)–ments and Arbitral Awards concluded in Montevideo on 5th May, 1979. The Convention was drafted in English, Portuguese and Spanish.[17]

According to Cremades, the most important obstacle–which was capable of hindering or even making impossible to employ arbitration–was the so-called *cláusula compromisoria* according to that, even if there was a stipula)–tion in the contract, arbitration could only be initiated provided the parties later confirmed this stipulation via *compromiso* (in Portuguese language: *compromisso*); in some cases, the confirmation of the *compromiso* by the court was

1965, Washington D. C. Many bilateral agreements were also concluded: for instance Argentina concluded 43, Chile 22, Peru 24 bilateral agreements.

[14] The New York Convention was ratified by Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela. Surprisingly, Brazil ratified only on 23rd July, 2002.

[15] For the topic of the present essay it may be regarded as very significant.

[16] See: Bowman, J. P.: *The Panama Convention and Its Implementation Under the Federal Arbitration Act.* www.texasadr.org/panama.cfm.

[17] The text of the Convention: http://www.sice.oas.org/dispute/comarb/intl_conv/caicmoe.asp. The Convention was originally signed by Brazil, Chile, Columbia, Costa Rica, Ecuador, Panama, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela.

also necessary.[18] This rule is very problematic should one of the parties is unwilling to sign the *compromiso* after the emergence of the dispute. The refusal of the *compromiso* (which in many cases contains essential information regarding the appointment of the arbitrator) can create an obstacle to the settlement of the dispute via arbitration. In some countries there is a way to establish the *compromiso* with the intervention of the state court system; if such a solution does not exist, the arbitration cannot be commenced.[19] It should be noted that the origin of the *compromiso* can be traced back to the *compromissum* in Roman law aimed at the appointment of the arbitrator.[20]

The issue related to the *compromiso* caused many controversies even after the conclusion of the Panama Convention. For instance, in Brazil, the Supreme Court of São Paulo ruled in a case between Brazilians and companies from France and other European countries on 16th September 1999 that the stipulation of jurisdiction of the International Chamber of Commerce (ICC) in a contract is valid and enforceable independently of any additional confirmation or agreement, therefore a separate *compromiso* is not a condition of employing arbitration.[21]

Robert Layton in the first half of the 1990's summarized the still existing obstacles which hindered the spread of commercial arbitration in South America. Layton found that the impressions according to which international commercial arbitration was impractical, uncertain, expensive and hard to enforce were still discoverable in the region.[22] It is also notable concerning the present essay that–according to Layton–the stipulation of arbitration was also problematic because a very limited number of people were allowed to be

[18] See: *Resurgence of the… op. cit.* 57.

[19] With respect to this see : Sanders: *Quo vadis arbitration? op. cit.* 41.

[20] For the Roman law definition of the *compromissum* (which is the agreement of the parties submitting their dispute under the jurisdiction of the appointed judge) in the Hungarian literature see: Földi, A.–Hamza, G.: *A római jog története és institúciói* [History and Institutions of Roman Law]. Budapest, 2008. 13. ed, 544. For a summary of the arbitration in the Roman law, see: Kaser, M.: *Das römische Zivilprozessrecht.* München, 1996. 2. ed. 639–644. For a detailed study on the arbitration in the Roman law, see: Ziegler, K. H.: *Das private Schiedsgericht im antiken römischen Recht.* München, 1971. For a review on this work, see: Schmidlin, B.: Ziegler, K. H.: Das private Schiedsgericht im antiken römischen Recht. *Savigny Zeitschrift Romanistische Abteilung,* 91 (1974) 435–443.

[21] See: *Renault do Brazil SA and others v. Carlos Alberto de Oliveira and others.* Quoted by: Cremades: *Resurgence of the…op. cit.* 62. I am dealing with this case in details later on. Robert Layton emphasizes that certain similarities exist between the *compromiso* and the Terms of Reference of the ICC. Layton, R.: Changing Attitudes Towards Dispute Resolution in Latin America. *Journal of International Arbitration,* 10 (1993) 128.

[22] Layton: Same art. 132–133.

appointed as arbitrator due to the legislation. Layton–in order to solve this issue–proposed appointing the arbitrator in the arbitration clause itself.[23] (However, we should mention that this solution is very questionable resulting from the fact that it is possible that the elected persons no longer can act as arbitrators at the time of the occurrence of the dispute.)

The MERCOSUR (South Common Market)[24] Agreement played an important role in the spread of international commercial arbitration in South America. MERCOSUR was founded by the Asuncion Treaty of 1991. Currently it has 5 member states, 5 associated members and one observer state. The MERCOSUR Treaty on International Commercial Arbitration was signed by the foreign ministers of the South Common Market on 23rd July 1998.[25] This agreement was concluded by Argentina, Brazil, Paraguay, Uruguay; ratified later by Chile and Bolivia.

There is a long-run story preceding the conclusion of the MERCOSUR Treaty on International Commercial Arbitration. One of the antecedents is the Montevideo Treaty on international procedural law (1889) that was ratified by Argentina, Bolivia, Paraguay and Uruguay. The Treaty was revised in 1940 by another Treaty signed in Montevideo. Another preceding event was the Pan-American Conference on the minimum requirements of arbitration held in Montevideo in 1933.[26] The Bustamante-code and the Panama Convention (which we already mentioned) are also important in this regard. The two direct antecedents are the bilateral Las Leñas Protocol (1992) regarding judicial co-operation and the Protocol convened by the MERCOSUR member states in Buenos Aires in 1994 on the international jurisdiction in contractual matters.[27]

[23] Layton: Same art. 128.

[24] In Spanish: *Mercado Común del Sur*; in Portuguese: *Mercado Comum do Sul*; in English: *Southern Common Market*. The current members of the Southern Common Market: Argentina, Brazil, Paraguay, Uruguay, Venezuela. Associated members of MERCOSUR: Chile, Bolivia, Peru, Colombia, Ecuador. Observer member is Mexico.

[25] Spanish name of the convention: *Acuerdo sobre Arbitraje Comercial International del MERCOSUR*.

[26] For the character as legal sources of the *Bustamante*-code see especially: Mádl, F.–Vékás, L.: *Nemzetközi magánjog és nemzetközi kapcsolatok joga* [Private International Law and the Law of the International Commercial Relations]. Budapest, 1992. 82–83. About the *Bustamante*-code see: Samtleben, J.: *Internationales Privatrecht in Lateinamerika. Der Codigo Bustamante in Theorie und Praxis. I. Bd.* Tübingen, 1979.

[27] It should be noted that the Arequipa conference played an important role in the unification of civil law in Latin America. The conference was held on 4th–7th August, 1999. Its participants were Argentina, Bolivia, Peru and Puerto Rico. During the conference *Acta de Arequipa* was concluded, the fourth article of which provides that concerning the important areas of civil law shall be harmonized in Latin America. The basis for the

The dispute settlement system of the MERCOSUR Treaty on International Commercial Arbitration is described by László Palotás in the Hungarian literature as follows: "The Mercosur dispute settlement system theoretically lay down the basis for adequate sanctions ruled by *ad hoc* board of arbitration. However, the member states have usually settled their disputes via political negotiations, often on presidential level; therefore not via arbitration. This method provided opportunity to retreat from the provisions of the Treaty, which regarded the effectiveness of the rules of integration as a function of the conformity of the member states."[28] According to Palotás, the MERCOSUR dispute settlement system cannot be analysed disregarding the political factor.

The MERCOSUR Treaty can be regarded as a completely unique institution, because it establishes a regional international arbitration law.[29]

It should be noted that the first MERCOSUR arbitral award of the Arbitration Tribunal was given on 1st April, 1999. In this case, the parties were the Brazilian and Argentine governments; the board of arbitration was composed of an Argentine, a Brazilian and an Uruguayan arbitrator.[30] To sum up, the South American region is not a "hostile" region to international arbitration any longer according to Fernando Mantilla-Serrano.[31]

It has to be highlighted that we can consider as a significant measure of the acceptance of arbitration in Latin America the degree of use of the arbitration in contracts involving governmental entities in the region in a variety of commercial activities. As it is stressed in article of Paul E. Mason and Mauricio Gomm–Sandos, the arbitration including state or a state–owned company has been the subject of a "hot debate" in Brazil, as well. As it has been elaborated by the case law two principles are applied to consider whether a legal dispute

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harmonization is the Roman–German origin of the South- and Central-American legal systems. In detail, see: Hamza, G.: *Az európai magánjog…op. cit.* 293.

[28] See: Palotás, L.: Az *összamerikai szabadkereskedelmi kezdeményezés. PhD-értekezés* [The pan-Americal free-trade initiative. PhD thesis]. http://www.lib.uni-corvinus.hu/phd/palotas_laszlo.pdf. In the quotation the expression fours refers to the founders of the Southern Common Market (Argentina, Brazil, Paraguay és Uruguay). Venezuela joined MERCOSUR in 2006, based on a decision made in Caracas in July, 2006.

[29] See in this respect: Blackaby, N.–Noury, S.: *International Arbitration in Latin America: Overview and Recent Developments.* http://www.iclg.co.uk/index.php?area=4&show_chapter=767&ifocus=1&kh_publications_id=35.

[30] See: Cattaneo, M.: *Recent Developments of Arbitration in Latin America–Focus on Mercosur Countries: Argentina and Brazil.* http://arcnet.org/arclibrary/more.php?id=22_0_1_0_M.

[31] See: Mantilla-Serrano, F.: Major Trends in International Commercial Arbitration in Latin America. *Journal of International Arbitration,* 17 (2000) 139.

of a state or a state–owned company can be arbitrated. First one should analyze the principle of legality under Article 37 of the Brazilian constitution, according to which public assets and rights are always subject to prior legislative authorization. Secondly one has to take into consideration the principle of arbitrability, which provides that the government could agree to arbitrate only with respect the so-called disposable assets (*bens ou direitos disponíveis*).[32]

III.

The legislation of the South American countries regarding arbitration is highly influenced by the process that in several states in the region adopt legislation harmonious to the UNCITRAL Model Law. 33 The purpose of these acts is not only harmonization, but the elimination of the obstacles hindering the adaptation of arbitration.

Another factor is the difference between the levels of the influence by the state courts. Also, several legal systems did not recognize the so-called *Kompetenz-Kompetenz* principle, i.e. the rule that the arbitrators can decide independently their competence.[34] These phenomena can only partly be explained by the influence of the Calvo Doctrine.

Legislators in the region shall face several particularities concerning arbitration, such as the fact that certain international conventions–for example the already mentioned New York Convention–were adopted in completely different times in the South American countries. Also, there is no consensus about the scope of cases that can be decided via arbitration (arbitrability). Another particularity–being closer to the present study–is the distinction between the *arbitraje de derecho* (*arbiter juris* or *arbiter de jure*) and the *amiable compositeur* (arbitrator who judges *ex aequo et bono*). This distinction originates from traditions of continental law. In certain countries the acts regulating arbitration used to separate (and in certain cases they still separate) the *arbiter*

[32] See in that regard the case *Companhia Paranaense de Energia v. UEG Arancaria Ltda.* See: Mason, P. E.–Gomm-Santos, M.: New Keys to Arbitration in Latin-America. *Journal of International Arbitration*, 1 (2008) 34–35.

[33] The UNCITRAL Model Law was compiled in 1985. See: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. For a brief essay on the Model Law: Horváth–Kálmán: *A nemzetközi eljárások joga… op. cit.* 65–66. For a comprehensive commentary on the Model Law: Binder, P.: *International Commercial Arbitration and Conciliation in Model Law Jurisdictions*. London, 2005. 2. ed.

[34] See: Tawil, G. S.: *Arbitration in Latin America: Current Trends and Recent Developments.* http://www.bomchilgroup.org/argmar04.html.

juris (*arbitraje derecho*) and the *arbiter ex aequo et bono*. The former one had to strictly follow the laws (both in the aspects of substantial and procedural law), while latter was allowed to administer justice more freely, even adopting principles of natural law in his judgement. Also, this distinction can be observed in the appointment and even the challenge of the arbitrator.[35] (However, the *ordre public* shall be respected by the *arbiter ex aequo bono* also.[36]) It should be noted that in several Latin American countries only persons having a law degree can act as an *arbiter de jure*.[37]

These rules–being in force only partially nowadays–highly influence the nature and practice of law on arbitration. In the following, we analyse (in different extent and fullness of details) the law concerning the appointment and challenge of the arbitrator in some Central and South American countries (Argentina, Brazil, Chile, and Mexico).

A) Argentina

Argentina is a federal state therefore composed of provinces. The constitutions allows the provinces–similarly to the constitution of the United States–adopting independent act of procedure. In the present days, on federal level the arbitration is governed by certain provisions of the Code of Federal Civil and Commercial Procedure (*Código Procesal Civil y Comercial de la Nación*) which was promulgated in 1967.[38] The states of the highest importance in Argentina (such as Buenos Aires) adopted independent acts concerning arbitration–however, these acts show high similarity to the federal code.

Surprisingly, arbitration is regarded by the federal code as a special court procedure, not an independent dispute resolution system. It should be also noted that only the amendment which was passed in 1981 allowed appointing foreign

[35] Pieter Sanders in this respect notes that the arbitrator proceeding *ex aequo et bono* is also bound by the public policy (*ordre public*), therefore he also has to respect the laws in force. See: Sanders: *Quo vadis arbitration? op. cit.* 43.

[36] See: Grigera Naón, H. A.: Arbitration in Latin America: Overcoming Traditional Hostility. *Arbitration International,* 5 (1989) 138.

[37] *Inter alia* the law on arbitration of Peru (*Ley General de Arbitraje*) takes up this position.

[38] It may be noted with respect to the name "code of civil procedure" that the Latin American countries (contrary to e.g. Spain) do not follow the mainly German tradition to use the terminology of "orders" (such as *Zivilprozessordnung*) to the procedural laws. In Latin America these acts are also called codes. See: David, R.–Brierley, J. E. C.: *Major Legal Systems in the World Today. An Introduction to the Comparative Study of Law.* New York, 1978. 102[77].

board of arbitrators in cases having international aspects. Before this amendment this was not possible in the Argentinean law. We can observe many attempts to reform the rules of arbitration. From 1990, codifying the law of arbitration according to the UNCITRAL Model Law was attempted five times. Lately, the draft (*Proyecto de Lex de Arbitraje Comercial Internacional*) was filed in March 2005; however, none of the two chambers accepted it.[39] In the following, we are studying the provisions of the code currently in force which are relevant for our topic. To some extent, we are also indicating certain provisions of the draft law.

The rules currently in force requires–besides a valid stipulation of arbitration–the *compromiso*, duly signed by the parties after the dispute arises as a confirmation of the intention to settle the dispute via arbitration. Art 740 of the federal procedural code defines the necessary elements of the *compromiso* as follows:

– It shall be drafted in writing indicating the date;
– It shall include the name and address of the parties;
– It shall include the names and addresses of the arbitrators;
– It shall include the subject of the arbitral procedure representing the facts;
– It shall mention that the party breaching the compromiso shall pay a fine.

According the Art 741 of the federal procedural code, the optional elements of the *compromiso* are the followings:

– Rules of the procedure; the location where the arbitrators shall proceed and pass the award (if this is not included, the location is the place where the compromiso was signed);[40]
– The timeframe available for the arbitrators to conduct the proceedings;
– A decision about the appointment of a secretary or leaving the appointment to the arbitrators' discretion;
– Stipulate a fine in case a party initiates the nullification of the award–excluding the situation if the parties explicitly declare the appeal off.

[39] See: Blackaby–Noury: *International Arbitration… op. cit.*

[40] It shall be noted that it is essential to differentiate between the location of the procedure and the passing of the award. It can give help for instance in clearing such questions, like when the members of an arbitral tribunal located abroad pass their award in the domicile of the arbitrators and not at the location of the tribunal.

Provided one of the parties will not sign the *compromiso*–in spite of the valid arbitration clause–the other party has to initiate proceedings at the state court to substitute this statement. Therefore, the state courts have extensive rights to interfere in the commencement of the arbitral procedure due to the fact they are to take up a position on a preliminary question of the proceedings, i.e. a question of law. If the state court finds the requests for issuing the *compromiso* grounded, it creates the *compromiso*, so opens the possibility for an arbitral procedure. In case the motion is rejected, the cost of the procedure shall be borne by the party who filed the motion.

The *compromiso*, therefore, also means the agreement on the appointment of the arbitrators. (The fact whether the court or the parties appointed the arbitrator has also serious relevance regarding the challenge of the arbitrators). The agreement on the arbitrators is typically an issue that cannot be agreed on at the time of the stipulation of the arbitration; i.e. the stipulation can be done even years before the emergence of the dispute; therefore it is more than possible that the parties are not able to nominate the arbitrators.

It shall be noted, however, that the practice of the courts shows that the judges have already acknowledged in the 1980's the stipulation of arbitration as being independent, therefore not linked to the *compromiso* and the validity of the contract including the stipulation. This was established by the Argentinean Commercial Supreme Court in a case concerning a stipulation in a contract concluded in Hamburg. The Court denied ruling that there is no opportunity in Argentina to initiate a lawsuit to appoint a board of arbitrators based on a contract concluded in Hamburg.[41]

The Argentinean law concerning the appointment of arbitrators is regarded as very special (however, not unique in South America, but inevitably peculiar). Second paragraph of Art 766 of the Federal Procedural Code provides that in lack of particular provision in the contract in this relation, the arbitrators shall act as *arbiter ex bono et aequo*, therefore proceed on the basis of the principles of natural law. This is why the parties are to stipulate explicitly if they are willing to appoint arbitrators who act as *arbiter de jure* (proceeding based on the statute law). In my opinion, the fact that the parties have to solve this question even in the arbitration agreement, but the arbitrators are appointed only in the *compromiso* is questionable.

In the Argentinean case law, the difference between the *arbiter ex aequo bono* and the *arbiter de jure* is also very significant. The Argentinean Commercial Supreme Court ruled on 4th March, 2005 that the *arbiter de jure* comes to his

[41] See: *Cámara Nacional de Apelaciones en lo Commercial–Sala, 26 September 1988;* http://www.kluwerarbitration.com/ arbitration/arb/country/Argentina.asp.

decision based on his specialized and legal knowledge, in comparison with the *arbiter ex bono et aequo* who settle the dispute according to the best of his knowledge, even by surpassing the legal formalities.[42] The judgment of the Commercial and Civil Court of Appeal of Formosa is also remarkably in this regard: the court ruled that the award of the board of *arbitri ex bono et aequo* could not be appealed against because they reached their decisions on the basis of natural law, not the positive law.[43]

Contrary to the above-mentioned strict rule, the Procedural Code is more compliant on the rule setting the minimum number of arbitrators. The parties shall agree on the number of arbitrators in the *compromiso*. The parties may agree on all arbitrators together, but they are also allowed appointing one arbitrator each, then the third arbitrator is appointed by the other two arbitrators. Art 750 of the Code is also worth mentioning, according to which the arbitrators–appointed by the parties–vote one from themselves as the president of the arbitral panel. Therefore, the chair is not necessarily the third arbitrator–appointed by the other two arbitrators. This rule is opposite to the rules of certain arbitral organizations.[44] In case the parties cannot agree on the arbitrators, it is the court which appoints them. If a position of an arbitrator becomes vacant, the rules to be followed are the ones which were laid down in the *compromiso.*

According to the Argentinean law, every adult person having full capacity may be appointed as arbitrators. Professional judges and employees of justice can only act as arbitrator in cases where one of the parties is the state.[45]

We can find several distinctions in the Argentinean law concerning the challenge of arbitrators. The most important–which often can be observed in the South American legal systems–is that the arbitrators appointed by the court can be challenged based on the same conditions as professional state judges, whilst the arbitrators appointed by the parties can only be challenged due to facts that arose after their appointment.

In this regard we shall emphasize the observation of Jan Kleinheisterkamp, who points out the problem in the Argentinean law–similarly to other legal systems, for instance the Uruguayan one–that it does not deal with the situation clearly in which the parties do not appoint the arbitrators jointly, but they

[42] See: *C. Nac. Com., sala B, 04/03/2005–armex S. A. v. Application Software.*; http://www.kluwerarbitration.com/ arbitration/arb/country/Argentina.asp.

[43] See: Telecom Argentina Stet-France Telecom S.A. (10. 03. 2005); http://www.kluwerarbitration.com/ arbitration/arb/country/Argentina.asp.

[44] See: Burghetto, M. B.: Current Status of Arbitration Legislation in Argentina. *Journal of International Arbitration,* 21 (2004) 523[17].

[45] See: Art 765 of the Federal Procedural Code.

each have the right to appoint one arbitrator separately. It does not seem to be reasonable that the other party, who has no right to interfere in the appointment of the arbitrator appointed by his opponent, can only challenge this arbitrator based on grounds arose after the appointment.[46]

As it is already mentioned, if the court appoints the arbitrators, the parties can initiate the challenge of an arbitrator on grounds being similar to the challenge of the professional judges. These are the followings:

- If the arbitrator has family relations with one of the parties or his organizational or legal representative;
- If the arbitrator or one of his relatives have interest in the dispute, provided the arbitrator has identical interest with one of the parties or his organizational or legal representative, excluding the shareholders' position in a public limited company;
- If there is legal dispute between the arbitrator and the party initiating his challenge;
- If the arbitrator is the creditor, the debtor or guarantee against one of the parties, excluding professional banks;
- If the arbitrator against the party, or the party against the arbitrator performed denunciation before the beginning of the arbitral procedure;
- If the arbitrator previously acted as a representative of one of the parties, or provided legal counsel or opinion either before or after the beginning of the procedure;
- If the arbitrator was given significant advantage by one of the parties;
- If a friendly relationship exists between the arbitrator and one of the parties which makes their communication direct and close;
- Apparent hostility showed by the arbitrator against a party, excluding the situation in which there was any kind of assault against the arbitrator following his conduct of the case.

It shall be noticed that these reasons for exclusion include several ones that can also be found in other countries' laws concerning arbitration and the procedural rules of international arbitral organizations.[47]

[46] See: Kleinheisterkamp, J.: *International Commercial Arbitration in Latin America. Regulation and Practice in the MERCOSUR and the Associated Countries.* New York, 2005. 214. It shall be noted that the Brazilian law governs the exclusion of the arbitrator appointed by the other party in a more sophisticated way. This difference is explained in detail later on.

[47] See e.g. Art 7. of the Procedural Rules of the International Chamber of Commerce and Art 5.3 of the Procedural Rules of the London Court of International Arbitration.

In case the arbitrators act as *arbitri ex aequo et bono* (following the explicit order or reserve of the arbitration agreement), initiating challenge of an arbitrator is only possible based on narrower scope of reasons arising after the appointment. For example, if there is a direct or indirect interest in the result of the dispute; or apparent hostility resulting from unidentifiable motive. This rule–which is also existent in the Uruguayan and other South American legal systems–is explained by Kleinheisterkamp with the greater flexibility of *ex aequo et bono* arbitration.[48]

According to Art 747 of the Argentinean Federal Procedural Code, challenge of an arbitrator shall be initiated at the board of arbitrators within 5 days after obtaining knowledge of the appointment of the arbitrator. According to Maria Beatriz Burghetto, this deadline is also applicable if the initiation of the challenge is based on a reason arose after the nomination.[49] If the arbitrator does not renounce, the state court has to decide on the petition. The competent court is the one which has otherwise jurisdiction, or the court where the *compromiso* was concluded. This decision cannot be appealed. However, we shall refer to the interesting fact that the arbitral procedure is suspended until the court rules on the challenge.[50] This can constitute means for obstructing the procedure.

Another rule worth mentioning provides that a judge–therefore an arbitrator also–is allowed denying the participation in the case based on incompatibility without disclosing the reason itself. This rule can be found not only in the Argentinean but also in the Brazilian law. This solution is self-evident for the arbitrator, because he can deny his participation without making the reason public.[51]

According to Art 746 of the Argentinean Procedural Code, the parties can agree on challenging the arbitrator; before this agreement, one of the parties shall file a motion of challenge.

The Argentinean law provides a peculiar solution for modifying the number of the board of arbitrators after the award. Provided the arbitrators cannot reach consensus concerning the award, therefore the decision is obtained via voting, in which the majority makes the decision on the award. If a majority cannot be obtained following the composition of the tribunal, another arbitrator shall be appointed in order to make decision.[52] The number of the board necessarily

[48] See: Kleinheisterkamp: *International Commercial Arbitration… op. cit.* 210.

[49] See: Burghetto: *Current Status of Arbitration… op. cit.* 524[23].

[50] See: Art 747 of the Federal Procedural Code.

[51] See: Art 30.2 of the Argentinean Federal Procedural Code, respectively Art 135 of the Brazilian Code of Civil Procedure.

[52] See: Art 757 of the Argentinean Federal Procedural Code.

varies, so they can obtain majority. It shall be noted here that–on the contrary–according to Art 25 of procedural rules of the ICC (International Chamber of Commerce) Court of Arbitration, the chair has the right to decide in lack of majority.[53]

The draft of the new procedural code contains several novelties being relevant also for this essay. The draft concerns the Argentinean and also the international arbitration (provided the location of the arbitration is in Argentina). The draft–in accordance with the UNCITRAL Model Law–would abolish the dualism of the arbitral agreement and the *compromiso*, using the uniform concept of arbitration clause. In case the parties do not agree on the procedural rules, the arbitrators have the right to choose the most appropriate rules. Another important difference in the draft is that arbitrators can only decide *ex aequo et bono* if the parties explicitly authorize them to do so.[54]

Regarding the appointment of the arbitrators, Art 10 of the draft provides that if the parties do not agree on the number of the arbitrators, one arbitrator is going to proceed. With respect to the exclusion grounds, it should be noted that an arbitrator shall not act in a joint arbitral procedure, excluding the situation if the same tribunal proceed in the other case. Therefore, one may challenge an arbitrator successfully if the given arbitrator proceeds in a case and in a joint case at the same time, and the composition of the two tribunals is different. The legislator is willing to ensure the impartiality of the procedure by this regulation. Joint case is a case in which the petitions and evidences are connected or the outcomes of the two cases are interrelated. However, some issues arise concerning the application of this rule. For instance, if the correlation between the two cases is not obvious, a party can initiate the challenge of the arbitrator–as a tactical means–at any time,[55] almost, stating that he got to know the information just before filing the motion of challenge.

he draft–in accordance with the Model Law–includes the principle of equal treatment of the parties and due process. In accordance with these principles, Art 24 (3) provides that the challenge of the arbitrator can based on the fact that the arbitrator does not forward any communication between him and one of the parties to the other party. The adaptation of a rule laid down in order to prove the impartiality and independence of the arbitrator can create some hindrances.

[53] Concerning the practice of the ICC, see: Schäfer, E.–Verbist, H.–Imhoos, Ch.: *ICC Arbitration in Practice.* The Hague, 2004.

[54] For the summary of the most important changes in the draft, see: Burghetto: *Current Status of Arbitration… op. cit.* 534–535.

[55] See: *Ibid.* 531[66].

In Argentina, one can find several renowned arbitral tribunals. The Stock Exchange Arbitration Court of Buenos Aires (founded in 1963), the Court of Arbitration at the Argentinean Chamber of Commerce and the Corn-Exchange Court of Arbitration (founded in 1905), which decides *ex aequo et bono* shall be referred here. The proceedings of these tribunals are determined by the legal framework of the Federal Procedural Code. The adaptation of the analyzed draft would contribute to the further development of the Argentinean arbitral practice.

B) Brazil

The Portuguese legal system has striking impact on the development of the Brazilian law, especially on the private law.[56] (We should also mention the fact that the German law played also an important role in the development of private law–with especial regard to the civil code.[57]) Arbitration was not unfamiliar to the Brazilian law at all, since Art 160 of the Constitution (known as the "imperial *Magna Carta*") recognized arbitration as a means of settling disputes. The Decree number 737 of 1850 rendered explicitly possible applying arbitration for merchants. It shall be noted that this Decree was abolished by Act 1350 promulgated on 14th September 1866. In spite of the fact that–for instance–in 1910 the dispute between Peru and Brazil on a conflict related to their borders was settled via arbitration (however, not commercial arbitration), until the new law on arbitration (currently in force) was adopted, the legal framework did not fit the needs of arbitration. The arbitration clause was not directly enforceable; the arbitral awards were to be homologated by the state judicial bodies; finally, Brazil ratified certain important international conventions concerning international arbitration relatively late.[58] Despite the fact that the Geneva Convention was signed in 1923 and ratified in 1932, the Panama Convention was ratified only in 1996, while the New York Convention in

[56] See: Hamza, G.: A magánjog kodifikálása Brazíliában [Codification of Civil Law in Brazil]. *Acta Faculatis Politico-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae,* 29 (1987) 203; Hamza, G.: Törekvések a magánjog újrakodifikálására Brazíliában [Approaches of the Recodification of the Civil Law in Brazil]. *Magyar Jog,* 44 (1997) 756.

[57] See: Valladão, H.: *Der Einfluß des deutschen Rechts auf das brasilianische Zivilgesetzbuch (1857–1922)*. Rio de Janeiro, 1973.

[58] See: Brechbühl, B.: 44th Congress of the International Association of Lawyers (UIA) in Buenos Aires–International Arbitration Commission. *Journal of International Arbitration,* 18 (2001) 239.

2002.[59] Until the Convention on the recognition and enforcement of arbitral awards was ratified by Brazil, the gap resulting from the late ratification led to serious problems for the arbitral practice.[60]

Prior to the act in force governing arbitration was passed, three drafts were presented, in 1981, 1986 and 1988. In 1991, a committee called *Arbiter Operation* was established. The final text of the draft was created in 1992 and the legislature passed the law in 1996. The Act 9307 on arbitration (*Lei de Arbitragem*) was promulgated by the president on 23rd September 1996 and came into force on 24th November, 1996. This act substantially modified the legal framework of arbitration; concerning *inter alia* the enforceability of the arbitral award and the importance of the arbitration clause (that is analysed later in detail).[61] Before the law currently in operation was promulgated, the rules of the arbitral procedure had been included in the Code of Civil Procedure of 1973.

The Brazilian law in force follows to a great extent the provisions of the Model Law–regarding both the domestic and international arbitration. It has, however, preserved certain traditional rules that are very important for the practice. Therefore, the Brazilian law on arbitration can be regarded as a combination of the modern and traditional legislation.[62] For the topic of the present study the questions related to the arbitration clause and the *compromisso* have great importance. Until the present legislation the conclusion of the arbitral agreement, the *compromisso* had striking importance besides the arbitration clause–similarly to several South American legal systems. In case one of the parties was unwilling to agree on the *compromisso*, it was the ordinary state court whose procedure could result in the conclusion of such agreement. It is a fair question, whether the party commencing arbitral procedure who acts *bona fides* may claim damages and costs at the end of the procedure of the state court, when the arbitral agreement is concluded. However, in the Brazilian practice, such claims do not exist.[63]

The act in force regulates also the compulsory elements of the arbitral agreement (*compromisso*), providing that it shall include–*inter alia*–the name,

[59] The Panama Convention was ratified by the Regulation 1902 of 1996, while the New York Convention was ratified by the Regulation 431 of 2002.

[60] Bowman holds a similar opinion. See: Bowman: *The Panama Convention and… op. cit.*

[61] For the importance of the law on arbitration see: Lopes, S.–Sodré, A.: Arbitration Procedures in Brazil. In: Campbell, D.–Rodriguez, S.–Prell, B. (ed.): *International Assistance in Judicial Matters.* Ardsley, N. Y., 1999. 27–28.

[62] See: Kleinheisterkamp: *International Commercial Arbitration… op. cit.* 8.

[63] See: Gomm-Santos, M.: Arbitration in Brazil. *Journal of International Arbitration,* 21 (2004) 496.

profession and domicile of the arbitrators. If the arbitration clause was concluded, however, one of the parties will not agree on the *compromisso*, Art 7 of the act may be applied saying the other party can commence a procedure at the ordinary state court. This court provides an oral hearing and decides on the *compromisso arbitral*. During the oral hearing the court tries to convince the parties to agree jointly on the *compromisso arbitral*. If the parties are unable to agree on the content of the *compromisso arbitral*, it is the court which creates it either at the oral hearing or within 10 days after the hearing.

According to Pieter Sanders this rules means the preservation of the *compromisso*. It constitutes an evidence for the legislative process in which the provisions of the Model Law are adopted in parallel with the traditional rules.[64]

At the present time, however, it is also possible–due to the influence of the practice, to some extent–to commence the arbitral procedure based directly on the arbitration clause. In this case the arbitration clause shall be the so-called complete arbitration clause, including–besides the submission of the parties' dispute under the jurisdiction of an arbitral panel–the precise procedure of the appointment of the arbitrators. This standpoint was explained in the already-mentioned *Renault do Brazil SA and others v. Carlos Alberto de Oliveira Andrade and Others* case. According to the facts of the case, in the arbitration clause the jurisdiction and procedural rules of the International Chamber of Commerce were stipulated in such a manner that the location of the arbitration was the USA. Considering the indicated arbitration clause included the precise rules for appointing the arbitrators, the Court of Appeal of São Paulo ruled that there was no need for concluding *compromisso*. In a subsequent case, a party–based on an arbitration clause not including the appointment of the arbitrators (i.e. not complete arbitration clause)–was unwilling to submit a dispute under the jurisdiction of an arbitral panel, this is why the resolution of the court substituted the *compromisso*.[65]

Therefore, in order to conclude an arbitration clause being capable to completely ignore the jurisdiction of the state courts and to commence the arbitral procedure, the clause shall include the exact procedure of the appointment of the arbitrators. The parties can either stipulate the procedural rules of a certain arbitral body or they may lay down the decisive rules of the appointment. This requirement shows the essential purpose of the legislature: the parties submitting their possible dispute under the jurisdiction of an arbitral

[64] See: Sanders: *Quo vadis arbitration? op. cit.* 49.

[65] See: *Americel S.A. v. Compushopping Informática Ltda. ME and Others*. Quoted by: Gomm-Santos: *Arbitration in Brazil… op. cit.* 52.

panel shall know the entire procedure of establishing the panel, because that will decide the case regarding possibly very large sum in issue.

Concerning the legitimacy of the arbitral procedure, it is essential for the contracting parties to know the procedure of the appointment before the dispute arises; therefore, this cannot constitute basis for ignoring the arbitral procedure. If the parties conclude the above-mentioned complete arbitration clause (no further *compromisso arbitral* is necessary), but one of the parties is not willing to take part in the arbitration, the state court declares the enforceability of the complete arbitration clause and oblige the reluctant party to participate in the arbitration.

Concerning the procedure of the state court it is essential to recognize the difference between this procedure and the one based on Art 7 of the act on arbitration. Latter is applied if a complete arbitration clause does not exist; therefore the conclusion of the *compromisso arbitral* is necessary, however one of the parties will not agree on it. In the case analyzed above the conclusion of the *compromisso arbitral* is not necessary (due to the fact that a complete arbitration clause exists). So, the duty of the court is to declare the enforceability of the complete arbitration clause in case one of the parties will not agree on the arbitral procedure.

According to Art 12 of the law on arbitration, in case the parties conclude the *compromisso*, it expires immediately, if the arbitrator refuses the appointment and the parties explicitly stated previously that they would not call for a substitute person. This applies if the arbitrator dies or certain circumstances occur that prevent him from voting. These conditions shall be taken into consideration when the parties conclude the complete arbitration clause or the *compromisso*.

According the Art 13 of the law on arbitration, every person having full capacity being trusted, therefore appointed by the parties may act as arbitrator. It is worth mentioning that the Brazilian citizenship is not a condition. The law requires that the number of the appointed arbitrators must be odd. If the parties appoint even number of arbitrators, the arbitrators can appoint one further person. Provided the arbitrators are unable to reach an agreement on this issue, the parties may commence the action of the competent state court. However, the law does not define timeframe for the parties to commence a procedure when they realize that the arbitrators cannot agree on the one further arbitrator. This issue shall be solved by the legal practice; however, this provision provides a means for the arbitrators to prolong the procedure. Provided the arbitral panel is not constituted by a sole arbitrator, the arbitrators elect one from themselves as chair of the panel. If the arbitrators are unable to agree on the chair, the law renders help: in this case the most elderly arbitrator will act as the chair.

Art 13 (6) of the Brazilian law on arbitration concerning the impartiality and independence of the arbitrators follows specifically the related provisions of the Model Law. It provides that arbitrators shall act independently, impartially and carefully.[66] Concerning the professional state judges, the grounds of exclusion are divided into two groups: absolute (strict) and less strict grounds of exclusion.[67] This provision regards state judges; however, Art 14 of the law on arbitration provides that a person who is in such relation to the parties or the case itself that–as a state judge–would lead to exclusion shall not proceed as arbitrator. It is necessary to mention that this provision does not show the above-mentioned differentiation between strict and lesser strict grounds of exclusion.

The Brazilian law requires the arbitrators–similarly to the Model Law–to disclose, before they accept the assignment, any fact that would raise justified doubts concerning their impartiality or independence. In order to ensure fair trial, the law further requires equal treatment of the parties (Art 21) and that the arbitrators shall provide oral hearing for both parties.[68]

The Brazilian law is very clear concerning the challenge of the arbitrators, providing that–based on grounds having arisen before the appointment–a party can file motions of challenge only if he had not taken part in the appointment or had obtained knowledge about the certain information after the appointment.[69] These provisions creates a regulation more sophisticated than the Argentinean system, which provides that a party may file motions of challenge against an

[66] The wording of the law on arbitration follows also that of the Model Law using the appropriate Portuguese expressions: „*No desempenho de sua função, o árbitro deverá proceder com imparcialidade, independência, competência, diligência e discrição.*" The Model Law uses the terms "impartiality" and "independence". It shall be noted that Section 2 of Art 21 of the Brazilian law emphasizes the requirement of impartiality, using the term "*imparcialidade"*.

[67] The strict grounds are the "*causas de implicancias",* the less strict grounds are the "*causas de recusaciones"* in the Brazilian law. These rules are regulated in Art 134–137 of the Procedural Code.

[68] With respect to this, see: Blackaby, N.: Arbitration and Brazil: A Foreign Perspective. *Arbitration International,* 17 (2001) 137.

[69] Cp. Section 2 of art 14 of the law on arbitration: „*O árbitro somente poderá ser recusado por motivo occorido após sua nomeação. Poderá, entretanto, ser recusado por motivo anterior a sua nomeação, quando: a) não for nomeado, diretamente, pela parte; ou b) o motivo para a recusa do árbitro for conhecido posteriormente á sua nomeação.*" In English: "An arbitrator may be challenged only for reasons which occurred after his appointment. However, he may be challenged for a reason which occurred before his appointment, when: a) he is not appointed directly by a party; or b) the reason for the challenge of the arbitrator becomes known after his appointment."

arbitrator appointed by himself only on grounds arose after the appointment. In this regard, the Argentinean law does not differentiate between the separately and jointly appointed arbitrators; the rule applies to both groups. While this rule is appropriate if the arbitrators are appointed jointly by the parties, in case of separate appointment, it is more questionable. For the party who could not participate in the appointment of the given arbitrator it is not fare to refuse the right to challenge him on grounds arose before the appointment.

The motion of challenge–according to Art 20 of the law on arbitration–shall be filed immediately after the ground for challenge arises. With respect to the decision making, the Brazilian law follows such a "radical" method, which is the stricter solution provided by the Model Law. According to this, the state courts cannot interfere in this case; it is exclusively the arbitral panel that can decide. There is no legal remedy against this decision.

The decision concerning the challenge of the arbitrator may only be challenged in the legal remedy provided against the arbitral award. Within sixty days of the date of service of the award a party may file for an action to have the award overturned–based on certain grounds.[70] The party may invoke the lack of the arbitrators' impartiality or independence; the text, however, does not follow the wording of the Model Law. Art 32 lists the grounds for declaring the award null and void. It includes the case when the award was given by an arbitrator who could not proceed as arbitrator; also, when the award was a result of corruption. The burden of proof–as it can be derived from Art 33–is on the side of the party who filed for an action.

It is clear that the arbitrators have serious responsibility in connection with the challenge of the arbitrators, because this decision highly influences also the award. If the arbitrators are negligent in this respect, it may lead to serious damages of the parties. (It should be noted that Art 17 of the law on arbitration orders the application of the rules governing the responsibility of persons having official positions.) Jan Kleinheisterkamp argues that it would have been a better solution to provide a legal remedy by the state judicial bodies against the decision concerning the challenge of the arbitrators.[71]

It should be also noted that it could take relatively a long time to enforce an arbitral award in Brazil. As a reason for that we can mention that the losing party usually attempts to challenge the award itself in front of a regular court. Nevertheless the regular court in most cases rejects the challenge, it can take significant time before the court in charge reaches such a decision.

[70] Cf.: Lopes–Sodré: *Arbitration Procedures in Brazil…op. cit.* 27–28.
[71] See: Kleinheisterkamp: *International Commercial Arbitration…op. cit.* 217.

As a recent example on the challenge of arbitrator we can refer to the following case. The parties agreed on arbitration in São Paulo under the UNCITRAL rules administered by American Arbitration Association. The parties defined the number of the arbitrators by ruling three arbitrators, each party could appoint one-one arbitrator and the party-appointed arbitrators could select the chairperson of the tribunal. Furthermore the parties composed a submission agreement, in which they expressly waived any challenges to all arbitrators. After two years of procedure the panel issued an award. After the receipt of the award the losing party started judicial proceedings in order to have the award annulled, based on the fact that the arbitrator nominated by the winning party had not disclosed the fact that he had offered legal services to another member of the same company-group several months before the arbitration procedure took place. The losing party argued that it learnt this fact only after the award had been rendered with the help of an Internet research of the arbitrator's law firm. The state court judge in São Paulo nullified the award based on Articles 32, II and VIII, 13, paragraphs 6 and 14 of the Brazilian law on arbitration. It is interesting to note the reasoning of the award, according to which the provisions regarding disqualification of arbitrators and judges cannot be derogated or modified by the agreement of the parties.[72]

The Brazilian law on arbitration combines the traditional rules and the provisions of the Model Law. I illustrated this approach above with some examples. However, the Brazilian law shall face some challenges. The Act 11079 on the Public-Private Partnership was promulgated on 30th December 2004. It allows settling the related disputes via arbitration; however, the location of the procedure shall be in Brazil and its language Portuguese. It is very questionable how the foreign investors will react to such provisions.[73]

C) Chile

The fundamental changes concerning arbitration that occurred in the Latin American countries took place also in Chile. The legal framework, however, is slightly different from the above-mentioned legal systems; we can observe some sort of duality. Chile ratified many international conventions rather earlier. For instance, Chile was one of the first countries which ratified the New York convention (being in force in Chile from 3rd December 1975) and the Panama Convention; moreover, Chile ratified the Washington Convention on settling disputes related to foreign investments. It has been in force since

[72] See in detail: Mason–Gomm-Santos: *New Keys to Arbitration… op. cit.* 65.
[73] See especially: Cremades: *Resurgence of the Calvo Doctrine… op. cit.* 63.

24th October, 1991. Chile concluded a free trade agreement in 1997 with Canada; in 1998 with Mexico and in 2003 with the European Community, South Korea and the United States of America. Moreover, Chile concluded many bilateral agreements on the protection of the investments with a number of European and Asian countries.[74]

Not surprisingly, the state of the economy was also attractive to foreign investors. However, in spite of the ratified international conventions including arbitration as an alternative dispute settlement system, very old rules were governing arbitration in Chile until 2004. The relevant provisions of the Code on Civil Procedure (*Código de Procedimiento Civil*) of 1902 and the law on the judicial organization (*Código Orgánico de Tribunales*) of 1943 had been applied to arbitration. These rules were highly influenced by the Spanish law of the 19th century.[75] Chile attempted several times to modernize the legal framework governing arbitration. The draft of 1992–for example–was rejected based on constitutional grounds. Only in 2004 the Chilean legislature could pass the new law on arbitration.[76]

The draft of the law in force was brought in on 2nd June, 2003. The Congress passed the law on 10th August, 2004, and then it was forwarded to the Constitutional Court for preliminary constitutional control. On 25th August 2004 the Constitutional Court ruled that no constitutional issue was found, therefore the new law was delivered to the President on 10th September 2004. The Act Nr 19.971 on international commercial arbitration (*Ley de Arbitraje Comercial Internacional*) was promulgated on 29th September 2004.[77]

The new law follows the provisions of the UNCITRAL Model Law; therefore it is regarded as the first law governing international arbitration in Chile. The Chilean Juan Eduardo Figueroa Valdes emphasizes the importance of the law as follows:

– The law contributes to create a legal framework in Chile beneficial to foreign investors, therefore it increases the volume of investments;

[74] Concerning these issues see: www.direcon.cl.

[75] With respect to these two laws see: Jorquiera, C.–Helmlinger, K.: *Chile*. In: Blackaby, N. et al. (red.): *International Arbitration in Latin America*. The Hague, 2002. 90.

[76] About the Chilean law on arbitration in the Spanish literature see especially: Paillas, E.: *El Arbitraje Nacional e Internacional Privado*. Santiago, 2003. albónico, E. P.: *Arbitraje Comercial Internacional.* Santiago, 2005.

[77] Regarding the drafting of the new law on arbitration see especially: Conejero Roos, C.: The New Chilean Arbitration Law and the Influence of the Model Law. *Journal of International Arbitration,* 22 (2005) 151–152.

– The law provides rules that are in close compliance with the international arbitral regulations, so it encourages stipulating Chile as the location of the arbitral procedures; therefore it contributes to the improvement of the standard of the Chilean arbitral bodies.78

The Chilean legislature follows the monist concept with respect to arbitration, because the law in issue governs only international arbitration. The Chilean domestic arbitral processes are still regulated by the previous rules. This differentiation has great importance for the topic of the present essay. In the following, I am analyzing the provisions of the new law on international arbitration; however, indicating certain rules normative to domestic arbitration.

Concerning the concept of international arbitration the Chilean law follows entirely the UNCITRAL Model Law. Contrary to the previous regulations–which are ordinary in the region–the new law does not require a second agreement for the arbitral procedure. Therefore, in case an arbitration clause exists, no further agreement shall be concluded when the dispute arises; so the duality of the *cláusula compromisoria* and the *compromiso* does no longer exists.[79]

The Chilean law follows the provisions of the Model Law regarding also the appointment of the arbitrators.[80] According to the Chilean law on arbitration, the parties may agree on the number of arbitrators freely. In case they cannot reach an agreement on the number of arbitrators, three arbitrators shall proceed. This rule is compliant to the standard practice of international commercial arbitration.

First paragraph of Art 11 of the Chilean law provides that in absence of different agreement, arbitrators with any nationality can proceed; the law does not contain any prohibitive rules. According to Figueroa Valdes, if advocates may act as *arbiter de jure* only, this would lead to an ostensible contradiction, because the Chilean law on the judicial organization, provides that only Chilean citizens can act as advocates in Chile. That would mean that a foreign advocate could not be *arbiter de jure*. The contradiction is ostensible only, however, because the law on international arbitration explicitly provides that

[78] See: Figueroa Valdes, J. E.: *The New Chilean Law on International Commercial Arbitration* (Law 19. 971). www.camsantiago.com/html/archivos/espanol/articulos.

[79] It should be noted that Art 234 of the law on the judicial organization provides that the parties shall conclude–besides the arbitration clause–an agreement including certain necessary elements. Otherwise, the lack of such agreement hinders the arbitral procedure.

[80] See: Art 10 of the Chilean law on arbitration (*Número de arbitros*–Number of the arbitrators), moreover Art 11 (*Nombramiento de los árbitros*–Appointment of the arbitrators).

anybody can proceed as arbitrator, irrespective of his nationality. This may only be limited by the agreement of the parties. Therefore, foreign advocate can also act as *arbiter de jure* in Chile. A contradictory interpretation of these rules would decrease the autonomy of the parties, which would violate one of the fundamental principles of the law governing international arbitration.[81]

According to the relevant provisions of the Chilean law, the parties may agree on the procedure regulating the appointment of the arbitrators freely. (It shall be noted here that it used to be the *compromiso*, the second agreement concerning the arbitration, which related to the procedure of the appointment.) Provided the parties do not reach an agreement on this issue and three arbitrators proceed, each party may appoint one arbitrator, and the third is appointed by these two arbitrators. The chair of the competent court of appeal shall decide on the appointment, if one of the parties does not appoint an arbitrator within 30 days, or the two arbitrators fail to appoint the third member of the panel within 30 days. Provided the parties agree on a panel constituted by a sole arbitrator, and the parties are unable to appoint the sole arbitrator, on the motion of a party it is the chair of the competent court of appeal which appoints the sole arbitrator. If the parties, or–concerning the appointment of the third arbitrator–the two arbitrators who are already appointed by the parties, or a third person being in charge of the appointment (including arbitral organizations) breach the rules of the appointment, on the motion of a party, it is the chair of the competent court of appeal that decides on the appointment (provided the agreement of the parties does not contain other provisions in this respect).

Section 5 of Art 11 of the law on international arbitration provides that these decisions of the chair of the competent court of appeal are not appealable. During the appointment, the required qualification of the arbitrator and the question of his impartiality and independence shall be taken into consideration. Provided that the third arbitrator or the sole arbitrator is to be appointed via this procedure, the possibility of appointing an arbitrator having different nationality than the arbitrators appointed by the parties shall be considered. This rule is based on the provisions of the UNCITRAL Model Law.

Some remarks should be made regarding the rules indicated above. Cristián Conejero Roos in his essay emphasizes the difference between the concept of the law in force (arbitrators are appointed independently by the parties) and the traditional concept of the law of Chile and other Latin American countries (arbitrators are appointed by the parties jointly).[82] In connection with the challenge of the arbitrator, however, the Argentinean law does not differentiate

[81] See: Figueroa Valdes: *The New Chilean Law… op. cit.*
[82] See: Roos: *The New Chilean Arbitration Law… op. cit.* 156.

between the jointly and independently appointed arbitrators either–as it has been noted above. According to Conejero Roos, emphasizing the concept of the arbitrator appointed by the parties is very important in the Chilean law, because it substantially differs from the earlier concept–being parallel to some extent to the traditions prevailing in the Roman law–of the appointment of the arbitrator.[83] It should also be mentioned here that the new law gives the chair of the court of appeal the right to decide–contrary to the former regulation, which delegated this right to the court of first instance.

In my view it ought to be also emphasized that–provided the parties did not agree on the procedure of the appointment and a panel of three arbitrators proceed–the right for the decision by the chair of the court of appeal opens after the thirty-day-long deadline expires. However, concerning the sole arbitrator, the law does not set such a deadline; it just provides that in case the parties cannot agree on the appointment of the sole arbitrator, on a motion of a party the court of appeal appoints the arbitrator. Taking into account the fact that there is no appeal against the decision, the rule not setting any deadline for the parties to appoint the sole arbitrator may allow misuse of the law. Therefore, the chair of the court of appeal is to be very careful in his decision concerning the appointment of the arbitrator, because this unappealable decision has very great impact on the arbitral procedure.

Traditionally the Chilean law differentiates between the *arbiter de jure* and the *arbiter ex aequo et bono* concerning the challenge of the arbitrators.[84] It provides the same rules to the ordinary state judges and the *arbiter de jure*; while–according to certain judgements–it shall not be applied to the *arbiter ex aequo et bono*.[85]

Compliant to the Model Law the Chilean law on international arbitration orders the arbitrator to disclose and fact that may raise doubts concerning his impartiality or independence. The former law did not include such a provision. Art 12 of the new law provides that a party may file a motion of challenge, if

[83] About the *compromissum* in the Roman law see: Ziegler: *Das private Schiedsgericht… op. cit.* 47–77.

[84] It is worth mentioning that the traditional Chilean law did use the concept of a combination of the *arbiter de jure* and the *arbiter ex aequo et bono*. This arbitrator was not bound by the procedural rules laid down in the law; however his award was to be based on the law–contrary to the award of the *arbiter ex aequo et bono*. See especially: Grigera Naón, H. A.: *Arbitration in Latin America… op. cit.* 139.

[85] The consequent application of this interpretation of the two categories of arbitrators would lead to an undesirable differentiation. For this judgement see: CA Santiago (Oct. 17, 1994) 91 II-2 RDJ 95, 96–97 (1994). Quoted in: Kleinheisterkamp: *International Commercial Arbitration… op. cit.* 210.

such doubts arise concerning the impartiality or independence of the arbitrator. A party who appointed or took part in the appointment of the certain arbitrator may file a motion for challenge based only on grounds that became known after the appointment. Therefore, in case the party appointed an arbitrator and was aware of the fact that a challenge would be grounded against the arbitrator, the right for challenge is regarded as renounced.[86]

The text of the Chilean law follows verbatim the expressions "independence" and "impartiality" of the Model Law using the Spanish words "independencia" and "imparcialidad".

According to the new Chilean law parties are free to agree on the procedure of the challenge of the arbitrators. In case the parties do not stipulate such procedural rules, the law provides subsidiary provisions.[87] According to these subsidiary rules a party is given 15 days following the establishment of the tribunal or obtaining knowledge about the ground for challenge to file a motion of challenge in writing at the panel. If the arbitrator does not renounce or the other party does not accept it (that would cancel the arbitrator's assignment), it is the panel itself that decides on the challenge.

The Chilean law–contrary to the above-mentioned Brazilian rules–provides legal remedy against such decision of the panel. Provided the procedure on the challenge–based on the law on arbitration or the agreement of the parties–does not lead to the desired result, the party who filed the motion of challenge may appeal against the decision. The right for the appeal is conferred on the chair of the court of appeal whose decision can no longer be appealed.[88] In my view, the importance of this appeal is highly decreased by the fact that the arbitral procedure is not suspended by the appeal, therefore even the award can be reached with the participation of the arbitrator in issue.

It should be noted that the procedure of challenge is more complicated if domestic arbitration is concerned.[89] Similarly to the Brazilian law, regarding domestic arbitration strict (*causas de implicancias*) and lesser strict grounds (*causas de recusaciones*) for challenge are differentiated. If one of the *causas de recusaciones* arises, the motion is decided by the state court of first instance–this decision is unappealable. Concerning the *causas de implicancias*, in case there is sole arbitrator, it is the sole arbitrator who decides on the challenge; however, his decision can be appealed at the regional court. Provided the panel

[86] Fernandez–Gutiérrez: *Chile*. In: Rowley–Mendelsohn (ed.): *Arbitration World… op. cit.* 55.

[87] See: Art 13 (2) of the Chilean law on arbitration.

[88] See: Art 13 (3) of the Chilean law on arbitration.

[89] The relevant provisions are Art 115–116 of the Chilean Code on civil procedure.

consists of more arbitrators, the decision is made by the tribunal excluding the arbitrator in issue. This decision is unappealable. It is worth mentioning that the arbitral procedure is not suspended, just before the award is made; however, the arbitrator in issue cannot proceed until the decision on the challenge.[90]

It can be observed that the Chilean law is much more complicated concerning the domestic arbitration than the new rules on international arbitration. The new law on arbitration regulates the appointment and challenge of the arbitrators in such way that may create a framework for arbitration meeting the requirements of the parties participating and willing to participate. According to Figureoa Valdes an important step of this process was the serious limitation of the role of the state courts concerning international arbitration.[91]

With respect to the possibility of appeal concerning the composition of the arbitral tribunal, we should refer to paragraph four of Art 34 (2) a) of the Chilean law on arbitration. It provides that the competent court of appeal may declare the award null and void, provided the party filing the motion manage to prove that the composition of the panel (or the procedure) was not in compliance with the agreement of the parties, excluding the situation when this agreement breaches one of the cogent provisions of the law. Provided the parties did not conclude an agreement on the procedural rules, the invalidation of the award may be initiated if the composition of the panel (or the procedure) breaches the provisions of the Chilean law on arbitration. It shall be emphasized that invalidation may also be initiated–besides the above-mentioned cases–if the composition of the panel (or the procedure) breaches the law on arbitration as such.

One of the most important arbitral organizations is the Court of Arbitration at the Santiago Chamber of Commerce. The Santiago Arbitration and Mediation Center was founded in 1992.[92] This Court of Arbitration has its own rules of procedure, which offers to the parties to call upon the Chamber of Commerce to appoint the arbitrators. Challenge of the arbitrators appointed by the Chamber of Commerce is also possible. Parties have six days from the appointment to file a motion of challenge. The motion is judged by the Council of the Chamber. Provided both parties agree on the challenge of an arbitrator, the exclusion takes places automatically, without the substantial examination of the motion.

[90] For a summary see: Kleinheisterkamp: *International Commercial Arbitration… op. cit.* 210.

[91] "*At the same time, the unquestionable restriction in judicial intervention of Ordinary Tribunals ensures the well functioning of the international arbitral system in Chile.*" See: Figueroa Valdes: *The New Chilean Law… op. cit.*

[92] http://www.camsantiago.com/en/index.htm.

If one of the parties does not agree, the Council makes the decision after holding an oral hearing. This decision of the Council is unappealable.[93] In my view, the rules of procedure of the Court of Arbitration at the Chilean Chamber of Commerce essentially respect the autonomy of the parties.

The Arbitration and Mediation Center of the Chilean-American Chamber of Commerce plays also an important role in Chile. The rules of procedure of this arbitral organization contain also important rules on the challenge of the arbitrators. Art 11 provides that parties may file motions of challenge if they obtain knowledge about concerns related to the impartiality or independency of an arbitrator. The deadline for this motion is 15 days from the appointment of the arbitrator.[94]

D) Mexico

Similarly to many Latin American countries, the Calvo Doctrine also played an important role in the development of the Mexican commercial arbitration.[95] Not surprisingly, serious changes of the system of the 19–20th centuries took place in the 1990's. One of the essential reasons of this phenomenon is– similarly to many other Latin American countries–the ratification of different international conventions. Mexico ratified the New York Convention in 1971 and it also became a member of the Panama Convention. In 1986 Mexico joined the Montevideo Convention. As it is already mentioned, Mexico is an observer state of the MERCOSUR. The importance of the free-trade agreements concluded by Mexico in the development of the Mexican law on arbitration shall also be noted. Special emphasis shall be laid on The North American Free Trade Agreement (NAFTA), whose members include Mexico. The Agreement provides that an investor of a member may initiate arbitral procedure directly against a member state. (Mexico has this rule in several other free-trade agreements also.)[96]

The US-Mexico Conflict Resolution Center plays very important role in the development of the arbitration practise in Mexico. This non-profit organization was founded in 1994 at the State University of New Mexico. The

[93] For all these rules see Art 8–10 of the rules of procedure: http://www.camsantiago.com/html/english/index.htm.

[94] See in this regard: http://www.amchamchile.cl/node/1456;http://www.amchamchile.cl/node/1108.

[95] For a good summery on the Mexican arbitration law in Spanish see: Uribarri Carpintero, G.: *El arbitraje en México.* Mexico City, 1999.

[96] Wobeser, C. V.: Mexico. In: Rowley, J. W.–Mendelsohn, Mc. B. (ed.): *Arbitration World. Jurisdictional Comparisons.* London, 2006. 2. edition. 206.

organization was founded in order to contribute to the development compliant with the international trends of the Mexican-American arbitration practise.[97]

The fundamental rules on arbitration are included in the code of commerce (*Código de Comercio*). The code was amended by a regulation promulgated on 4th January, 1989 with a new Chapter four of the Fifth Book regulating arbitration.[98] In spite of the fact that these rules already followed the provisions of the UNCITRAL Model Law, they were substantially amended in 1993. The regulation promulgated on 22nd July 1993 provided rules on arbitration being much more flexible to the parties. A novelty being important for the topic of the present essay provides that the parties are free to choose the language of the procedure different from Spanish; also the location of the arbitration and they are also free to define the number of the arbitrators.[99]

The Mexican law differentiate between the arbitrators proceeding based on statute law, the *arbiter de jure (derecho)* and the arbitrators deciding on the basis of fairness, the *arbiter ex aequo et bono (de conciencia)*.[100] The provisions concerning the appointment and challenge of the arbitrators are included in Art 1426–1431 of the Mexican *Código de Comercio*. According to these rules, the parties are free to choose the number of the arbitrators. If such an agreement does not exist, a sole arbitrator proceeds. The legal practise requires that the number of the arbitrators shall be odd (*número non*), in order to create a functioning panel.[101] The law does not provide any limitation regarding the nationality of the arbitrators. The parties are free to define the procedure of appointment. Provided the parties are unable or unwilling to agree on this issue, the law provides subsidiary rules. The sole arbitrator is appointed by the judge of the state court if the parties cannot agree on his appointment. If the panel consists of three arbitrators, each party appoints one arbitrator, and the third (the chair) is appointed by these two arbitrators. Provided a party does not appoint an arbitrator within 30 days after the call for doing so, or the two arbitrators–appointed by the parties–are unable to appoint the third arbitrator

[97] See: www.nmda.nmsu.edu.

[98] See in this regard: Hoagland, A. C.: Modification of Mexican Arbitration Law. *Journal of International Arbitration,* 7 (1990) 91–100.

[99] See: ITA NEWS & NOTES "Mexican Commercial Code Amendments Further Liberalize Arbitration Law". http://faculty.smu.edu./pwinship/arb-17.htm. About the amendment of 1993 see further: Drafting and Enforcement of International Arbitration Clauses in Mexico and the United States. See: www.mexicolaw.com/LawInfo01.htm. This article includes samples of the recognized clauses.

[100] About this differentiation see especially: Penner, V.: Development of Arbitration. In: *Arizona Civil Remedies Seminar* (October, 1999.). www.cidra.org/articles/newway.htm.

[101] See: Penner: *Quoted art. op. cit.*

within 30 days, it is the state court that is going to appoint the chair of the panel on a motion of a party. If the parties reached an agreement on the procedure of the appointment; however, one of the parties, or the already appointed arbitrators, or a third person–including institutions–did not complete his duties, the court may interfere in the procedure according to the purpose of the procedural order.

In spite of the fact that one of the aims of the amendment of the Mexican law on arbitration was the diminution of the role played by the state courts,[102] we should refer to the fact that there is no appeal against the above-mentioned decisions of the judge of the state court. According to the law, the judge–when appointing an arbitrator–has to take into consideration the necessary qualification of the arbitrator and any other circumstances that are capable of assuring the impartiality and independence of the arbitrator. Despite the fact that the law explicitly provides that anybody–irrespective of his nationality–may be appointed as arbitrator,[103] in case a state judge decides on the appointment, he shall appoint an arbitrator having different nationality from the parties. While the aim of the previous rule is to provide freedom to the parties concerning nationality of the arbitrators, the purpose of the latter is to provide that the arbitrator having dominant position is impartial and independent

It can be observed in the above-mentioned rules that the Mexican law does not require any specific qualification for the arbitrators; however, the certain person has to be of full age and have full capacity. We should mention here that in some other Latin American countries the legislature explicitly includes specific requirements for becoming arbitrator in the law concerning the appointment of the arbitrator. For instance, second paragraph of Art 480 of the Uruguayan Code of civil procedure in force (*Ley N. 15982 Codigo Gerenal del Proceso*) provides explicitly that arbitrators shall be over 25 and have full capacity.[104]

Certain international conventions–also ratified by Mexico–may provide further requirements concerning the qualification of the arbitrators. The North American Free Trade Agreement–for instance–requires that the arbitrator proceeding in

[102] See: *ITA NEWS & NOTES „Mexican Commercial Code… op. cit.*

[103] See: Art 1427 of the Codigo de Comercio.

[104] See: *Ley N. 15982 Codigo General del Proceso*, Art. 480 (*Arbitros*): „*2. Puede ser árbitro toda persona mayor de veinticinco años de edad, que se halle en el pleno goce de sus derechos civiles.*" These requirements (age 25, full civil capacity) are explicitly included in the part concerning the appointment of the arbitrators.

disputes between an investor and a member state has to be familiar to international law and investment affairs.[105]

Concerning the impartiality and independence of the arbitrator, the Mexican code strictly follows the relevant provisions of the UNCITRAL Model Law;[106] it provides that the arbitrator has to disclose any information before the appointment that may raise concerns regarding his impartiality or independence. After the appointment, the arbitrator still has to disclose any such information, until the end of the procedure–if the parties did not obtain knowledge of the given fact. If the party appointed an arbitrator or took part in the appointment, he may file a motion of challenge against this arbitrator based only on grounds he noticed after the appointment.

The challenge may only be initiated in the existence of facts raising grounded doubts concerning the impartiality or independence of the arbitrator; or, provided the arbitrator does not have qualifications having been required by the parties. The interpretation of this rule–which follows the provisions of the Model Law–leads to an interesting question: what is the procedure to be followed if a qualification is required by an international convention but the parties did not include such rule in their agreement. However, we will not find explicit answer in the law; presumably challenge may be initiated based on the above-mentioned provisions.

Similarly to the appointment of the arbitrator, the parties are free to define the procedure of the challenge of the arbitrators. In case such an agreement does not exist, the party initiating the challenge shall file a motion of challenge in writing at the panel within 15 days after he obtained knowledge on the composition of the panel or the ground for challenge. If the arbitrator does not renounce or the other party does not accept it, it is the panel itself that decides on the challenge. The party filing the motion may appeal against this decision at the court within 30 days. The court makes an unappealable decision on this issue. The arbitral procedure is not suspended by the procedure of the court; the arbitrator in issue may also participate; moreover, even the award may be given. This provision follows the Model Law; however, the latter is substantially different concerning the fact that in the Model Law, it is not only the court that may decide on the appeal.[107]

[105] See: Wobeser: *Mexico… op. cit.* 209–210.

[106] For the relevant parts of the commentary on the UNCITRAL Model Law see: Binder: *International Commercial Arbitration… op. cit.* 116–117.

[107] See: Binder: *International Commercial Arbitration... op. cit.* 124. The evident purpose of the above-mentioned distinctions is to ensure the applicability of the Model Law in different legal families.

Art 1457 of the Mexican law regulates the nullification of the award. We should emphasize the rule which provides that such procedure may also be initiated on grounds that the composition of the panel (or the procedure) did not comply with the agreement of the parties; excluding the situation when this agreement breached one of the cogent provisions of the law. Provided the parties did not conclude an agreement on the procedural rules, the invalidation of the award may be initiated if the composition of the panel (or the procedure) breaches one of the rules of Art 1457.[108] We should refer here to the judgement of the 25th Civil Court of the Federal District on 12th June, 2001.[109] The plaintiff initiated the nullification of an award of the ICC Court of Arbitrator, based on–*inter alia*–certain concerns regarding the impartiality of the arbitrator. The Mexican court dismissed the case. It reasoned that the ICC had already dismissed the motion of challenge filed during the arbitral procedure, and the plaintiff did not appeal this decision at the state court, in spite of the fact that such option was granted by Art 1429 of the Mexican Code of Commerce (following the Model Law).[110]

IV.

I presented certain essential features of the law concerning arbitration of the Latin American states, with special emphasis on the appointment and challenge of the arbitrators. It can be observed that–until the recent past–many factors (including political ones) contributed to the regulation and practise of commercial arbitration. (I did analyze in details the Calvo Doctrine in this regard.) The striking influence of the UNCITRAL Model Law of 1985 is obvious in the recent legislation of the states of the region.

[108] We should emphasize the difference between the solution for legal remedy and the concept of *amparo*. The *amparo* is a constitutional appeal that may be filed at the federal court against a judgement of a state court in a nullification or enforcement procedure, if the judgement breaches a personal right protected by the constitution. See: Wobeser: *Mexico*. *op. cit.* 217.

[109] The judgement is: http://www.kluwerarbitration.com/ arbitration/arb/country/ Mexico.asp.

[110] Art 1429 of the Mexican Code on commerce–following the Model Law–provides that the party filing the motion of challenge are given 30 days after receiving the refusal of his motion to appeal at the state court. The decision of the court shall not be appealed. The arbitral procedure is not suspended by the procedure of the court; the arbitrator in issue may also participate; moreover, even the award may be given.

The new laws and drafts based on the UNCITRAL Model Law faced (and still face) different challenges due to–besides the above-mentioned political factors–the legal traditions. One of these challenges is the still existent differentiation between the domestic and international arbitration. The duality of the arbitration clause and the arbitration agreement (the *clausula compromisoria* and the *compromiso arbitral*) and the efforts to put an end to this duality in order to facilitate the arbitral procedure are also important. The principle according to which arbitrators are appointed jointly and not independently by the parties has also traditional basis. The rules governing the appointment and challenge of the arbitrators are determined by the dichotomy of the *arbiter de jure* and the *arbiter ex aequo et bono*. The efforts of the legislatures to unify the law on arbitration have to face these phenomena also. The fact that rules concerning the appointment and challenge of the arbitrators, moreover the possible legal remedies are still different to some extent in the region (i.e. in the countries examined in the present essay) shows that the process of creating a uniform system for arbitration has not reached an end yet.

In conclusion, it can be established that the efforts to unify the law on arbitration–that have already materialized in the laws, the legal practice and the completed drafts–substantially contributed to create a more coherent legal framework concerning international arbitration. Due to this process, international commercial arbitration, as an alternative dispute settlement system became popular among domestic and foreign investors in the region.[111]

[111] It is interesting to mention that the spread of the arbitration in the Latin American region also resulted in the formation of an informal, but well–known "Arbitration Bar", including lawyers and law firms from the region and also from Europe and the United States. In Brazil the activity of the Brazilian Arbitration Committee ("CBAr") should be mentioned, which has its own journal dealing with arbitration (*Revista Brasileira de Arbitragem*). See in detail: Mason–Gomm-Santos: *New Keys to Arbitration… op. cit.* 63.