

# “IN THE CANAL ZONE”: THE PANAMA CONVENTION AND ITS RELEVANCE IN THE UNITED STATES TODAY

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## INTRODUCTION

An interesting dynamic has developed in the United States concerning the Inter-American Convention on Arbitration (the “Panama Convention”). Courts in this country have overwhelmingly declined to interpret and implement the Panama Convention to disputes concurrently governed by the New York Convention.<sup>2</sup> The hesitation of U.S. courts to apply, interpret, and build case law under the Panama Convention begs the question of when and in what context the Panama Convention remains relevant to international commercial arbitration in the United States.

This Article briefly questions and explores the current relevancy of the Panama Convention in commercial arbitration disputes between

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<sup>2</sup> *Banco de Seguros del Estado v. Mut. Marine Offices, Inc.*, 257 F. Supp. 2d 681, 684-86 (S.D.N.Y. 2003); *see also* *Emp’r Ins. of Wausu v. Banco De Seguros Del Estado*, 199 F.3d 937, 942 (7th Cir. 1999) (holding that the Panama Convention incorporates the New York Convention and that, even though the Panama Convention applies, the court looks to case law construing the meaning of the New York Convention as a means to interpret the Panama Convention).

citizens of the United States and Latin American countries. Jan van den Berg's ("Van den Berg") 1989 article not only discussed the possible interpretations of the Panama Convention but also predicted how U.S. courts would ultimately apply such instrument over the years.<sup>3</sup> Employing van den Berg's framework as a model, this article analyzes the development of case law involving the Panama Convention in U.S. courts since 2005.<sup>4</sup>

First, this Article discusses the history of arbitration in Latin America. Additionally, it highlights some reasons why the U.S. adopted the Panama Convention as a regional arbitration instrument closely resembling the New York Convention. Second, it examines how the New York and Panama Conventions interact with one another under U.S. law, observing that the former continues to infringe on matters originally intended to be covered by the latter. Finally, and more concretely perhaps, this Article delves into three key stages of the arbitral process—action to compel, determination of jurisdiction, and award enforcement—and purports to explicate the role and function granted to the Panama Convention therein. More broadly, the present work desires to stress how accurate Professor van den Berg's seminal work on the Panama Convention was, whose analytical framework continues to govern.

## I. Background

### A. Development of Arbitration in Latin America

The United States codified two conventions relevant to commercial arbitration between the United States and most Latin American countries: the Panama Convention<sup>5</sup> and the 1958 New York Convention on

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<sup>3</sup> Albert J. van den Berg, *The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?*, 5 *ARB. INT'L* 214 (1989). Professor van den Berg is a world-renown arbitrator and arbitration expert who co-authored the highly regarded "Preliminary Draft Convention on the International Enforcement of Arbitration Agreements and Awards" (the Miami Draft).

<sup>4</sup> For articles focusing on case law interpreting the Panama Convention *before* 2005, Helena Tavares Erickson et al., *Looking Back, And Ahead: The Panama Convention After 30 Years*, 23 *ALTERNATIVES TO HIGH COST LITIG.* 184 (2005); Robin Miller, *Construction And Application Of Inter-American Convention On International Commercial Arbitration*, 1 *A.L.R. FED.* 2d 309 (2005).

<sup>5</sup> Inter-American Convention on International Commercial Arbitration, 9 *U.S.C.* §§ 301-07 (1990).

the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).<sup>6</sup> Perhaps because the Panama Convention was meant to mirror the terms, provisions, and system implemented by the New York Convention,<sup>7</sup> one must observe that even in those sections in which the two instruments differ,<sup>8</sup> Congress has indicated—and courts have acknowledged—that both instruments were meant to be construed and applied in the same manner.<sup>9</sup>

First ratified by the United States,<sup>10</sup> the New York Convention was intended to unify nations and forego regional standards for handling arbitration disputes by adopting a standardized arbitration framework, thereby doing away with national peculiarities concerning enforcement requirements and procedures.<sup>11</sup> However, before 1975, many Latin American countries refused to sign on to the New York Convention,<sup>12</sup> prompting the United States to adopt the Panama Convention to promote international commercial arbitration in Latin America.<sup>13</sup> For Latin America, ratifying the Panama Convention symbolized a marked compromise<sup>14</sup> in that it was a complete departure from its traditional hostility toward U.S. foreign policy. Most importantly, this ratification

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<sup>6</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-08 (1970).

<sup>7</sup> See *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994) (stating that the “legislative history of the Inter-American Convention’s implementing statute clearly demonstrates that Congress intended the Inter-American Convention to reach the same results as those reached under the New York Convention”).

<sup>8</sup> van den Berg *supra* note 3, at 221.

<sup>9</sup> See *Allstate Ins. Co. v. Banco Do Estado Do Rio Grande do Sul, S.A.*, 04 CIV. 1550 (DLC), 2004 WL 1398437, (S.D.N.Y. June 23, 2004) (rejecting plaintiff’s argument that the slight difference in wording requires a different interpretation of the Panama Convention, instead holding the Panama Convention is meant to be interpreted in line with the New York Convention).

<sup>10</sup> 9 U.S.C. §§ 301-07; 9 U.S.C. §§ 201-08.

<sup>11</sup> NIGEL BLACKABY ET AL., *Overview of Regional Developments, in* INTERNATIONAL ARBITRATION IN LATIN AMERICA 3 (Nigel Blackaby et al. eds., 2002).

<sup>12</sup> van den Berg, *supra* note 3, at 215.

<sup>13</sup> *Id.* at 221.

<sup>14</sup> The implementing legislation to the Panama Convention states that “[a]rbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention” thereby not recognizing all foreign arbitration awards who are not party to this regional arbitration convention. 9 U.S.C. § 304.

removed "the philosophical objection to arbitration as a means of dispute resolution,"<sup>15</sup> while sustaining at the same time consistency with respect to the notorious—and investment-tailored—"Calvo" doctrine.<sup>16</sup> For the United States, ratifying the Panama Convention meant bringing Latin America into the fold of its own international commercial arbitration framework as well as creating a safer environment for many U.S. corporations to invest in the Latin American market.<sup>17</sup> In fact, since U.S. adoption and codification of the Panama Convention, some observed the rise in the use of arbitration clauses in commercial contracts and an increase in the number of investment disputes involving Latin American parties.<sup>18</sup>

### **B. Implementation and Interpretation of the Panama Convention in the United States**

Since its ratification, the interpretation of the Panama Convention by U.S. courts has fallen in line with Professor van den Berg's predictions,<sup>19</sup> in that the absence of key provisions regarding the enforcement of arbitration agreements or awards has prevented the jurisprudential development of an autonomous case law.<sup>20</sup> Indeed, in the long run, the successful enforcement of many arbitral disputes would require a more solid normative matrix to support its evolution. Thus, Congress and U.S. federal courts developed two legal solutions to face the issue. First, Congress codified the New York and Panama Conventions in a manner that rendered them interrelated with the FAA, which contains explicit

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<sup>15</sup> van den Berg, *supra* note 3 at 221.

<sup>16</sup> A foreign policy doctrine holding that jurisdiction in international investment disputes lies with the country in which the investment is located. Alwyn V. Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge of International Law*, 40 AM. JOURNAL INT'L LAW 1, 121-147 (1946).

<sup>17</sup> 132 CONG. REC. S15,774 (daily ed. Oct. 9, 1986) (stating that "the United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State" upon its ratification).

<sup>18</sup> BLACKABY ET AL., *supra* note 11.

<sup>19</sup> *Id.*

<sup>20</sup> van den Berg, *supra* note 3, at 221.

provisions for compelling arbitration.<sup>21</sup> Second, while incorporating the Panama Convention into the United States Code, Congress virtually duplicated the already codified New York Convention's language, thereby guiding U.S. Courts to achieve the same results regardless of whether the case was tried under the New York or Panama Convention.<sup>22</sup> U.S. courts have generally utilized this second legal solution in one of two ways. First, courts reasoned that, since the New York and Panama Conventions were codified in such a way as to bring about the same normative outcome, the language of the New York Convention should govern instances where both instruments concurrently applied.<sup>23</sup> Otherwise, in rarer circumstances, U.S. Courts have directly cited Chapter Three of Title Nine, under which the Panama Convention is codified.<sup>24</sup> When presented with an arbitration agreement that falls under the auspices of the Panama Convention, courts generally state that because the New York and Panama Conventions were codified in the same manner and pursuant to and identical rationale, U.S. jurisprudence should favor the application of the New York Convention in lieu of the Panama Convention.<sup>25</sup>

The present paper will shed some light on the arbitral issues where the Panama Convention retains exclusive governance and highlight instances where U.S. courts have utilized the New York Convention despite the applicability of the Panama Convention.

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<sup>21</sup> Federal Arbitration Act, 9 U.S.C. §§ 4, 208, 307; *Bautista v. Star Cruises*, 396 F.3d 1289, 1296-97 (11th Cir. 2005); *Martinez v. Columbian Emeralds, Inc.*, 2009 WL 57847 at \*12-3 (V.I.) (dissent) for an exemplary analysis of how to untangle the interrelated nature of Title 9. Note also that 9 U.S.C. §§ 208 and 307 stipulate that Chapter One of the FAA applies residually to supplement provisions of both Conventions where the FAA does not conflict. FAA, 9 U.S.C. §§ 4, 208, 307 (1947).

<sup>22</sup> H.R. REP. NO. 501 at 4 (1990), reprinted in 1990 U.S.C.C.A.N. 675, 678. *Productos Mercantiles E. Industriales, S.A. v. Faberge USA*, 23 F.3d 41, 45 (2d Cir. 1994) and *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334 (S.D.N.Y. 2005) for cases basing interpretation of Panama on this intention.

<sup>23</sup> *Productos Mercantiles*, 23 F.3d at 45. Note that there has been some debate as to whether the Panama Convention should be interpreted when the same provisions under the New York convention are also applicable. *E.g.* *Nicor Int'l Corp v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1371-72 (S.D. Fla. 2003) (describing in several paragraphs that Panama applies to the Parties only to further the use of the New York Convention).

<sup>24</sup> *ChevronTexaco Corp.*, 376 F. Supp. 2d at 334.

<sup>25</sup> *Bautista*, 396 F.3d at 1296-97.

## II. Panama Convention as Interpreted in U.S. Case Law

### A. Action To Compel Arbitration

United States courts have shown a tendency to rely on the New York Convention to compel parties to arbitrate a dispute.<sup>26</sup> Only the New York Convention stipulates that courts in contracting states must stay their proceedings and are required to refer contracting parties in a qualified dispute to arbitration.<sup>27</sup> Because the Panama Convention does not arm the parties with such actionable rights, U.S. courts commonly employ the New York Convention as a means to compel parties to arbitrate their disputes.<sup>28</sup> Considering the inability of the Panama Convention to independently compel arbitration, U.S. courts have generally tied the language of the New York Convention, as well as its jurisprudence, to arbitration clauses arising from the Panama Convention in lieu of its missing provisions.<sup>29</sup>

Albeit merely in its dissent, *Martinez v. Colombian Emeralds, Inc.* is one of the only cases to discuss whether the Panama Convention, as codified under Chapter Three, is equipped to autonomously allow courts to compel arbitration.<sup>30</sup> In *Martinez*, the appellant was challenging a trial court's action compelling him to arbitrate his dispute. Rather than considering the order to compel arbitration, the majority overturned the lower court based on non-compliance with the Federal Rules of Civil Procedure.<sup>31</sup> Despite believing that the Supreme Court of the Virgin Islands lacked jurisdiction in this case, Justice Swan, an associate justice of the Virgin Islands' Supreme Court and former labor arbitrator, thoroughly evaluated the basis for deciding whether to compel arbitration under the Panama Convention or New York Convention.<sup>32</sup> This is where *Martinez* proves unique. Although inevitably finding that the application of the New York Convention was appropriate, Justice Swan noted that

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<sup>26</sup> van den Berg, *supra* note 3, at 221.

<sup>27</sup> *Id.*; 9 U.S.C. §§ 201-08 ("The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.").

<sup>28</sup> *Nicor*, 292 F. Supp. 2d at 1372 (2003).

<sup>29</sup> *Bautista*, 396 F.3d at 1296-97.

<sup>30</sup> *Martinez v. Columbian Emeralds, Inc.*, 2009 WL 57847 at \*6 (V.I. Mar. 4, 2009).

<sup>31</sup> *Martinez*, 2009 WL 57847 at \*6.

<sup>32</sup> *Id.* at \*12.

under Chapter Three of Title Nine, courts could implement the Panama Convention to compel arbitration.<sup>33</sup> Section 303 of Title Nine is similar to the New York Convention's "Order to Compel Arbitration" codified under section 206 of the same title.<sup>34</sup> Interestingly enough, no other court has chosen to directly link the language of Panama as codified in 9 U.S.C. § 303 to an action to compel arbitration.<sup>35</sup> This may be due to courts having more jurisprudence under the New York Convention.<sup>36</sup>

Another issue that has troubled both the New York and Panama Conventions pertains to whether a court may ever allow a party to avoid arbitration. The Second Circuit considered this very issue in *Republic of Ecuador v. ChevronTexaco Corp.*<sup>37</sup> In this case, the plaintiffs were not seeking to compel arbitration, but rather asked the Court to prevent arbitration, as well as grant them injunctive and declaratory relief.<sup>38</sup> After reviewing numerous cases interpreting both the Panama and New York Conventions, the Court decided that there was "little or no basis in Second Circuit case law for invocation of the New York Convention or the Inter-American Convention by a party seeking to *avoid* arbitration, rather than compel or aid it."<sup>39</sup> Inevitably, the court had no choice but to uphold the stay of the proceedings pending further investigation of the laws of Ecuador.<sup>40</sup>

Despite these two more recent exceptions, Professor van den Berg's analysis of the Panama Convention remains essentially true: the Panama Convention is hardly ever invoked to decide whether to compel arbitration despite being codified in the United States Code. Whatever the

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<sup>33</sup> *Id.* at \*13.

<sup>34</sup> 9 U.S.C. §§ 206, 303 ("A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.").

<sup>35</sup> *Martinez*, 2009 WL 57847 at \*13.

<sup>36</sup> *See, e.g.*, *Emp'r Ins. of Wausu v. Banco De Seguros Del Estado*, 199 F.3d 937, 942 (7th Cir. 1999) (providing case law to support the court's argument even though the case law interprets the New York Convention instead of the analogous provisions of Panama Convention).

<sup>37</sup> 376 F. Supp. 2d 334 (S.D.N.Y. 2005). In this case, the Second Circuit did not dispute whether the New York Convention and/or the Panama Convention could be cited to compel arbitration although they clearly preferred to interpret the case based in the New York Convention as there is more jurisprudence regarding interpretation of this Convention than there is in Panama.

<sup>38</sup> *Id.* at 348-9.

<sup>39</sup> *Id.* at 349.

<sup>40</sup> *Id.* at 380.

reasoning may be, United States Courts generally continue to evaluate arbitration agreements under the New York Convention, even in cases in which they could resort to the Panama Convention.

### **B. Acquiring Federal Jurisdiction: Invoking the Panama Convention along with 28 U.S.C. § 1331**

Many parties instrumentalize the Panama Convention as a tool to remove a case to the federal court system. Indeed, the invocation of a treaty renders their case removable as a federal question pursuant to 28 U.S.C. § 1331.<sup>41</sup> Despite jurisdictional disagreements being uncommon in international commercial arbitration disputes, some courts have approached the jurisdictional question.<sup>42</sup> The latter has resulted in analysis similar to those employed by federal courts when examining questions involving treaties.<sup>43</sup> However, federal courts have differed in their use of the Panama Convention to establish jurisdiction.

Although jurisdiction based on federal question was unchallenged, the Second Circuit made a point of evaluating the issue in *Republic of Ecuador v. ChevronTexaco Corp.* The court found that a federal question existed in this case regardless of whether the New York or Panama Conventions applied.<sup>44</sup> It further elaborated on the issue of removal, stating that the Panama Convention, as implemented under 9 U.S.C. § 302, allows the original-jurisdiction and removal provisions of Chapter Two of the New York Convention to apply. Again, consistent with the trend in U.S. courts, the court deferred to the New York Convention to interpret an agreement governed by the Panama Convention.<sup>45</sup> However, this is not because more jurisprudence existed to support a court evaluation based on the New York Convention (as sometimes occurs with issues like compelling arbitration).<sup>46</sup> In establishing appropriate jurisdiction,

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<sup>41</sup> Removal of cases based on federal question is governed under 28 U.S.C § 1441 (2011).

<sup>42</sup> *ChevronTexaco Corp.*, 376 F. Supp. 2d at 347.

<sup>43</sup> *Id.* at 334; *Huntsman Corp. v. Int'l Risk Ins. Co.*, No. H-08-1542, 2008 WL 4453170, at \*11 (S.D. Tex. Sept. 26, 2008); *Higgins v. SPX Corp.*, No. 1:05-CV-846, 2006 WL 1008677, at \*2 (W.D. Mich. Apr. 18, 2006).

<sup>44</sup> *ChevronTexaco Corp.*, 376 F. Supp. 2d at 345.

<sup>45</sup> *Bautista v. Star Cruises*, 396 F.3d 1289, 1296-7 (11th Cir. 2005); *Higgins*, 2006 WL 1008677, at \*2.

<sup>46</sup> *Bautista*, 396 F.3d at 1296-97 (demonstrating how a court can compel arbitration based on the wording of the Panama Convention but the jurisprudence of the New York Convention).



neither the strict language of the Panama Convention nor the New York Convention as codified in the United States Code independently establish appropriate jurisdiction or removal procedures.<sup>47</sup> Therefore, the language of New York proved indispensable in this situation.

### C. Enforcement of Arbitral Awards

The majority of cases interpreting the Panama Convention do so in the context of enforcing an arbitral award.<sup>48</sup> Professor van den Berg's 1989 article highlights the fact that "no major conflict between both Conventions would seem to arise, except with the applicability of the Inter-American Commercial Arbitration Commission ("IACAC") rules" which has held true within all U.S. case law discussing both treaties.<sup>49</sup> Additionally, Professor van den Berg suggested that the U.S. legislation implementing the Panama Convention would lead courts to interpret and apply the Panama Convention over the New York Convention.<sup>50</sup> While Professor van den Berg is technically correct, courts persist in avoiding the Panama Convention, finding it unnecessary because the

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<sup>47</sup> 9 U.S.C. §§ 301-07; 9 U.S.C. §§ 1-16.

<sup>48</sup> *U.S. for use and Benefit of Inmobiliaria y Constructora Mexicana v. Caddell Construction*, No. EP-09-CV-376-KC, 2010 WL 2622939, at \*1 (W.D. Tex. June 25, 2010).

<sup>49</sup> *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 929 (D.C. Cir. 2007); van den Berg, *supra* note 3, at 224-28 ("It should be noted that the provisions in the IACAC Rules are not limited to the arbitral proceedings but also include provisions on the method of appointing arbitrators (Arts. 6-8). The effect of Article 3 of the Panama Convention then is that, in case the parties have not agreed on a method of appointing arbitrators, the method laid down in the IACAC Rules is to be followed. Such effect constitutes the logical complement to Article 2 of the Panama Convention which provides that the parties are free to agree on the method of appointing arbitrators. If no such agreement is made, Article 3 comes to rescue by implying that the method of appointment laid down in the IACAC Rules shall be applied.").

<sup>50</sup> van den Berg, *supra* note 3, at 221, 225 ("A rather unusual treaty provision, which has no counterpart in the New York Convention, is to be found in Article 3, reading: The IACAC Arbitration Rules, as amended in 1978, are virtually identical with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) of 1976. Article 3 is very important for Latin America where local laws on arbitration contain many types of provisions that may impede a smooth functioning of the arbitration. Article 3 establishes that the agreement of the parties on arbitration matters ranks first and that in the absence of such agreement the arbitration is to be conducted in accordance with the modern IACAC Rules which are specifically geared to international arbitration. In neither case, do the local rules of procedure apply since provisions in treaties prevail over them.").

New York Convention already embodies not only all the relevant provisions, but also more tested provisions—and thus a more secured case law.<sup>51</sup> Such reluctance to resort to the Panama Convention often leads courts to inaccurately apply the New York Convention to the enforcement of awards unless there is a conflict between the two conventions.<sup>52</sup>

When the United States ratified the Panama Convention, it made a reservation<sup>53</sup> stipulating that unless certain criteria were met, the Panama Convention and the IACAC rules should not govern the enforcement of an award.<sup>54</sup> Accordingly, if these criteria were not satisfied nor met, the New York Convention's provisions would be incorporated into the Panama Convention as codified in the U.S. Code.<sup>55</sup> However, this reservation has no effect if the parties have expressly contracted otherwise.<sup>56</sup>

Courts generally conduct a three-step test when a party seeks to enforce a foreign arbitral award in the United States under either the New York or Panama Conventions.<sup>57</sup> First, they must determine whether

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<sup>51</sup> *TermoRio*, 487 F.3d at 929.

<sup>52</sup> Two cases interpret the Panama Convention on its own provisions and both cases involved the parties' use of the IACAC rules. This is consistent with this article's assessment that courts will continue to apply the New York Convention unless there is a conflict between the Panama Convention and the New York Convention. *See Americatel El Salvador, S.A. de C.V. C.V. v. Compania de Telecomunicaciones de El Salvador, S.A. de C.V.*, No. 07-21940-CIV, 2008 WL 1805476, at \*4 (S.D. Fla. Apr. 20, 2008) (applying the Panama Convention to the parties' agreement to use an amended version of the IACAC rules to decide whether the U.S. should enforce an award prior to the completion of foreign proceedings); *see also* *DRC, Inc. v. Republic of Honduras*, 774 F. Supp. 2d 66, 71 (D.D.C. 2011) (applying the Panama Convention to the parties' agreement but reaching a contrary conclusion as to whether the U.S. should enforce an award prior to the completion of foreign proceedings.); *accord* *Hernandez v. Smart & Final, Inc.*, No. 09-CV-2266 BEN NLS, 2010 WL 2505683, at \*3 (S.D. Cal. June 17, 2010) (the court states inaccurately that it need only use the FAA, and if there are any conflicts, only then look at the Panama Convention for guidance); *Higgins v. SPX Corp.*, No. 1:05-CV-846, 2006 WL 1008677, at \*2 (W.D. Mich. Apr. 18, 2006).

<sup>53</sup> 9 U.S.C. § 305.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Empresa De Telecomunicaciones De Bogota S.A. E.S.P. v. Mercury Telco Group, Inc.*, 670 F. Supp. 2d 1357, 1361 (S.D. Fla. 2009).

the Panama Convention should trump the New York Convention.<sup>58</sup> Second, they look to whether the applicable provisions of the New York Convention and the FAA are incorporated by reference into the Panama Convention.<sup>59</sup> Finally, if the New York Convention's provisions are incorporated into the Panama Convention, the court will apply and interpret the New York convention instead of the Panama Convention.<sup>60</sup>

Even after establishing the Panama Convention's primacy over the New York Convention, U.S. courts continue to revert back to the New York Convention should they find that opting for the Panama Convention is unnecessary. It would be unnecessary if, for instance, the Panama Convention's provisions incorporated the New York Convention and the FAA's terms and the Panama Convention was meant to reach an identical outcome as the New York Convention.<sup>61</sup> However, no court has yet found that the Panama Convention's provisions deviated substantially

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<sup>58</sup> 9 U.S.C. §§ 201-08 (recognizing other multi-lateral and bilateral arbitration treaties); 9 U.S.C. §§ 1-16 (including both the New York Convention and the Panama Convention); 9 U.S.C. §§ 301-07 (stating the Panama Convention applies only when the parties to the agreement are citizens of states that have ratified the Panama Convention and the parties to the arbitration agreement are citizens of states that are members of the OAS).

<sup>59</sup> *Empresa De Telecomunicaciones De Bogota*, 670 F. Supp. 2d at 1362.

<sup>60</sup> Courts may decline to use the Panama Convention in situations where the Convention functions only to establish jurisdiction. *See Figueiredo Ferraz Consultoria E Engenharia De Projeto Ltda. v. Republic of Peru*, 655 F. Supp. 2d 361, 374 (S.D.N.Y. 2009) (holding that while the Panama Convention "establishes jurisdiction in the United States as a signatory state through a venue statute appended to the Federal Arbitration Act (FAA), there remains the authority to reject that jurisdiction for reasons of convenience, judicial economy and justice"); *see also* *Terminales Portuarios Termiport, S.A. v. Saxon Energy Services Del Ecuador, S.A.*, No. H-06-3565, 2007 WL 4353711, at \*2 (S.D. Tex. Dec. 11, 2007) (demonstrating that a court may also refuse jurisdiction when the U.S. is not involved in the dispute, even though the parties' States are signatories of the Convention and members of the OAS).

<sup>61</sup> H.R. REP. NO. 501, at 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 675, 678. *See also* *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 (1974) (stating "the goal of the Convention and principle purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries"). *See e.g., Empresa De Telecomunicaciones De Bogota*, 670 F. Supp. 2d at 1362.

enough from the New York Convention and FAA's terms to warrant an autonomous interpretation and application of the Panama Convention.<sup>62</sup>

The obligation of U.S. courts to apply the Panama Convention for certain disputes under 9 U.S.C. § 305 does not ultimately change the court's use of the New York Convention.<sup>63</sup> In *Termorio S.A. E.S.P. v. Electranta S.P.*,<sup>64</sup> a contractor who had obtained an award in Colombia against a utility company owned by the Colombian government sought enforcement in the United States.<sup>65</sup> The issue was whether the award could be enforced in the United States after the Colombian court had nullified it.<sup>66</sup> The court held that it was unnecessary to discuss the Panama Convention because its codification incorporated, by reference, the relevant provisions of the New York Convention.<sup>67</sup> This was so even though the court recognized that the Panama Convention applied to the dispute since Colombia is both a party to the Organization of American States and a signatory to the Panama Convention.<sup>68</sup> In other words, notwithstanding the Panama Convention's indisputable applicability, the court deemed the use of the Panama Convention irrelevant.<sup>69</sup>

Another strain to the Panama Convention framework concerns the potential incorporation of the FAA's terms. In *Sanluis Developments, L.L.C. v. CCP Sanluis, L.L.C.*,<sup>70</sup> the court addressed the claimant's motion to vacate an award by first finding that the Panama Convention applied.<sup>71</sup> It then stated that the Panama Convention incorporates the

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<sup>62</sup> *Higgins v. SPX Corp.*, No. 1:05-CV-846, 2006 WL 1008677, at \*1 (W.D. Mich. Apr. 18, 2006); see *Hernandez v. Smart & Final, Inc.*, No. 09-CV-2266 BEN NLS, 2010 WL 2505683, at \*3 (S.D. Cal. June 17, 2010) (stating inaccurately that the court need only use the FAA, and only in the event of conflict look at the Panama Convention for guidance).

<sup>63</sup> The court confuses the two Conventions to the point where no distinction is made between the New York Convention and the Panama Convention. While the court points out that the Panama Convention applies, it cites several provisions of the New York Convention as if they were part of the Panama Convention. *Int'l Transactions Ltd. v. Embotelladora Agral Regiomontana S.A. de C.V.*, No. 3:01-CV-1140-G, 2007 WL 1944353, at \*3 (N.D. Tex. June 29, 2007).

<sup>64</sup> *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 929 (D.C. Cir. 2007).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> 498 F. Supp. 2d 699, 702 (S.D.N.Y. 2007).

<sup>71</sup> *Id.*

terms of the FAA unless the FAA conflicts with the terms of the Panama Convention under case law.<sup>72</sup> Therefore, the court revamped the same analysis as the aforementioned cases to conclude that the Panama Convention could be replaced not only by the New York Convention but also by the FAA.

A common misapplication of the Panama Convention is a leading trend in most cases involving enforcement of arbitral awards under this Convention.<sup>73</sup> The statute clearly states that the Panama Convention is to be applied when certain conditions are met.<sup>74</sup> Courts have misconstrued this statute by developing case law that instead favors the New York Convention and the FAA unless there are conflicts with the Panama Convention.<sup>75</sup>

### CONCLUSION

While U.S. federal courts and Congress have determined that the Panama Convention takes precedence over the New York Convention, these same courts frequently steer away from the Panama Convention, preferring instead the New York Convention or the FAA to examine disputes technically falling within the purview of the Panama Convention. In this regard, U.S. courts seem to discuss the Panama Convention only so that they may apply New York Convention in resolving the international commercial arbitration dispute at hand. The trend indicates that courts continue to treat the Panama Convention only as an extension of the New York Convention—particularly when analyzing disputes to compel arbitration, determine jurisdiction, and disputes over enforcement of an arbitral award. This current interpretative trend shows little evidence of ever being overturned.

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<sup>72</sup> *Sanluis Developments*, 498 F. Supp. 2d at 702; *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994) (citing 9 U.S.C. § 307 (2011)).

<sup>73</sup> *Productos Mercantiles*, 23 F.3d at 45; *Hernandez v. Smart & Final, Inc.*, No. 09-CV-2266 BEN NLS, 2010 WL 2505683, at \*3 (S.D. Cal. June 17, 2010); *Higgins v. SPX Corp.*, No. 1:05-CV-846, 2006 WL 1008677, at \*1 (W.D. Mich. Apr. 18, 2006).

<sup>74</sup> 9 U.S.C. § 305 (1990).

<sup>75</sup> *Empresa De Telecomunicaciones De Bogota S.A. E.S.P. v. Mercury Telco Group, Inc.*, 670 F. Supp. 2d 1357 (S.D. Fla. 2009) (holding that the Panama Convention incorporates the FAA's terms for confirming an award unless one of the grounds for refusal or deferral of recognition or enforcement of the award is found in the Convention); *Sanluis Developments*, 498 F. Supp. 2d at 702; *Hernandez*, 2010 WL 2505683, at \*3; *Higgins*, 2006 WL 1008677, at \*1.