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CHOICE OF LAW IN LATIN AMERICAN ARBITRATION : SOME EMPIRICAL EVIDENCE AND REFLECTIONS ON THE LATIN AMERICAN MARKET FOR CONTRACTS

ELECCIÓN DE LA LEY APLICABLE EN EL ARBITRAJE LATINOAMERICANO: EVIDENCIA EMPÍRICA Y REFLEXIONES SOBRE EL MERCADO DE CONTRATOS EN LATINOAMÉRICA

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El objetivo de este artículo es evaluar las preferencias de las partes que participan en transacciones comerciales latinoamericanas cuando eligen el derecho que ha de regir sus contratos. Para ese propósito, los autores han conducido un análisis empírico de datos que pudieron ser obtenidos de instituciones de arbitraje activas en Latinoamérica, enfocado en los años 2011 y 2012.

Asimismo ofrecen algunas reflexiones sobre los resultados y evalúan si pueden ser explicados por la visión territorial de los conflictos de leyes en Latinoamérica, la importancia de Estados Unidos como socio comercial de los países latinoamericanos y el grado de presencia de abogados angloamericanos en los mercados latinoamericanos.

Palabras clave: Elección de la ley aplicable; sede del arbitraje; América Latina; CCI; ICDR; enfoque territorial; preferencias de las partes.

The aim of this Article is to assess the preferences of parties to Latin American international business transactions when they choose the law governing their contracts. For that purpose, the authors have conducted an empirical analysis of data that they were able to gather from arbitral institutions active in Latin America, with a focus on years 2011 and 2012.

Furthermore they offer some reflections on the results and elaborate on whether they can be explained by the territorial approach of choice of law in Latin America, the importance of the United States as a trading partner for Latin American countries and the extent to which Anglo-American lawyers are present on Latin American markets.

Keywords: Choice of law; seat of the arbitration; Latin America; ICC; ICDR; territorial approach; parties' preferences.

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I. INTRODUCTION

The aim of this Article is to assess the preferences of parties to Latin American international business transactions when they choose the law governing their contracts. For that purpose, we have conducted an empirical analysis of unpublished data that we were able to gather from arbitral institutions active in Latin America, with a focus on years 2011 and 2012.

One of the authors had already conducted similar research on other samples revealing the contractual practices in other parts of the world, in particular in Asia (Cuniberti, 2016).[1] One aim of this Article is to compare our findings about Latin America with the findings about Asia, and to confirm the existence of regional variations in international economic actors' preferences.

We present the results of our empirical study in Section II. The data, unfortunately, are incomplete, as many arbitral institutions have declined to share it. We submit, however, that our study is reasonably representative, in particular because the dominant player in Latin American arbitration –the International Chamber of Commerce– did cooperate. We hope to be able to gather more data in the future, but the results of our study already allow us to formulate some preliminary conclusions, which we present in Section III.

II. CHOICE OF LAW IN LATIN AMERICAN ARBITRATION: SOME EMPIRICAL EVIDENCE

It is generally delicate to assess the contractual practices of private actors. Private contracts are not published, and millions of them are concluded every day. Yet, an interesting source for that purpose is the data gathered by arbitral institutions on cases they have handled. Arbitration is the dominant mode of resolution of international commercial disputes, and certain leading arbitral institutions handle large numbers of cases which are remarkably diverse, both from the perspective of the origin of the parties as well as the industries concerned. In addition, it appears that the data that they publish are, in many respects, remarkably consistent over the years. It is true, of course, that the data of arbitral institutions are only concerned with contracts which gave rise to disputes, and that this could be an important selection bias. It is hard to identify, however, which influence this could have on many of the terms of the relevant contracts and, in particular, on choice of law clauses. We submit, therefore, that the data of arbitral institutions are reasonably representative of the relevant contractual practices.[2]

This is even more so in the context of this Article. Our aim is to assess the preferences of parties to international business transactions with respect to the choice of law. In Latin America, freedom of choice in international contracts is much more accepted in the context of arbitration than it is in a judicial context. This makes the study of the data of arbitral institutions much more meaningful, as parties may express more freely their preferences than in a judicial context.[3]

The definition of international contracts has long been a vexing issue in comparative private international law. Because our focus is on the preferences of actors, we focus on, and thus define international contracts as, contracts concluded between parties based in different states.

We present in turn the data that we obtained from Latin American arbitral institutions and from international institutions.

A. Latin American Institutions

1. Background

In Latin America, the vast majority of cases filed with local arbitral institutions are domestic. Thus, most of the parties that turn to these institutions do not really choose the law that govern their contracts, they just abide automatically to the law that is common to them. There is, however, an international practice that has started to develop.

In April 2011, the Americas Initiative of the Institute for Transnational Arbitration (ITA) issued a survey that depicts the emergence of local arbi-

1 A number of empirical studies of choice of law preferences were also conducted on the basis of questionnaires sent to economic actors: see Vogenauer (2017) and Queen Mary University of London (2010). In the United States, empirical studies were also conducted, but they focused on choice of law in domestic contracts, which raises entirely different questions: see Eisenberg & Miller (2009) and Sangath (2014).

2 For a wider discussion on the representativeness of the data published by the ICC, see Cuniberti (2014, p. 467).

3 In particular, there is no distinction between the law of the forum and foreign law in international arbitration. A number of private international law techniques which could result in the application of another law than the law chosen by the parties play a limited role (this is, in particular, the case of the public policy exception): this largely limits the scope of the argument made by certain scholars that Latin American courts do not respect freedom of choice because of their application of the public policy exception: see Pargendler (2012, p. 1730).

tral institutions throughout the region (2011). The survey identified 165 local institutions from eighteen different countries,[4] but focused on only 30 institutions from fifteen countries. Of particular interest for the purpose of this Article is the data collected with respect to foreign parties involved in arbitrations handled by these institutions.[5] Out of the 30 institutions studied, 17 reported that foreign parties were involved in some cases, 6 reported that no foreign parties were involved in any of the arbitrations they handled, and 7 did not provide any information in this respect. This practice is rather recent. According to the survey, 70% of these institutions were created between twenty to ten years ago, when many Latin American countries adopted new laws with the aim of fostering arbitration. It is reasonable to believe that, while consolidating during their first years, these institutions were exclusively, or almost, conducting domestic arbitrations.

The ITA's survey gives us an idea of the dimension of the international practice of Latin American arbitral institutions. The average proportion of foreign parties in cases handled by the 17 institutions which reported an international practice is 16%. We cannot assume, however, that this percentage is also the percentage of international cases of this caseload. This would only be possible if there were only one foreign party per arbitration, and this is often not the case.[6] Thus, the percentage of foreign parties in the caseload of a given institution does not translate into the number of international cases. The aggregate number of cases handled by the 17 institutions was 3,483. They included, therefore, less than 557 international cases, and indeed probably much less.[7] This still shows, however, that, as a whole, Latin American arbitral institutions are developing an international practice of significant dimension.

As exaggerated as it might be, the criterion of the number of foreign parties also allows us to compare the dimension of the international practice of each institution. From the 17 institutions with foreign parties in their caseloads,[8] only 5 would have more than 20 international parties participating. The most active institution would definitely be, by

4 This is not the total amount of arbitral institutions in the region. The survey does not say it, but we believe that this amount corresponds to those institutions that are permanently active and enjoy certain recognition as arbitration more than conciliation or mediation centers, and not to every single arbitral institution authorized in each country. Only in Colombia, there are about 330 authorized arbitral institutions, most of which function primarily as conciliation centers, as it was pointed out by Rafael Bernal Gutiérrez, Vice-President of the Centro de Arbitraje y Conciliación of the Chamber of Commerce of Bogotá, in an interview with *La República*, the leading economic newspaper in the country (Arteaga, 2014).

5 The survey appears ambiguous as to the caseloads of the institutions. It raises the question of whether they correspond to the number of pending cases at the moment when the data was collected or to the total of cases ever handled. Most of the caseloads seem to be collected under the first methodology. They go in line with the number of cases received by year. But others do not seem to correspond to this logic. For example, one institution appears with 546 cases and another with 1380, while receiving 50 and 150 per year (during a period rather close to the survey, and not during the first years of functioning), respectively. These caseloads seem to correspond to a much longer period of time. The Centro de Arbitragem e Mediação of the American Chamber of Commerce (AMCHAM) Brazil is a local institution that used to publish its statistics. They confirm that the survey is also based on the second methodology. By 2011, this institution had received a total of 50 cases, just as it is stated in the survey (Estatística do Centro de Arbitragem e Mediação em 2015, in file with the authors). Given this ambiguity, we will refer to these caseloads and the data ensuing therefrom without any relation to a specific period of time.

6 For example, see the cases reported by the Centro de Arbitraje y Conciliación of the Chamber of Commerce of Bogotá below.

7 Actually, the survey's data concerning foreign parties contains, to some extent, parties that are not foreign. Despite designating as foreign parties those that are established abroad (ITA, 2011, p. 12), the survey does include local subsidiaries of multinational companies. It is the case, for example, of the Centro de Arbitraje y Mediación of AMCHAM Quito, whose percentage of foreign parties is 29 according to the survey. This institution provided us with information on choice of law. Its Director told us, in one of the e-mails exchanged (in file with the authors), that the majority of those parties are local subsidiaries of multinational companies. Counting local subsidiaries of multinational companies as if they were foreign parties would be commonplace in the survey. By some conversations by mail and on the phone with other institutions, when asked about data concerning foreign companies, we noticed that some of them take local subsidiaries as one if the majority of the shares are held by foreigners, or are simply not sure whether to take these companies into account. Yet, many Latin American arbitration laws provide that an arbitration is international if the parties to the arbitration agreement are established in different countries.

8 They are, from the most to the less active, the Centro de Arbitraje y Mediación (CAM) of the Ecuadorian-American Chamber of Commerce - Quito, the Centro de Arbitraje de México (CAM), the Centro de Arbitraje (CACC) of the Chamber of Caracas, the Centro Internacional de Arbitraje of the American Chamber of Commerce of Peru (AMCHAM Peru), the Centro de Arbitragem e Mediação of the American Chamber of Commerce (AMCHAM) Brazil, the Centro de Arbitragem e Mediação (CAM-CCBC) of the Brazil-Canada Chamber of Commerce, the Centro Empresarial de Conciliación y Arbitraje (CEDCA) of the Venezuelan-American Chamber of Commerce of the United States, the Câmara de Arbitragem Empresarial - Brasil (CAMARB), the Câmara de Arbitragem do Mercado (CAM - BM&FBOVESPA), the Centro de Conciliación y Arbitraje (CCA) of the Chamber of Commerce of Costa Rica, the Centro de Mediación y Arbitraje of the Chamber of Commerce, Services and Tourism of Mexico City (CANACO) and the Câmara de Mediação e Arbitragem (ARBITAC) of the Commercial Association of Paraná.

far, the Centro de Mediación y Arbitraje (CAM) of the Chamber of Commerce of Santiago, Chile, with about 100 foreign parties participating.[9] These figures suggest that most Latin American institutions only receive a handful of international cases in a given year, and that they may not receive year in and year out.

Though the survey dates back to the beginning of 2011, it can still reflect a more actual picture of the international practice of Latin American institutions.[10] If there is no doubt that as a whole, arbitration is a phenomenon on the rise in the region, it is less clear whether the international cases are also growing at a fast pace.[11] The data on choice of law that we will present suggest that it has not been the case.

2. Choice of Law

Only six Latin American institutions provided us with data on choice of law. All in all, they cover 44 international cases in an average time span of 3 years between 2011 and 2016. Despite numerous efforts, several other local institutions did not provide us with this information.[12] The data will also show that the international practice of Latin American institutions seems to remain similar after 2011, i.e., in general, local institutions do not handle many international cases. After presenting the data, we will draw some conclusions on the choice of law of parties that turn to this kind of institutions to have their international disputes settled.

The Latin American arbitral institutions that provided us with data on choice of law are based in Bolivia, Brazil, Colombia, Ecuador, Mexico and Venezuela.

a. *The Centro de Arbitraje of the Chamber of Caracas (CACC)*

The CACC was created in 1989 but has been working without interruption since 1998. By 2016, it reported to have administered more than 450 cases and it has been presented as one of the two most active Venezuelan arbitral institutions (Saghy, 2018, p. 3). It ranks third in terms of caseload among the 30 institutions included in the ITA's survey, with 277 cases.

The CACC provided us with information on choice of law for the international cases that it received from 2011 until August 2016.[13]

Table 1: CACC International Cases, 2011-2016

2011			**2012**		
Nationality of the parties	**Seat of the arbitration**	**Chosen law**	**Nationality of the parties**	**Seat of the arbitration**	**Chosen law**
U.S. vs.Venezuelan	Caracas	Venezuelan	Venezuelan vs. Colombian	Caracas	Venezuelan
Venezuelan vs. Venezuelan and Panamenian	Caracas	Venezuelan	Venezuelan vs. Venezuelan and Panamenian	Caracas	Venezuelan

9 From a total of 1,380 cases. The other four are, in this order, the Centro de Conciliación y Arbitraje de Panamá (CeCAP) of the Chamber of Commerce, Industries and Agriculture of Panama, the Centro Internacional de Conciliación y Arbitraje (CICA) of the Costa Rican-American Chamber of Commerce, the Centro de Arbitraje of the Chamber of Commerce of Lima (CCL) and the Centro de Conciliación y Arbitraje Comercial (CCAC) of the Chamber of Industry, Commerce, Services and Tourism of Santa Cruz - Bolivia.

10 It is however reasonable to consider that now there might be other local institutions that handle international arbitrations apart from the 17 of the survey, like the Centro de Arbitraje y Conciliación (CAC) of the Chamber of Commerce of Bogota, which provided us with data on choice of law. Not to count that it would be hard to believe that the survey did not miss institutions that had already handled international cases.

11 Karin Helmlinger, former Executive Director of CAM Santiago, the most active institution according to the survey, noted, in an interview with the Chilean newspaper *El Mercurio* in 2013 –one of the oldest Spanish language newspapers currently distributed– that this kind of arbitration was still growing but only by little (Chaparro, 2013).

12 These are all the ones referred to in note 9, except the CCAC of the Chamber of Industry, Commerce, Services and Tourism of Santa Cruz - Bolivia, as well as all the ones mentioned in note 8, except the CAM of the Ecuadorian-American Chamber of Commerce - Quito, the Centro de Arbitragem e Mediação of AMCHAM Brazil, the Centro de Arbitraje de México and the CACC of the Chamber of Caracas, as well as the CCA of the Chamber of Commerce of Costa Rica and ARBITAC of the Commercial Association of Paraná, which we did not contact, plus the Câmara de Conciliação, Mediação e Arbitragem of the Federation of Industries of the State of São Paulo (CIESP/FIESP), the Centro Brasileiro de Mediação e Arbitragem (CBMA), the Centro de Mediación y Arbitraje Comercial (CEMARC) of the Argentinean Chamber of Commerce and Services and the Centro de Arbitraje y Mediación Paraguay (CAMP) of the National Chamber of Commerce and Services of Paraguay, which are not included in the survey as institutions with a percentage of foreign parties or are not included in it at all, but we thought worth to contact. Additionally, we contacted also without success, the Comisión Interamericana de Arbitraje Comercial (CIAC), which is a global institution of the region.

13 We sincerely thank former Executive Director Mrs. Adriana Vaamonde.

2014			2015		
Nationality of the parties	**Seat of the arbitration**	**Chosen law**	**Nationality of the parties**	**Seat of the arbitration**	**Chosen law**
Venezuelan vs. U.S.	Caracas	Venezuelan	Venezuelan vs. Brazilian	Caracas	Venezuelan
Venezuelan vs. U.S.	Caracas	Venezuelan	**2016**		
Venezuelan vs. Venezuelan and Panamanian	Caracas	Venezuelan	**Nationality of the parties**	**Seat of the arbitration**	**Chosen law**
Venezuelan vs. Venezuelan and Panamanian	Caracas	Venezuelan	Venezuelan vs. Portuguese	Caracas	Venezuelan
Venezuelan vs. Venezuelan and Panamanian	Caracas	Venezuelan	Venezuelan vs. Portuguese	Caracas	Venezuelan
Venezuelan vs. Venezuelan and Panamanian	Caracas	Venezuelan	Venezuelan vs. Brazilian	Caracas	Venezuelan

b. *The Centro de Arbitraje y Conciliación (CAC) of the Chamber of Commerce of Bogota (CCB)*

The CAC was the first Colombian arbitral institution. It was created in 1983. It is one of the most active local institutions in Colombia (Zuleta, 2012, p. 1; World Bank, 2010, p. 101), and perhaps, the most active when it comes to international arbitration. In the ITA's survey, it appeared with a caseload of 202 cases and ranked seventh in this respect among the 30 institutions therein included.

The CAC informed us that it did not handle an international arbitration before 2014. In this year, 6 international cases were filed with it. It received 5 more during 2015. It provided us with information on choice of law for all of these cases.[14]

Table 2: CAC International Cases, 2014-2015

2014			2015		
Nationality of the parties	**Seat of the arbitration**	**Chosen law**	**Nationality of the parties**	**Seat of the arbitration**	**Chosen law**
Colombian vs. Panamanian	Colombia	Colombian	Colombian vs. Panamanian	Colombia	Colombian
Colombian vs. Brazilian	Colombia	Colombian	Colombian vs. Mexican	Colombia	Colombian
U.S. vs. Colombian	Colombia	Colombian	Colombian vs. Mexican	Colombia	Colombian
Chinese vs. Colombian	Colombia	Colombian	Colombian (x5) vs. Brazilian (x2)	Colombia	Colombian
Colombian vs. Venezuelan	Colombia	Colombian	Peruvian vs. Canadian and Colombian	Colombia	Colombian
Chinese (x2) vs. Colombian (x2)	Colombia	Colombian			

c. *The Centro de Arbitragem e Mediação of the American Chamber of Commerce (AMCHAM) Brazil*

AMCHAM Brazil is established in São Paulo and has offices in fourteen other Brazilian cities, where arbitrations also take place. The center was created in 2000, but it received its first arbitration in 2002. It has been referred as one of the eight most commonly used local institutions, from a universe of more than 100 (Gonçalves & Spaccaquerche Barbosa, 2013, p. 1). By 2015 it had handled a total of 90 arbitrations (Centro de Arbitragem e Mediação – AmCham, 2015). In the ITA's survey it ranked twentieth, with 49 cases by 2011.

AMCHAM Brazil provided us with information on choice of law for the international cases that it received in 2013 and 2015, and further specified that it did not handle any such cases in 2011, 2012 and 2014.[15]

[14] For which, we thank Mrs. Verónica Romero Chacín, former Head of Arbitration, and Mrs. Isabel Victoria Galván R., former Coordinator of the School of International Arbitration.

[15] We are very much grateful to Dr. Fernanda Pires Merouço, former Deputy Secretary General.

Table 3: AMCHAM Brazil International Cases 2011-2015

2013			2015		
Nationality of the parties	**Seat of the arbitration**	**Chosen law**	**Nationality of the parties**	**Seat of the arbitration**	**Chosen law**
Brazilian and U.S.	São Paulo	Brazilian	Brazilian and U.S.	São Paulo	Brazilian
Brazilian and Kuwaiti	São Paulo	Brazilian			

These international cases represent respectively 20% and 11% of the total of cases received in each of these years. In these years, the center received a total of 10 and 9 cases, respectively (Centro de Arbitragem e Mediação – AmCham, 2015).

d. *The Centro de Arbitraje y Mediación (CAM) of the Ecuadorian-American Chamber of Commerce (AMCHAM) Quito*

The center was created in 1999. It is one of the most important Ecuadorian arbitral institutions (Consejo de la Judicatura, 2017).[16] It is the only institution from Ecuador included in the ITA's survey, where it ranked sixteenth in terms of caseload, with 70 cases.

AMCHAM Quito provided us with information on choice of law for the international cases filed with it in 2011 and 2012.[17]

Table 4: AMCHAM Quito International Cases 2011-2012

2011			2012		
Nationality of the parties	**Seat of the arbitration**	**Chosen law**	**Nationality of the parties**	**Seat of the arbitration**	**Chosen law**
Ecuadorian vs. Spanish	Ecuador	Ecuadorian	Colombian vs. U.S.	Ecuador	Ecuadorian
U.S. vs. Ecuadorian	Ecuador	Ecuadorian	German vs. Ecuadorian	Ecuador	Ecuadorian
Chinese vs. Ecuadorian	Ecuador	Ecuadorian	Ecuadorian vs. Spanish	Ecuador	Ecuadorian
			Spanish vs. U.S.	Ecuador	Ecuadorian

e. *The Centro de Arbitraje de México (CAM)*

The CAM was established in Mexico City in 1997. It is one of the three most important arbitral institutions of Mexico (von Wobeser, 2018, p. 1). It appears as the seventeenth most active institution in the ITA's survey, with 62 cases. The CAM provided us with information on choice of law for the international cases that it received from 2011 to 2015.[18]

Table 5: CAM International Cases, 2011-2015

2011			2012		
Nationality of the parties	**Seat of the arbitration**	**Chosen law**	**Nationality of the parties**	**Seat of the arbitration**	**Chosen law**
Mexican and U.S.	Mexico City	Mexican	Mexican and Brazilian	Mexico City	Mexican
2014			2015		
Nationality of the parties	**Seat of the arbitration**	**Chosen law**	**Nationality of the parties**	**Seat of the arbitration**	**Chosen law**
Mexican and Canadian	Mexico City	Mexican	Mexican and U.S.	Mexico City	Mexican

f. *The Centro de Conciliación y Arbitraje Comercial (CCAC) of the Chamber of Industry, Commerce, Services and Tourism of Santa Cruz - Bolivia (CAINCO)*

The CCAC was created in 1993. It is one of the most active arbitral institutions of Bolivia, if not the most (World Bank, 2010). It is the only Bolivian institution that appears in the ITA's survey, ranking twelfth from the 30 institutions included in it, with a total of 110 cases.

[16] By 2017, there were 15 authorized arbitral institutions in Ecuador.

[17] We warmly thank Mrs. Patricia Vera Nieto, Director.

[18] We are grateful to Mrs. Sylvia Sámano Beristain, LL.M.

Table 6: CCAC International Cases 2011-2014

2012			2013		
Nationality of the parties	**Seat of the arbitration**	**Chosen law**	**Nationality of the parties**	**Seat of the arbitration**	**Chosen Law**
Ecuadorian vs. Bolivian	Bolivia	Bolivian	Bolivian vs. Chinese	Bolivia	Bolivian

2014		
Nationality of the parties	**Seat of the arbitration**	**Chosen law**
Chinese vs. Bolivian	Bolivia	Bolivian
Chinese vs. Bolivian	Bolivia	Bolivian
Bolivian vs. Paraguayan	Bolivia	Bolivian

The CCAC provided us with information on choice of law for the international cases filed with it in 2012, 2013 and 2014. It also let us know that it did not receive an international case in 2011.[19]

g. *Conclusion*

The data available are few but remarkably consistent. All 44 cases had three common features. The first is that the seat of the arbitration was in the country where the local arbitral institution was based. The second is that the law chosen by the parties was the law of that same country. The third was that the seat of the arbitration and the law chosen by the parties coincided. Finally, virtually all 44 cases (42 out 44) had in common that one party was a national from the country where the local arbitration institution was based. Although it would have been interesting to study the data from other local institutions, it is likely that they would share the same features.

The authors submit that a likely explanation for some of these features is that local arbitral institutions are chosen by the parties where a local party has a strong bargaining power and is thus able to dictate many of the contractual terms, including the jurisdiction and choice of law clauses. The local party thus imposes on the other party the local arbitral institution, a seat in its country and the application of the local law. This is not to say that Latin American arbitral institutions favor local parties, and even less that the law of Latin American institutions favor the same, but rather that Latin American parties with a higher bargaining power prefer to litigate in a forum that they know and which is easily accessible, and under a law they are familiar with.

B. International Institutions

Latin American parties do not only resort to Latin American arbitral institutions. Indeed, it seems that most international cases involving Latin American parties are handled by international arbitral institutions. Two international institutions have a significant activity in this market: the International Court of Arbitration of the International Chamber of Commerce (ICC) and the International Center for Dispute Resolution (ICDR), which is the international division of the American Arbitration Association. The data published by most other international institutions reveal that they barely handle cases involving Latin American parties.[20]

1. The International Chamber of Commerce (ICC)

a. *Background*

Contrary to Latin American arbitral institutions, the International Court of Arbitration of the ICC is a global institution which is not specifically focused on Latin America. However, it is an important player in Latin American arbitration which handles both arbitrations with a seat in Latin America and arbitrations involving Latin American parties with a seat outside of this region.

In 2011 and 2012, Latin American parties were involved in respectively 81 and 95 ICC cases, but only 37 and 46 arbitrations had their seat in Latin America. This suggests that the seat of arbitrations

[19] We are very much grateful to Mrs. Claudia Paccieri Rojas, Executive Director.

[20] This is the case, for instance, of the London Court of International Arbitration (LCIA) and the Swiss Chambers' Arbitration Institution. Parties originating from Central and South America accounted for 4.8% of parties in 2019 (4.7% in 2018; 1.9% in 2017; 3.4% in 2016; 2.5% in 2015) in arbitrations handled by the LCIA (LCIA, 2019, p. 10; LCIA, 2017, p. 6). The statistics of the Swiss Chambers' Arbitration Institution does not even report separately that some of the parties involved in the arbitrations that it handles originate from Latin America (they are included in Others) (SCAI, 2019, p. 3).

involving Latin American parties is in Latin America in around 45 % of the cases, and that most ICC Latin American arbitrations are thus held outside such region.

Table 7: Number of Cases and Parties, 2011-2012

	2011	2012
ICC Cases involving a Latin American Party	81	95
Number of Latin American Parties involved in an ICC Case	180	205

Table 8: Latin American Seats in ICC Arbitrations, 2010-2013

	2010	2011	2012	2013
Brazil	11	16	17	22
Mexico	13	11	12	9
Chile	3	2	5	4
Argentina	6	4	2	3
Panama	0	1	2	2
Uruguay	1	1	1	0
Peru	0	0	2	0
Bolivia	0	1	0	1
Venezuela	0	1	0	0
Colombia	0	0	1	3
Ecuador	0	0	1	0
El Salvador	0	0	1	0
Honduras	0	0	1	1
Costa Rica	0	0	1	0
Total	**34**	**37**	**46**	**45**

An important feature of arbitration in Latin America is that parties often agree to resort to arbitration to resolve disputes involving parties of the same nationality. The data that the ICC publishes each year about the cases that it handles indicate that the proportion of single nationality cases is often high among Latin American countries. In particular, 33 to 45% of ICC cases involving Brazilian parties are single nationality cases. Unfortunately, the ICC only reports about countries which have a proportion of single nationality cases higher than a certain level, which changes each year. From 2010 to 2012, the threshold was respectively 20, 21 and 22 %. In 2013, it was 40%. It is thus not possible to know whether there were a lower proportion of single nationality cases in other countries, or simply none, during these years. The only exception is for nationalities which were involved in such a low number of cases that one single case would be above the threshold. For instance, if there were less than 5 cases in which parties of a given nationality were involved in 2010 to 2012, this would mean that none of them was a single nationality case, as one case would account for 25 % of all cases involving parties from that country.

The following results can thus be deduced from data published by the ICC.

Table 9: Latin American Single Nationality cases in ICC Arbitrations, 2010-2013

	2010	2011	2012	2013
Brazil	11 (42 %)	10 (33 %)	10 (34 %)	18 (45 %)
Mexico	Less than 20 %	Less than 21 %	8 (35 %)	7 (41 %)
Chile	3 (75 %)	Less than 21 %	Less than 22 %	Less than 40 %
Argentina	3 (60 %)	2 (22 %)	2 (22 %)	Less than 40 %
Uruguay	1 (50 %)	0	0	Less than 40 %
Peru	0	0	4 (80 %)	2 (66 %)
Bolivia	0	1 (50 %)	0	Less than 40 %
El Salvador	2 (50 %)	2 (100 %)	1 (50 %)	Less than 40 %

	2010	2011	2012	2013
Honduras	0	0	1 (100 %)	Less than 40 %
Ecuador	0	0	Less than 22 %	0
Venezuela	Less than 20 %	0	0	0
Guatemala	0	0	0	0
Costa Rica	0	0	0	0
Nicaragua	0	0	0	0
Colombia	0	Less than 21 %	Less than 22 %	Less than 40 %
Panama	Less than 20 %	Less than 21 %	Less than 22 %	Less than 40 %

Table 10: Nationality of Latin American Parties to ICC Arbitrations, 2010-2013

	2010	2011	2012	2013
Brazil	74 (38 %)	81 (45 %)	82 (40 %)	91 (42.3 %)
Mexico	62 (31%)	28 (15.5 %)	44 (21.4 %)	47 (28.8 %)
Argentina	16 (8.2 %)	18 (10 %)	14 (6.8 %)	19 (8.8 %)
Panama	7 (3.6 %)	13 (7.2 %)	12 (5.8 %)	11
Chile	9 (4.6 %)	12 (6.6 %)	13 (6.3 %)	10
Colombia	1 (0.5 %)	10 (5.5 %)	11 (5.3 %)	17 (7.9 %)
Peru	0	2 (1.1 %)	11 (5.3 %)	5
El Salvador	6 (3 %)	4 (2.2 %)	11 (3.7 %)	0
Ecuador	1 (0.5 %)	0	7 (3.4 %)	0
Bolivia	0	4 (2.2 %)	0	1
Venezuela	11 (5.6 %)	3 (1.6 %)	1 (0.4 %)	1
Uruguay	4 (2 %)	1 (0.5 %)	3 (1.4 %)	9
Honduras	1 (0.5 %)	1 (0.5 %)	2 (0.9 %)	0
Guatemala	2	2 (1.1 %)	0	2
Costa Rica	0	1 (0.5 %)	1 (0.4 %)	2
Nicaragua	0	0	1 (0.4 %)	0
Total	**194**	**180**	**205**	**215**

b. *Choice of Law*

We are also grateful to the ICC for providing us with detailed data on choice of law in arbitrations involving Latin American parties filed with the ICC in 2011 and 2012. More specifically, the ICC provided the seat of the arbitration and the law chosen by the parties for each of the 81 and 95 cases filed respectively during these two years.

It must be underscored again, however, that a number of these cases were single nationality cases. This is important, because parties to single nationality cases all originate from the same jurisdiction, and are thus very likely to provide for the application of the law which is known to all them.

Additionally, single nationality cases will often be domestic cases[21] where the power of the parties to provide for the application of foreign law will be doubtful. It is therefore useful to break the data and present separately cases involving parties of different nationalities. This could easily be done where the data indicated that the only case involving parties from a given country was a single nationality case, and a seat in this country had only been selected once.[22] For other countries, it was more difficult. The following assumption

[21] That is, cases with no connection to other jurisdictions, such as the domicile of the parties or the place of conclusion or performance of the contract.

[22] This was the case for Honduras in 2012. The ICC reported that the only case involving parties from Honduras in 2012 was a single nationality case, and the data revealed that a seat in Honduras had only been selected once. The parties had not chosen the applicable law, in most likelihood because it was obvious to them that Honduras law would apply to a domestic case.

was therefore made to identify them. Parties to single nationality cases would either select a seat of the arbitration and provide for the application of the law of the same jurisdiction, or select the seat in the same jurisdiction and then omit to indicate the applicable law.[23] We find that the ICC handled respectively 66 and 69 international cases involving Latin American parties in 2011 and 2012.

We present the data for both all cases and international cases in Table 11.

Table 11: Substantive Law Chosen in ICC Latin American Arbitrations, 2011-2012

	2011			2012		
	All cases	Int'l cases		All cases	Int'l cases	
Brazilian law	15	7	10.6%	19	11	16%
Mexican law	10	10	15.1%	12	4	5.8%
U.S. laws	7	7	10.6%	10.5	10.5	15.2%
Chilean law	2	2	3%	8	8	11.6%
Argentinian law	6	4	6%	2	1	1.4%
English law	4	4	6%	2.5	2.5	3.6%
Swiss law	2	2	3%	2	2	2.8%
French law	2	2	3%	2	2	2.8%
Other non-Lat Am laws	8	8	12%	4	4	5.8%
Panamanian law	2	2	3%	1	1	1.4%
Peruvian law	1	1	1.5%	2	0	0
Salvadorian law	2	0	0	1	0	0
Ecuadorian law	0	0	0	2	2	2.8%
Uruguayan law	1	1	1.5%	0	0	0
Guatemalan	1	1	1.5%	0	0	0
Columbian law	0	0	0	1	1	1.4%
Bolivian law	1	0	0	0	0	0
Non-national law	2	2	3%	4	4	5.8%
Unspecified	15	13	19.7%	22	16	23.1%
TOTAL	**81**	**66**	**100%**	**95**	**69**	**100%**

The first lesson that the data teach is that Latin American laws are often chosen. They were chosen in 28 cases both in 2011 and 2012. This represented respectively 42% and 40% of international cases. If one focuses on cases where the parties had actually made a choice (and thus neglect cases where no choice was specified), parties chose Latin American laws in 53% of cases. While laws of non-Latin American countries are also regularly chosen, in around 40% of cases where the parties had actually made a choice, they do not dominate.

The situation is different in other parts of the world. A previous study conducted by one of the authors (Cuniberti, 2016) revealed that parties to international arbitrations in Asia choose much more often laws of non-Asian states than laws of Asian states. The ICC data for the same period show parties to arbitrations involving Asian parties chose the laws of non-Asian states in around 60% of cases and chose the laws of Asian states in around 40% cases.[24]

The second lesson, which is correlated to the first, is that Latin American international business transactions are not dominated by the law of an influential jurisdiction of the northern hemisphere. In particular, English and Swiss laws, which dominate international business transactions in other parts of the world (Cuniberti, 2014, p. 479), do not seem

[23] For anecdotal evidence of the fact that parties to single nationality cases might not care for choosing the applicable law, see previous note.

[24] In 2011, parties to ICC arbitrations involving Asian parties had chosen non-Asian laws in 61% of cases where the parties had chosen a law (44.3% of all cases) and had chosen Asian laws in only 37% of such cases (26.7% of all cases). In 2012, parties to ICC arbitrations involving Asian parties had chosen non-Asian laws in 56.6% of cases where the parties had chosen a law (45.4% of all cases) and had chosen Asian laws in only 42% of such cases (34.6% of all cases).

to be very influential in Latin America. U.S. laws are chosen more often, but they do not dominate. In contrast, English law dominates Asian international business transactions, where it is chosen twice as often as any Asian law (Cuniberti, 2016, p. 54).[25]

c. *Combination Seat-Law*

One of the two most important lessons of data of Latin American arbitral institutions was the correlation between the seat of the arbitration and the law chosen to govern the dispute on the merits (see *supra* II.A.).

The data provided by the ICC for years 2011 and 2012 confirm this important trend of Latin American arbitration. In Table 12, we present the distribution of cases where the parties had actually chosen both the seat of the arbitration and the law governing the substance of the dispute (we exclude, therefore, cases where the parties had neglected to choose one or the other).

Table 12: Combination of Seat and Substantive Law in ICC Arbitrations, 2011-2012

	2011		2012	
	Number of cases	**% of choices**	**Number of cases**	**% of choices**
Same country				
Latin America	22	42.3%	18	33.9%
United States	6	11.5%	10[26]	18.8%
Europe	5	9.6%	7	13.2%
Lebanon	0	0	1	1.8%
Different countries				
Seat Latin America	2	3.8%	1	1.8%
Seat United States	6[27]	11.5%	2	3.7%
Seat Canada	0	0	1	1.8%
Seat France	8	15.4%	7	13.2%
Seat other Europe	3	5.7%	2	3.7%
Total	**52**	**100%**	**53**	**100%**

The data reveal first that parties to ICC arbitrations will designate the same jurisdiction for choice of law purposes and as the seat of the arbitration in more than 60% of cases. Given that there is, in principle, no reason for combining the two, this seems remarkably high. It begs the question of whether there is some reluctance among Latin American parties to choose foreign law in any adjudication (see *infra* III).

Table 13: Latin American Seats in ICC Arbitrations, 2011-2012

	2011		2012	
	Int'l cases	**Same law chosen**	**Int'l cases**	**Same law chosen**
Brazil	8	7	7	7
Mexico	11	9	4	2
Chile	2	2	5	5
Argentina	2	2	0	0
Panama	1	1	2	1
Uruguay	1	1	1	0
Venezuela	1	0	0	0
Colombia	0	0	1	1
Ecuador	0	0	1	1
Costa Rica	0	0	1	0
Total	**26**	**22**	**22**	**17**

[25] In 2011 and 2012, parties to ICC arbitrations involving Asian parties had chosen English law in respectively 11.6% and 17.7% of cases, while the most chosen Asian law (Indian law) had only been chosen in respectively 5.5% and 8.2% of cases.

[26] Including one case where the parties had chosen both UK and US laws.

[27] Not including two domestic Salvadorian cases.

While most parties to international arbitrations understand the importance of and the difference between the seat of the arbitration and the law governing the merits, there is still a significant proportion of cases where parties omit to provide for the applicable law, including cases where they also fail to choose the seat of the arbitration. These cases are summarized below.

Table 14: Cases with Choice of Seat but not Law in ICC Arbitrations

	2011		2012	
	Domestic cases	**Int'l cases**	**Domestic cases**	**Int'l cases**
Choice of seat only				
Seat in Latin America		2	3	1
Seat in the United States	2	4		6
Seat in France		1		3
Seat in other European S.		4		3
No choice of seat				
No choice of law	2	2	3	3
Choice of law	0	0	0	0
Total	2	13	6	16

The data reveal that parties omit to provide for the applicable law in about 20% of cases. This proportion is not higher in Latin American arbitration than it is in arbitrations involving parties based in other parts of the world. It is similar to the average proportion of choice of law in ICC arbitration generally (Cuniberti, 2014, p. 468).

2. The International Center for Dispute Resolution (ICDR)

As the ICC, the ICDR, which is the international division American Arbitration Association, is a global institution which is not specifically focused on Latin America. However, it is an important player in Latin American arbitration which handles a significant number of arbitrations involving Latin American parties.

We are grateful to the ICDR for providing us some data about its Latin American caseload in years 2011 and 2012.

Table 15: Nationality of Latin American Parties to ICDR Arbitrations, 2011-2012

	2011	**2012**
Mexico	28 (26.4%)	30 (26.5%)
Brazil	18 (17%)	11 (9.7%)
Colombia	12 (11.3%)	10 (8.8%)
Peru	9 (8.5%)	8 (7%)
Panama	11 (10,4%)	5 (4.4%)
Costa Rica	6 (5,6%)	6 (5.3%)
Honduras	5 (4,7%)	7 (6.2%)
Chile	2 (1,9%)	3 (2.6%)
Nicaragua	5 (4,7%	7 (6.2%)
Venezuela	0	8 (7%)
Bolivia	4 (3,7%)	3 (2.6%)
Argentina	3 (2,8%)	3 (2.6%)
Ecuador	0	5 (4.4%)
Guatemala	2 (1,9%)	1 (0.9%)
Uruguay	1 (0,9%)	2 (1.8%)
El Salvador	0	2 (1.8%)
Paraguay	0	2 (1.8%)
Total	**106**	**113**

Unfortunately, more precise data on these cases were unavailable. However, some general features of ICDR arbitration are known. The first is that the vast majority of ICDR cases have their seat in the United States (ICDR, 2016, p. 7).[28] The second is that, in the vast majority of cases, one party originates from the U.S. (ICDR, 2016, p. 7; ICDR, 2018, p. 1).[29] This means that most ICDR Latin American cases (probably about 90%) are likely to oppose a U.S. party to a Latin American party, and have their seat in the U.S.

The ICDR has never reported on the law chosen by the parties to ICDR arbitration. There are several reasons to believe, however, that, in the vast majority of cases, the law of a U.S. state applies. The first reason is that, in most cases, one of the parties was a U.S. party, and that the negotiation dynamics resulted in the choice of a U.S. seat and the choice of a U.S. arbitral institution. It is likely that the same negotiation dynamics would also be used to settle on the law of a U.S. state. The second reason is that it is the general trend in Latin American arbitration, including ICC arbitration.[30]

III. SOME REFLECTIONS ON THE PREFERENCES OF LATIN AMERICAN PARTIES

A. Territorial Approach

A striking feature of Latin American arbitrations is the willingness of parties to associate the seat of the arbitration with a choice of the substantive law of the same state. The data presented above reveal that this is almost systematically the case in arbitrations held under the aegis of Latin American institutions, and that this is the case in more than 60% of ICC arbitrations. Yet, the seat of the arbitration and the law governing the merits of a case are conceptually different. They serve different functions, and parties to international arbitrations may choose them independently from each other.

There are three possible reasons for the Latin American trend to associate the seat and the law governing the merits of the arbitration. The first could be a lack of sophistication of the parties. Parties to international commercial transactions will typically not have any legal education, and they might not be advised by lawyers. When advised by lawyers, these lawyers will typically be transactional lawyers, or in-house lawyers, who might have limited knowledge of the complexities of conflict of laws and doctrines of international commercial arbitration. As a result, the parties and their lawyers might not see clearly the difference between the venue of an arbitration and the applicable law, and even less between choosing the seat of the arbitration for the purpose of choosing the *lex arbitri* and choosing the substantive law. While it is inevitable that some of the parties lack legal sophistication and fail to understand this fundamental conceptual difference, in Latin America or elsewhere, it is difficult to believe that such a proportion of parties to Latin American arbitrations would be in this situation. It is therefore submitted that lack of sophistication cannot fully explain this phenomenon.

The second possible reason is that parties to international transactions typically prefer to litigate at home under their own law, with which they are familiar. As a consequence, when their bargaining power allows, they typically try to impose that disputes be resolved in their home state under the law of their state of origin. Under that explanation, the association seat/substantive law would often reveal the stronger bargaining power of one of the parties.

The third possible reason would be peculiar to Latin America, and might thus at least partially explain why the phenomenon is so strong in this part of the world. Latin America has traditionally distinguished itself by a territorial approach to choice of law and a reluctance to accept freedom of choice, in particular in international contracts. Historically, Latin American states would only apply local law and they would not accept that the parties choose the law governing their contract. Although the situation has changed in certain Latin American states, in particular in the context of international arbitration, it is possible that the idea of territoriality remains deeply ingrained in the mind of Latin American businessmen and lawyers. This could explain why Latin American actors continue to find it natural to provide for the application of "local" law which, in the context of international arbitration, would be interpreted as the designation of the law of the seat of the arbitration.

The territorial approach to choice of law has deep roots in Latin America. The colonies of Spain were subject to a private law system with a strong terri-

[28] For 2015, ICDR reported that only 109 cases out of 1064 cases filed had their seat outside of the U.S., i.e. 10%.

[29] For 2015, ICDR reported that less than 10% of cases (97 out of 1064) did not include a U.S. party. For 2018, the ICDR reported that about half of all parties originated from the U.S. (1067 U.S. parties vs 1011 non-U.S. parties).

[30] In the context of the study of one of the authors on Asia, this was also confirmed by a number of practitioners (Cuniberti, 2016).

torial character that goes back to the feudal period and even before.[31] This inherited approach to conflicts of laws became very appealing in the region in the early XIX century at the time of the wars for independence. It also helped the new constituted states as part of an ideological defense against the colonial powers when the latter tried to reconquer their old territories. The Chilean Constitution of 1812, one of the first constitutions of the continent, was particularly eloquent when referring to the rejection of foreign laws. It stated that "no decree, providence or order emanating from any authority or Tribunal from outside the territory of Chile, will be given effect; and those who tried to give them any value, will be punished as prisoners of the State" (Article 5). Also, the vast majority of the Hispanic American countries kept the territorial Spanish civil laws way after independence (Pereznieto Castro, 1985, p. 326; Samtleben, 1979, pp. 177-178),[32] and those which changed them quickly, adopted legal systems based on territorialism (Samtleben, 1979, p. 179).[33]

The private law systems of Latin America were deeply shaped in a territorial manner by the thinking and the works of Venezuelan Andrés Bello and Argentinean Dalmacio Vélez Sarsfield. Both men lived their early lives in the transition period from subordination to emancipation, hence the ideals of freedom and independence were natural in them. Andrés Bello was strongly influenced by the Dutch doctrine (Pereznieto Castro, 1985, p. 329).[34] He captured his ideas in his *Principios de derecho de jentes* of 1832, and then in the Chilean Civil Code of 1855, which he drafted.[35] Bello formulated the principle of the territoriality of the laws in an unequivocal way in article 14 of the Chilean Civil Code: "[t]he law is obligatory to all the inhabitants of the Republic, including foreigners". Dalmacio Vélez Sarsfield drafted the Argentinean Civil Code of 1869. He was also influenced by the Dutch doctrine, which he learnt through the work of Joseph Story, the most important figure of territorialism in North America. Vélez Sarsfield made a clear statement for territorialism at the very beginning of the Argentinean Civil Code. He drafted article 1 practically over Bello's provision and specified at the end: "residents or temporary residents". It is clear that, under these provisions, anyone who is in the territory of these countries is subject to their laws, and that no other law is applicable to them therein.

Neither of these men was completely insensible to the application of foreign laws, but for them, it was more a matter of necessity having regard to the international nature of social relations, contrary to Savigny, who shaped European conflict of laws in the same period under a universal, i.e. open approach. Driven by sovereignty ideas and ideals, Bello in particular would never have accepted that foreign law could apply in his country only because the nature of the concrete situation called for it. Rather, foreign laws could be applied as an exception based on comity, or because a given situation already vested rights abroad, and it would be unpractical not to apply the foreign law under which these were produced (Samtleben, 1992, p. 150). Thus, the very essence of Bello's doctrine was that the law of a given country has power and authority exclusively within the territory where it is enacted (1992, p. 150). This fundamental idea connects to another one just as fundamental, and along with it completes the general theory of conflict of laws of this author and lawmaker. If the laws of the countries have power and authority only within their

31 Indeed, despite the existence of a *Derecho Indiano*, which was a legal system created having regard to the specificities and the needs of the colonial societies, Spanish law was the main source of private law in the American colonies (Guzmán Brito, 2000, pp. 104-106). For the territorial character of ancient Spanish law, see Pereznieto Castro (1985, pp. 323-325) and Samtleben (1979, pp. 174-179). These authors agree that this characteristic of Spanish law goes back to the *Liber Iudiciorum*, which was a legal text from the Visigoth period (VII century) that unified the law of the Iberian Peninsula for the first time. It stated: "From now on, we do not want either Roman laws or foreign laws to be used".

32 Cuba and Puerto Rico gained their independences in 1898. They were the last Hispanic American states to obtain freedom. The same ancient Spanish law that applied in the other colonies applied to them until 1889, when the new Spanish Civil Code was promulgated. This code applied in Cuba until 1987 and it still influences the law of Puerto Rico (Guzmán Brito, 2000, pp. 143-146). In its origins, the 1889 Spanish Civil Code –still in force–, also presented territorial traits, but they have practically disappeared after plenty of reforms.

33 It was the case of the Civil Code of the Mexican State of Oaxaca, promulgated in parts between 1827 and 1829, and those of Bolivia, Costa Rica and Peru, promulgated respectively in 1830, 1841 and 1851, which were modeled on the French Civil Code.

34 In order to reaffirm the independence of the Netherlands from Spain, and to reunify its different provinces under one new nation, various Dutch authors of the XVII century advocated for the sovereign right of the state to dictate laws binding for everyone within its territory. As a consequence, foreign laws were applied only exceptionally when the state so decided as a matter of comity (Pereznieto Castro, 1985, pp. 298-300). Comity has been traditionally referred to as an act of mere courtesy or deference, however, it can also be construed as a directive of the legal order addressed to the judge (Niboyet & Geouffre de la Pradelle, 2009, pp. 129-30) and Briggs (2011, pp. 87-92).

35 He was invited by the Chilean government to do so, after having represented the revolutionary interests of Chile, Colombia and his home country, Venezuela, in England, where he lived for almost twenty years (Samtleben, 1979, p. 180).

territories, only the judges of the given enacting countries, and no others, may apply them. For this pioneer of Latin American conflict of laws, the applicable law was thus closely related to jurisdiction (pp. 150 and 153).

In the field of contracts, Bello's territorial approach translated into a choice of law regime that left very little room for the application of foreign laws. His most important legacy is article 16 of the Chilean Civil Code, which is still in force and provides, in its third paragraph, that the performance of a contract in Chilean territory subjects the effects of the contract to Chilean law, regardless of the place of conclusion. If the contract is to be performed in Chile, Chilean law governs the whole legal regime of the contract, and, when it is not, the Chilean code simply does not provide a solution.[36] Bello's and Vélez Sarsfield's territorial approach to conflict of laws in general, and this specific choice of law rule in particular, were adopted, sometimes in response to specific, yet slightly different, social realities,[37] in several Hispanic American civil codes,[38] and they still remain in some of them.[39]

Territorialism hindered the admission of party autonomy in many Latin American states (Albornoz, 2010). Surveys of Latin American scholars have shown that, while certain countries allow freedom of choice in international contracts, the law is at best unclear in this respect in many others.[40] Freedom of choice is relatively recent among the countries that allow it. Nine Latin American countries (out of a total of twenty –including Puerto Rico–) have incorporated freedom of choice in their legislation in the last decades.[41] But Brazilian law, for instance, still lacks a clear admission of freedom of choice and, despite the efforts of scholars to identify legal arguments supporting freedom of choice, and the existence of certain cases which could be favorably interpreted, the extent to which choice of law clauses are enforceable in Brazilian courts remains unclear (Albornoz, 2010, note 21, pp. 44-46).[42] Uruguayan appended 1868 Civil Code ex-

[36] Foreign law may only be applied in the case of a contract validly concluded under the laws of a foreign state in regard to property located in Chile (Chilean Civil Code, Article 16, paras. 1 and 2).

[37] Mexico's approach to foreign laws was rather open at the moment of independence, and it remained so until the 1920s, when the triumph of the revolution gave a nationalistic sentiment to many laws, including the federal civil code of 1928 (Pereznieto Castro, 1985, pp. 330-334). It is only in 1988, after important reforms were introduced in this code, that Mexico opened again, and this time completely (at least at federal level), to the application of foreign laws, by adopting a universal conflict of laws regime.

[38] Strongly influenced by Story and by authors who shared the views on conflict of laws of Savigny, like Brazilian Augusto Teixeira de Freitas, Vélez Sarsfield approach to conflict of laws was very eclectic. He construed the Argentinean Civil Code of 1869 in a territorial manner in regard to the personal statute, leaving however some room for the application of foreign laws (articles 6, 7 and 8), but did provide for a bilateral choice of law rule for contracts (articles 1.205, 1.209 and 1.210).

[39] Bolivia (at least for commercial contracts), Colombia, Costa Rica, Ecuador and El Salvador. Honduran codes are extremely incipient in this field of law; they do not contain a provision that could allow to ascertain a specific approach to conflict of laws. It could thus be inferred that the role of foreign law is restricted. The same is true for Puerto Rico, though its civil code is currently being reformed and many changes are expected soon, including the admission of party autonomy. The situation is different in Nicaragua. Its civil code provides for bilateral choice of law rules in the field of contracts, but nowhere in its law is there an indication of freedom of choice in international contracts.

[40] *See* Albornoz (2010). See also Vial Undurraga (2018, 2020) and Revoredo de Mur (1994). The different treaties on private international law concluded at a multilateral level by the different Latin American countries among them, have not clarified the issue. What is more, this regime seems to expose the difficulties towards the acceptance of freedom of choice. For instance, the Convention on Private International Law (Bustamente Code) concluded under the aegis of the OAS in 1928, probably the most meaningful among these treaties for the purpose of an empirical type of research like this, considering the number of contracting states and its universal scope, recognizes the tacit will of the parties, but provides at the same time that such will results in the application of specific laws: in the case of pre-formulated standard contracts, the law that prepares them, and the common personal law of the parties in all other contracts, and, failing this, the law of the place of conclusion. Furthermore, some of the countries that have ratified the convention, have made reservations in the sense of excluding its application when contrary to their laws.

[41] Such provisions have been in force in Argentina since 2016, in Cuba since 1988, in the Dominican Republic since 2014, in Guatemala since 1990, in Mexico since 1988, in Panama since 2008, in Paraguay since 2015, in Peru since 1984, and in Venezuela since 1999. The development of free trade that took place in the region from the 1980s played an important role in the evolution of a territorial choice of law system into a more universal one, including the acceptance of freedom of choice (Juenger, 1997, pp. 196-197, 203).

[42] Before 1916, Brazil choice of law rules were very similar to those contained in Bello's Chilean Civil Code. Since, the relevant laws have provided for a bilateral choice of law system. See generally Samtleben (1985). Actually, Brazil did not inherit a territorial approach to conflict of laws as the Hispanic countries did. Contrary to Spain, the Portuguese empire was open towards the application of foreign laws, and Brazilian independence did not take place in a dramatic fashion, like it was the case in most of the Spanish colonies of the continent (Samtleben, 1979, pp. 187-88). Nevertheless, whether or not a territorial approach prevails is still a matter of controversy. First, because despite the existence of bilateral choice of law rules, traditionally, Brazilian jurisprudence seems to provide for the application of local law. Second, because the Civil Code of 1916 expressly admitted freedom of choice, but then the *Lei de Introdução às normas do Direito Brasileiro* of 1942, a law whose objective is to clarify and complete different important aspects of Brazilian law,

pressly rejects party autonomy.[43] Among all Latin American countries, this characteristic is specific to Uruguay and it may well also draw from Bello's territorial ideas.[44] Bello never addressed the issue of allowing the parties to an international contract to choose the applicable law, but this goes hand in hand with the cornerstone of his theory, i.e. the exclusive application of the law of the enacting state.[45] It is true that the 1941 appendix contains bilateral choice of law rules in different fields, but the completing postulate of Bello's ideas, which states that jurisdiction is subject to the applicable law is explicitly present,[46] and also strikingly given the time of its conception. The territorial approach also hindered the acceptance of international arbitration and the freedom that it entails (Jana, 2015, p. 420). This changed in the 1990s when many Latin American states adopted legislation regulating arbitration (2015, p. 422) and providing for the freedom of parties to choose the applicable law in international cases.[47] In particular, several states adopted legislation mirroring closely the UNCITRAL Model Law.[48]

Territorialism might well be in decline in Latin America, and party autonomy on the rise. It remains, however, that old habits and conceptions die hard, and that commercial parties may continue for years to be reluctant to dissociate the forum and the applicable law. The data might reveal such reluctance. It should be underlined, however, that the data are based on cases which were litigated in the early 2010s, and which arose out of contracts concluded a few years before.[49] They reflect, therefore, practices which are a decade old.

B. Importance of the U.S. as an Economic Partner

The United States is the most important trading partner of Latin American countries, and the most important source of foreign direct investments (FDI). As far as trade is concerned, the World Bank reports (WITS, n.d.) that, in 2009,[50] almost 37% of Latin American and Caribbean exports were to the U.S., while 19% were to other Latin American and Caribbean countries and close to 15% to European and Central Asian countries. In the same year, more than 31% of imports of Latin American and Caribbean countries came from the U.S, while 20% came from other Latin American and Caribbean countries and 16% from European and Central Asian countries. As far as FDI are concerned, the Economic Commission for Latin America and the Caribbean reports that the U.S. accounted for 25% of FDI in Latin America and the Caribbean in years 2006-2010 (ECLAC, 2011, p. 41).

The weight of the U.S. in Latin American trade and FDI should logically entail that Latin American parties conclude more international sales contracts, and more broadly more international commer-

misses out the issue while addressing the choice of law rule in the field of contracts, and now, the current civil code of 2002, which revokes that of 1916, simply does not address any of these issues.

43 Article 2403: "The rules of legal and judicial jurisdiction determined in this Title cannot be modified by the will of the parties. It can only act within the scope that the applicable law confers to it". Thus, if the Uruguayan choice of law rule designates as applicable a law that accepts party autonomy, the Uruguayan judge could give effect to the will of the parties to the extent established in the applicable law.

44 Though it comes from a rule directly taken from the Additional Protocol to the 1940 Montevideo treaties, which received more influence from Savigny, Story, Teixeira de Freitas and Vélez Sarsfield (Samtleben, 1985, pp. 274-275).

45 Story and Vélez Sarsfield did not address it either, but Savigny and Teixeira de Freitas arguably did. Contrary to Savigny, the ideas of the Brazilian author did not really impact positive law, at least not at the national level.

46 Article 2401: "The judges of the State whose law governs international legal relationships, have jurisdiction to hear the proceedings arising from those relationships. Patrimonial personal claims can also be exercised, at the will of the claimant, before the judges of the country where the defendant is domiciled". This does not contradict article 2403. Contractual claims belong to this type of claim, hence a Uruguayan judge may exercise jurisdiction in a lawsuit arising from a contractual claim governed by a foreign law in application of the Uruguayan choice of law rule for contracts, i.e. *lex loci executionis* (article 2399).

47 Mariana Pargendler has argued that the existence of the public policy exception will always limit the enforcement of choice of law clauses, as courts may find that foreign law violates public policy and thus apply the law of the forum instead (2012, p. 1730). In a commercial context, the argument is exaggerated: the public policy exception is typically interpreted restrictively and rarely applied, even in Latin America. It holds even more true before arbitrators: see above text accompanying note 3.

48 *See*, e.g., Argentinean International Commercial Arbitration Act No. 27449 of 2018; Chilean International Commercial Arbitration Act No. 19.971 of 2004; Costa Rican Act on International Commercial Arbitration based on the Model Law of the United Nations Commission for International Trade Law (UNCITRAL) No. 8937 of 2011; Uruguay International Commercial Arbitration Act No 19636 of 2018. See also Colombian Act on National and International Arbitration No. 1.563 of 2012.

49 Data from arbitral institutions show that the majority of contractual disputes arise two to three years after the conclusion of the contract.

50 As the majority of contractual disputes arise two to three years after the conclusion of the contract, and our data relate to arbitral proceedings initiated in 2011 and 2012, we refer to trade of Latin American countries in 2009.

cial contracts, with corporations based in the U.S. than with corporations based in any other country in the world. Of course, trade and FDI are macroeconomic concepts which do not directly translate into individual transactions. Nevertheless, it is submitted that they are reasonably good proxies for the proportion of individual transactions concluded between the economic actors of the relevant countries, or group of countries. It will be assumed, therefore, that about 30% of international commercial contracts of Latin American parties were concluded with U.S. parties at the end of 2000s.

While the U.S. is the most important trading partner of Latin America, the bargaining power of U.S. parties in individual transactions is not necessarily high. It might not be in a variety of case scenarios, in particular where other foreign companies are competing for the contract. It is submitted that the higher bargaining power of one of the parties can be revealed by the fact that the country of origin of that party was chosen both as the seat of the arbitration and as the jurisdiction providing the substantive law governing the contract. The ICC data show that parties to ICC arbitrations chose both a U.S. seat and the law of a U.S. state respectively in 11% and 18% in 2011 and 2012. These were likely cases where the bargaining power of U.S. parties was high.[51] But the ICC data also show that, in 2011 and 2012, the parties chose in respectively 11% and 3.7% of cases a U.S. seat and the substantive law of another country, which was almost always Latin American.[52] It is likely that most of these cases involved contracts concluded by a U.S. party and a Latin American party where the bargaining power of the U.S. party was not particularly strong. Finally, in certain cases, the Latin American party had a stronger bargaining power and could impose its country of origin both as the seat of the arbitration and as the jurisdiction providing the substantive law governing the contract: some cases reported by Latin American arbitral institutions likely suit this model.

The data reveal that the U.S. can be attractive as a seat of the arbitration. As already mentioned, besides the cases where the parties chose a U.S. state both as the seat and as the jurisdiction providing the applicable law, there are cases where the parties chose a Latin American law and a U.S. seat. In addition, the data reveal that, in a remarkably high number of cases, the parties choose the seat of the arbitration, but not the applicable law. In such cases, the U.S. is the preferred venue (see Table 14). This suggests that, from the perspective of Latin America, the U.S. appears as an attractive venue. One possible explanation is that certain Latin American parties may want to find a neutral venue where they can safely, and confidentially, resolve their disputes. Indeed, the ICC data reveal that some Latin American parties may choose to arbitrate domestic disputes in the U.S.[53]

By contrast, the data do not show any particular attractiveness for the laws of U.S. states. The data reveal, first, that they are never chosen in arbitrations handled by Latin American arbitral institutions. The data relating to ICC arbitration reveal that they are chosen in a proportion of the cases which is inferior to the likely proportion of cases involving Latin American and U.S. parties. It is therefore also likely that, in the vast majority of cases where the laws of a U.S. state was chosen, one of the parties to the transaction was a U.S. party, and that the law of a U.S. state was chosen because the bargaining power of that party was higher than the one of the Latin American party. By contrast, there is no sign that the laws of U.S. states are chosen as laws of a third state, i.e. in transactions where none of the parties is based in the U.S. This is consistent with a previous study of one of the authors on the laws chosen by parties to Asian arbitrations, (Cuniberti, 2016) where it was shown that, despite the claim that international business transactions are dominated by English and U.S. laws, only English law is regularly chosen as a third law in Asian business transactions, while U.S. laws are only chosen in transactions involving a U.S. party. The laws of U.S. states are not more attractive in Latin America than they are in Asia. A major difference, however, is that English law is not either. There is no third law consistently chosen in Latin American business transactions.

One of the authors has argued elsewhere that it is hard to identify any substantive rule of English law which could explain its attractiveness (Cuniberti, 2014, p. 497). Rather, the reason seems to relate to the presence of English lawyers in many parts of the world and, in particular, throughout Asia, including in the Asian offices of American law firms (Cuniberti, 2016). Before we wonder about the presence of foreign lawyers in Latin America and its

[51] The same phenomenon is probably at play when parties choose to arbitrate under the aegis of ICDR, as the vast majority of ICDR proceedings have their seat in the U.S. and are subject to the substantive law of a U.S. state.

[52] In 5 out of 6 cases in 2011, and in all (two) cases in 2012.

[53] This was the case, in particular, in two Salvadorian single nationality cases in 2011, which were both arbitrated in the U.S., under Salvadorian law.

importance with respect to the influence of foreign laws, it should also be underlined that a factor in the influence of English law in Asia could arguably be that England was an important colonial power there, and that some of the leading legal centers (such as Singapore or Hong Kong) in Asia are common law jurisdictions closely following the English lead (Cuniberti, 2014, p. 490). In Latin America, the colonial powers were essentially Spain and Portugal. It could thus have been imagined that Spanish and Portuguese laws would have played a comparable role in Latin America. The data reveal that this is not the case: Spanish and Portuguese laws are virtually never chosen. This suggests that the colonial past, as such, is not an important factor in the attractiveness of commercial laws.[54]

C. Who and Where Are the Lawyers?

Parties to international commercial contracts are often advised by lawyers. Where the applicable choice of law rule allows, these lawyers should inform their client that they need not choose the same law as the place of the seat of the arbitration, or the law of the place of performance of the contract, but may choose any law. In practical terms, however, lawyers have an interest in advising their client to choose the law of a legal system in which they are admitted to practice and offer legal advice. Otherwise, they might lose the client to a lawyer admitted to practice in the law that the parties would ultimately choose, both at the stage of conclusion of the contract and, as the case may be, for future work related to the resolution of any dispute that may arise between the parties. This is a typical agency problem (Posner, 2000): the interests of the lawyers might be different from the interests of their client.

A crucial factor in the choice of the laws governing international business transactions in a given part of the world is thus the availability and the prestige of foreign lawyers[55] in that part of the world. If the most prestigious law firms in a given legal market are the local offices of foreign firms staffed with lawyers educated in and practicing only foreign law, the chances are high that clients will be told, and convinced, that foreign law would be the best suited law to govern many of their international contracts.[56] By contrast, if very few foreign lawyers are active in a given legal market, most clients will turn to local lawyers who will advise clients to choose, if possible, local law to govern their international transactions. In a previous study conducted by one of the authors, it was shown that a big part of Asia corresponds to the first model (Cuniberti, 2016).[57] English and American firms have opened offices in many Asian states (Singapore, Hong Kong, Japan for instance). These offices are typically staffed with lawyers trained in the British common law (but rarely with U.S. lawyers, even in the local offices of U.S. law firms). As a result, Asian clients can easily find lawyers trained in the British common law. This important presence of British lawyers in Asia is correlated with the dominance of English law on Asian international business transactions, which is often chosen as a neutral law.

The data on choice of law in Latin American international arbitration reveal that there is no such dominance of English law or the law of any other state of the northern hemisphere in Latin America. Quite to the contrary, parties to Latin American transactions seem to choose primarily the laws of Latin American states. This begs the question whether this is because there are very few foreign lawyers in general, and common lawyers in particular, active in Latin American states.

Until recently, the presence of international law firms in Latin American countries was very limited (Gómez & Pérez-Perdomo, 2018, p. 18). In certain countries like Brazil, the national legal sector is strongly protected, and the local bar association imposes severe restrictions which make it difficult for foreign law firms to enter into the local market. By contrast, other countries have opened their local markets to foreign firms (Gómez & Pérez-Perdomo, 2018, p. 19). This has long been the case of Mexico and Venezuela, for instance. In Mexico, a number of international firms have opened offices of significant size in recent years.

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54 It must be underscored, however, that a few Latin American cases are arbitrated in Spain under Spanish law. We are grateful to Mrs. María Arias Navarro for indicating to us that the Corte Española de Arbitraje of the Chamber of Commerce of Spain has handled a few cases involving Latin American parties, including single nationality cases (Peruvian), cases involving Spanish parties (Spanish v. Mexican, Spanish v. Ecuadorian) and cases between a European and a Latin American party (Swedish v. Bolivian). All had their seat in Madrid and were governed by Spanish law.

55 By foreign lawyers, we do not refer to the nationality of lawyers, but to their willingness to advise on matters of foreign law. See Posner (2000).

56 We assume that lawyers willing to advise on matters of foreign law (if only for insurance purposes) would have received primary education in the foreign legal system and be admitted to a foreign bar. We further assume that holding a master's degree from a foreign law school (e.g. a U.S. LL.M.) does not suffice. An interesting question is whether being admitted to the NY bar, associated with some experience in a NY firm, might suffice: see Curtis (n.d.).

57 Study excluding mainland China, for which data were unavailable.

Whatever the specific regime regulating the practice of the law for foreign lawyers in the different Latin American states, the fundamental issue is whether there are many foreign lawyers present on these markets. Below, we briefly review the composition of certain leading foreign firms established in the three biggest Latin American markets.

"It is not an exaggeration to say that the legal profession in Mexico is unregulated" (Meneses-Reyes & Caballero, 2018, p. 182). The one and only real condition to practice law in the country is to obtain a law degree from a Mexican university (Ley Reglamentaria del Artículo 5º Constitucional).[58] There are not real bars that would admit lawyers into the practice of law, but rather, associations of lawyers organized as trade associations or guilds, that are, in some cases, "seen as elitist organizations" (Meneses-Reyes & Caballero, 2018, p. 183).[59] These characteristics of the legal profession in Mexico clearly suggest that there is no specific regime to practice foreign law in this country. As a result of the signing of NAFTA in the mid-1990s, many "new competitors appeared as branches of international law firms, especially from the United States" (2018, p. 184).[60] Most of them, however, got associated with local firms in order to compete in the local market and be able to deal with the intricacies of the Mexican legal system and practice.[61] Two of the biggest offices of international law firms are the offices opened in Mexico City by Hogan Lovells with 18 partners (Hogan Lovells, n.d.) and White & Case with 22 partners, including 10 local partners (White & Case, n.d.). The education of the partners based in each of these two offices is similar. All of these lawyers received their primary legal education in Mexico. About two thirds of them (in each office respectively) completed their education by attending a U.S. or U.K. university. Despite working in an Anglo-American or American firm, none of them is a fully trained U.S. or English lawyer.

In Argentina, only graduates from Argentinean law faculties would be admitted to the local bar and may practice Argentinean law. But it does not seem that there are restrictions on foreign lawyers to practice foreign law. A few international firms have established small offices in Buenos Aires. Cleary Gottlieb established an office in 2009, which consists today of one partner, a counsel and a couple of associates. The partner and the counsel both received their primary education in Argentina and completed it with a U.S. LL.M. (Clearly Gottlieb, n.d.). A few years later, Curtis Mallet-Prevost, Colt & Mosle also opened an office in the Argentinean capital. It is much bigger, as it built on an alliance previously established with a local firm. Unsurprisingly, all 10 partners and counsel, who previously constituted an independent Argentinean law firm, were educated primarily in Argentina, with half of them holding a U.S. LL.M. (Curtis, n.d.). Finally, all 15 partners in the Buenos Aires office of DLA Piper received their primary education in Argentina, with 10 of them completing it with a U.S. graduate degree (DLA Piper, n.d.). This brief survey suggests that the presence of foreign lawyers on the Argentinean market is very limited.[62]

In Brazil, although there is no statutory provision prohibiting the practice of law by foreign lawyers, the Brazilian Bar Association has long enacted a provision (Provimento Nº 91/2000) preventing lawyers who are not admitted to the Brazilian bar to practice in Brazil, except as foreign law consultant (Ordem dos Advogados do Brasil, 2000). As a result, foreign firms have followed three strategies. The first has been to establish associations with Brazilian law firms.[63] The second has been to open small offices staffed with lawyers admitted as consultants in foreign law.[64] The third has been to open small offices staffed with a mixture of lawyers admitted to the local bar and lawyers admit-

58 Each of the other 31 Mexican states has a law of the kind. For those holding a foreign law degree, there is the possibility of having it recognized by the ministry in charge of education.

59 And there "are also no significant requirements for lawyers to become associated in order to offer services jointly" (Meneses-Reyes & Caballero, 2018, p. 182)

60 But it was not easy at the beginning. There were "attempts to establish limits and barriers to prevent the participation of foreign law firms and lawyers in Mexico. Some legal organizations even opted to expressly prohibit their members to associate with foreigners offering legal services in Mexico" (Meneses-Reyes & Caballero, 2018, p. 184-185).

61 Multinational law firms also "subcontract local services to be able to claim 'local knowledge'" (Meneses-Reyes & Caballero, 2018, p. 191)

62 It seems, however, that at least one firm established in Buenos Aires has long specialized in the practice of New York law although none of its lawyers had received their primary education in the U.S. The firm might have considered that the combination of being admitted to the NY bar and experience in the New York office was sufficient for this purpose.

63 This strategy has been pursued by Mayer Brown and Baker & McKenzie. Linklaters also established a cooperation agreement with a local firm but terminated it in 2012 after the Brazilian bar confirmed the restriction on the practice of law in Brazil by foreign firms.

64 This strategy has been pursued by Skadden, for instance: the Sao Paulo office includes two partners and two other resident lawyers (and a partner attached both to the New York and the Sao Paulo offices) who are all admitted as foreign consultants (or only admitted in New York).

ted as consultants in foreign law.[65] Firms following either the second or the third strategy introduce in the local market foreign lawyers available to advise local clients, including on foreign contract law. The chances that Brazilian clients might be convinced of the advantages of submitting an international contract to a law other than Brazilian increase accordingly. However, it seems that, for the time being, these foreign lawyers are very few, and were even less at the end of the 2000s. Their impact on choice of law by Latin American parties is thus likely limited.

IV. CONCLUSION: THE LATIN AMERICAN MARKET FOR CONTRACTS

In many parts of the world, freedom of choice of the law governing international contracts has created the conditions of an international market for contracts. Commercial parties are free to choose a law suited to their needs even if it is unrelated to their contract. In recent years, some national lawyers' associations have competed for international contracts through marketing materials that promote their contract law (Law Society of England and Wales, 2007; Alliance for German Law, 2012). These marketing efforts demonstrate that elites in at least some jurisdictions believe that there is an international market for contracts in which it is worth competing (Vogenauer, 2013; Rühl, 2013).

Is there a similar market for international contracts in Latin America? The conditions for its existence have gradually been established. The power of commercial parties to freely choose the law governing their transaction is now widely recognized in the context of international arbitration. Parties willing to choose a law for its intrinsic qualities may do so if they also include an arbitration clause in their contract. Our study reveals, however, that parties to Latin American international transactions barely use their power to choose a law other than the law of origin of one of the parties, and rarely dissociate the seat of the arbitration from the law governing the transaction. This suggests that their choices are essentially dictated by the relative bargaining power of the parties and the appeal of resolving disputes at home, before an arbitral tribunal sitting in the jurisdiction and applying the law of the party who was able to impose his preferences. In contrast, parties seem to choose the law of a third country in rare circumstances. If there is a Latin American market for contracts, it does not seem to be very active.

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[65] This seems to be the strategy of Cleary Gottlieb, for instance: the Sao Paulo office includes two partners educated abroad and admitted in New York, and a counsel and 10 associates who received their primary legal education in Brazil and are admitted to the Brazilian bar.

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