

## THE VALIDITY OF INTERNATIONAL COMMERCIAL ARBITRATION AGREEMENT

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**ABSTRACT:** *The Arbitration Agreement constitutes the relinquishment of an important right to have the dispute resolved judicially and creates others rights. The rights it creates are the right to establish the process for resolving the dispute. In their arbitration agreement, the parties can select the rules that will govern the procedure, the location of the arbitration, the language of the arbitration, the law governing the arbitration, and frequently, the decision-makers, whom the parties may choose because of their particular expertise in the subject matter of the parties' dispute. The parties' arbitration agreement gives the arbitrators the power to decide the dispute and defines the scope of that power. In essence, the parties create their own private system of justice. The parties' arbitration agreement is frequently contained in a clause or clauses that are embedded in the parties' commercial contract. The agreement to arbitrate is thus entered into before any dispute has arisen, and is intended to provide a method of resolution in the event that a dispute will arise. However, if there is no arbitration clause in the parties' contract, and a dispute arises, at that time the parties can nonetheless enter into an agreement to arbitrate, if both sides agree. Such an agreement is called submission agreement. In light of the important rights that are extinguished when the parties agree to arbitration, this paper aims to examine the question of the validity of arbitration agreement. In others words what are the characteristics of a valid arbitration agreement? What does a valid arbitration agreement imply as legal effects? Arbitration is a creature of consent, and that consent should be freely, knowingly, and competently given Therefore, to establish that parties have actually consented, many national laws, as well as the New York Convention, require that an arbitration agreement be in writing*

**KEYWORDS:** International, Commercial, Arbitration Agreement Validity, Competence-Competence

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### INTRODUCTION

International commercial arbitration is a private method of dispute resolution, chosen by the parties themselves as an efficient way of putting an end to disputes between them, by the mean of tribunal. It is conveyed in different countries and against different legal and cultural backgrounds, with a striking lack of formality. There are no national flags or other symbols of state dominance. There are no formalisms, just a group of people seated around a row of tables, in a room hired for the occasion. For someone who's knows nothing about arbitration, it would look as if a conference or business meeting was in progress. It does not look like a legal proceeding at all even the appearance conceals the reality. It is truthful that the parties themselves choose to arbitrate, as an alternative to litigation or to other methods of dispute resolution. It is true too that, to a large extent, the arbitrators and the parties may choose for themselves the procedures to be followed. If they want a short arbitration, they may have one. If they want to dispense with the disclosure of documents or the evidence of witnesses, they may also do so. Indeed, they may even dispense with the hearing itself if they wish. Yet, the practice of resolving disputes by international commercial arbitration only works because it is

held in place by a complex system of national laws and international treaties. Even a comparatively simple international commercial arbitration may require reference to as many as four different national systems or rules of law. First, there is the law that governs recognition and enforcement of the agreement to arbitrate. Then there is the law that governs, or regulates, the actual arbitration proceedings themselves. Next – and in most cases, most importantly – there is the law or the set of rules that the arbitral tribunal has to apply the substantive matters in dispute before it. Finally, there is the law that governs recognition and enforcement of the award of the arbitral tribunal. These laws may well be the same. The law that governs the arbitral proceedings may also govern the substantive matters in issue but it is not necessarily so. In other hand, because most international arbitrations take place in a ‘neutral’ country that is to say, a country which is not that of the parties, the system of law which governs recognition and enforcement of the award of the arbitral tribunal will usually be different from that which governs the arbitral proceedings themselves. International commercial arbitration are characterized by four principle features. Namely: the agreement to arbitrate; the choice of arbitrators; the decision of the arbitral tribunal; the enforcement of the award.

Our analysis will be focused on the first feature who is the agreement to arbitrate. The agreement to arbitrate is an agreement by the parties to submit to arbitration any disputes or differences between them. In order for arbitration to be valid, a valid agreement to arbitrate is required. This is recognized both by national law and by international treaties such as the New York Convention and the UNCITRAL Model Law. For example, under both the New York Convention and the Model Law, recognition and enforcement of an arbitral award may be refused if the parties to the arbitration agreement were under some incapacity, or if the agreement was not valid under its own governing law. An arbitration agreement can take the qualification of arbitration clause, submission agreement and sometime can be an arbitration agreement by reference. An arbitration clause (or clause compromissoire, as it is known in the civil law) relates to disputes that might arise between the parties at some time in the future. It will generally be short and to the point. The agreement to arbitrate may also take the form and qualification of submission agreement. Submission Agreement is an agreement which is drawn up to deal with disputes that have already arisen between the parties. It is usually an equal detailed document, involving the arbitration rules decided by the parties, the substantive law and other matters. Whichever way it is done, there must be an agreement. If there is no agreement, there can be no valid arbitration. Moreover for all practical purposes, and in particular for the purposes of enforcement internationally, there must be written evidence of the agreement to arbitrate. The international commercial arbitration has much important principle. The most important and essential principle of these is the consent of the parties. Without it, there can be no valid arbitration. The fact that international commercial arbitration rests on the agreement of the parties is given particular importance by some continental jurists. The arbitral proceedings seems to the willingness of the parties, on the basis of their autonomy. It is sometimes argued that international commercial arbitration should be freed from the constraints of national law and treated as denationalized or delocalized. Once parties have validly given their consent to arbitration, this consent cannot be unilaterally withdrawn.

In light of the important rights that are extinguished when the parties agree to arbitration, this paper aims to examine the question of the validity of arbitration agreement. In others words what are the characteristics of a valid arbitration agreement? What does a valid arbitration agreement imply as legal effects? These questions are going to be treated throughout a conceptual analysis (chapter1) before talking about the validity conditions and legal effects of an International Commercial Arbitration Agreement (chapter2)

## CONCEPTUAL ANALYSIS

Two major concepts, the concept of International and the concept of Commercial are going to be analyzed in the (section1) before the internationality of the commercial arbitration agreement in the (section2)

### Section1: Concepts of International and Commercial

#### Paragraph: Notional approach

##### **A- International**

The term ‘International ’ was coined by the utilitarian philosopher Jeremy Bentham in his publication in 1780 and published in 1789. Bentham wrote: ‘the word international, it must be acknowledged, is a new one; though, it is hoped, sufficient analogous and intelligible’<sup>1</sup>. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the law of nations. The word was adopted in French in 1801. Thomas Erskine Holland noted in his article on Bentham in the 11<sup>th</sup> edition of the Encyclopedia Britannica that “Many of Bentham’s phrases, such as ‘international’ are valuable additions to our language<sup>2</sup>. International mostly means something involving more than a single country. The term international as a word means involvement of, interaction between or encompassing more than one nation, or generally beyond national boundaries. For example international law which is applied by more than one country and usually everywhere on earth.

##### **B- Commercial and Commercial activities**

The word ‘commercial’ is referred to in Art 1 of the Model Law, which states that the law ‘applies to international commercial arbitration, subject to any agreement in force between this State and any other States or State’<sup>3</sup>. A large interpretation should be given to the term ‘commercial’ because it covers matters arising from all relationships of a commercial nature whether contractual or not. Historically, the ‘commercial’ scope of modern international arbitration has its roots in Article 1 of the Geneva Protocol<sup>4</sup>. Article 1 required that Contracting States recognize arbitration agreements ‘relating to commercial matters or to any other matter capable of settlement by arbitration.’ It went on to provide that:

‘each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.’<sup>5</sup>

Pursuant to the text of Article I of the Geneva Protocol, the ‘commercial’ requirement seems to involve the notions of non-arbitrability reflected in linkage of the requirement to ‘other

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<sup>1</sup> Jeremy Bentham.

<sup>2</sup> Thomas Erskine Holland, article on Bentham.

<sup>3</sup> Article 1 UNCITRAL Model Law.

<sup>4</sup> Geneva protocol, Art I (emphasis added). See supra pp. 58-61. The Geneva Convention incorporated this limitation. Geneva Convention, Art I; supra pp.61-64.

<sup>5</sup> This language paralleled that later adopted in Article I (3) of the New York Convention. See E. Gaillard & J. Savage (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration pp 243,262(1999) (The same reservation, adopted under the 1923 Geneva Protocol, likewise raised no major difficulties in practice).

matters capable of settlement by arbitration'' and the apparently decisive role of individual state's national laws in defining what was commercial. In turn, early national arbitration statutes in many jurisdictions were limited to ''commercial relationships.<sup>6</sup> This reflects the historic focus of arbitration as means for resolving business disputes, as well as traditional restrictions under some national legal systems regarding the scope of arbitral disputes.

Relationships of commercial nature include ; but are not limited to, the following transaction: any trade transaction for the supply or exchange of goods and services distribution agreements; commercial representation or agency; factoring; leasing; construction of work; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial and business corporation; carriage of goods or passengers by air, sea, train or road.<sup>7</sup> This footnote was created as a guideline for interpretation and, apart from stating that contractual as well as non-contractual relationships are included, it also supplies a non-exhaustive list of transactions considered to be 'commercial'. Although the Analytical Commentary and the Commission Report do not consider this footnote to be a 'definition' (apparently because a clear-cut definition that would draw an exact line between commercial and non-commercial disputes could not be found)<sup>8</sup>, the footnote's content significantly resembles what one would expect of a definition. This is especially so if one considers what kinds of provisions pass for genuine definitions in the Model Law such as those contained in art.2(a) to c. Regardless of whether the above-mentioned provision is a definition or just a rule of interpretation, the technique of using a footnote is highly unusual due to its uncertain legal effect, as is admitted by the Analytical Commentary: 'there may be some uncertainty as to the addressee and the legal effect of this footnote, since such legislative technique is not used in all systems'. The reasons for choosing the technique of a footnote are to be found in the above-mentioned use of a list of transactions considered to 'commercial'.

According to the UNCITRAL Model Law Working Group, 'it was pointed out that the illustrative list of commercial transactions set forth in paragraph(3) was inappropriate as [definition] for various reasons:(a) inclusion of a list of examples was contrary to the legislative techniques in a number of legal systems;(b) courts might interpret the list as exhaustive despite its express illustrative nature; (c) the examples contained in the list were unbalanced in that important transactions were missing (e.g. maritime transport, banking, insurance, licensing); (d) some of the examples(e.g. consulting, providing of services) were too wide or vague and thus more harmful than helpful''<sup>9</sup>. As there was general support for the retention of such a list, it was decided to move it into a footnote, giving it more the character of a rule of interpretation. During the drafting process an eye was always kept on the Model Law's conformity with the New York Convention, a fact which can be seen in some articles' similarity to the latter text. The New York Convention's 'commercial reservation'' contained in art. I (3) states: '[a contracting State] may also declare that it will apply the Convention only to differences arising

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<sup>6</sup> U.S. FAA, 9 U.S.C section2 ('any maritime transaction or a contract evidencing a transaction involving commerce'); E. Gaillard & J. Savage (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration pp 64-65 (1999) (Historically, French domestic law was noted for its hostility towards the arbitration of non-commercial disputes hostility resulted, in particular, in a prohibition on arbitration clauses for disputes or than those within the jurisdiction of the commercial courts. The court generally void an arbitration clause which failed to comply with this prohibition.); Jarrosson clause compromissoire (art. 2061 C. civ.), 1992 Rev. arb. 259. In England, non-arbitrability issues appear to have been historically unimportant (with church, family and criminal matters being arbitrated). Roebuck, Sources for the History of Arbitration Bibliographical Introduction 14 Arb. Int'l 237, 257-265(1998).

<sup>7</sup> Article 1 UNCITRAL Model Law footnote relative to commercial activities.

<sup>8</sup>A/CN.9/264,art1,para.16;A/40/17,para.19.

<sup>9</sup> A/CN.9/233, para.53; explanation of UNCITRAL Working Group.

out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration”<sup>10</sup>. At the outset of drafting the Model Law it was held that a provision binding the term ‘commercial’ to national laws, as is done by the New York Convention, was not desirable, mainly because prior difficulties due to a narrower interpretation of this provision of the New York Convention arose. When we make a literal reading, Article I (3) of the New York Convention arguably leaves it to individual Contracting States to define ‘commercial’ under national law, without imposing any international limits on national definitions.<sup>11</sup> This interpretation of Article I(3) would result in the provision largely duplicating the non-arbitrability doctrine by permitting Contracting States to rely on local law to avoid application of the Convention’s pro-arbitration regime. It would also permit dilution or circumvention of the Convention’s objectives through adoption of artificially narrow definitions of the term ‘commercial’. Despite this possibility, the Convention’s ‘commercial’ requirement has in practice produced few such difficulties in most national courts, and the clear trend has been towards a liberal and expansive definition of the term.

Notwithstanding the literal language of Article I (3) of the Convention, a substantial case can be made that Contracting States are not free to adopt whatever definition they choose of the term ‘commercial’. Permitting this type of unilateral action without any sort of international limit would effectively allow states to empty the Convention of most or all meaningful obligations,<sup>12</sup> which cannot have been the drafters’ intentions.

Rather, the better view is that the Convention leaves Contracting States free, within the scope of an international-defined conception of ‘commercial’ to adopt particular reservations based on specific national law definitions. That is, a Contracting State is free under Article I (3) to make a reservation declaring that does not accept the Convention’s obligations as to particular non-commercial matter (e.g. domestic relations), but a state is not free to categorize what are properly regarded, from an international perspective, as ‘commercial’ matters (e.g., contract claims arising from a joint venture agreement) as ‘non-commercial’ and thereby to evade the Convention’s obligations with regard to such matters<sup>13</sup>. According to this analysis, if a contracting State wished to do so, it would remain free to invoke non-arbitrability and public policy exceptions to the recognition of arbitral awards (Article V(2)<sup>14</sup> and arbitration agreements (Article II(1))<sup>15</sup>. Again, however, a Contracting State could not define commercial matters to be non-commercial. In addition to limiting the possibilities that the Convention’s objectives would be frustrated or circumvented, this analysis would also reduce duplication between the Convention’s commercial relationship requirement and non-arbitrability exception. It would do so by leaving Contracting States free to exclude genuinely non-commercial disputes from the Convention, while also adopting more carefully-tailored non-arbitrability restrictions as to particular commercial disputes under Articles V(2) (a) and II(1).

In terms of the content of the term under the Convention, a “commercial” relationship should have its ordinary meaning, being a relationship involving an economic exchange where one or both parties contemplate realizing a profit or other economic benefit. This definition is

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<sup>10</sup> A/CN.9/WG.II/WP.48.

<sup>11</sup> See New York Convention, Art. I (3) (considered as commercial under the national law of the state making the declaration).

<sup>12</sup> This interpretation would in theory permit a Contracting State to define all but particular types of contractual relationships (e.g., sale of goods between merchants) as non-commercial. The consequence would be to exclude other types of agreements (joint ventures, lending services, distribution) from the convention.

<sup>13</sup> This consistent with the existence of international limits on Contracting State’s applications of Article II’s non-arbitrability and ‘null and void’ exceptions to the presumptive validity of international arbitration agreements.

<sup>14</sup> See New York Convention, Arts. V (2) (a), (b).

<sup>15</sup> See New York Convention Art. II (1).

consistent with the weight of lower court authority under the Convention and the definition of the term in other contexts<sup>16</sup>. It is a liberal, expansive definition that includes all manner of business, financial, consulting investment, technical and other enterprise. Among other things, the foregoing definition of ‘commercial’ includes consumer transactions and employment contracts, thereby bringing agreements to arbitrate disputes arising from such matters within the Convention’s other limits, to adopt rules of substantives validity or non-arbitrability tailored to employment or consumer relations which is preferable to a categorical exclusion of the Convention’s protections in such cases: Contracting States may then permit the arbitrability of certain kinds of employment or consumer disputes, in which case the Convention would apply, but not others, in which case the dispute will be non-arbitrable.<sup>17</sup>

To underline this fact, a draft version of the Model Law contained the footnote wording: ‘The term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, irrespective of whether the parties are ‘commercial persons’ (merchants) under any given national law’’. Nevertheless, it was feared that this wording could be interpreted as dealing with the highly sensitive issue of state immunity, which was not intended to be touched by the Model Law:

‘There was general agreement that the Model Law should not deal with questions of State immunity. The reason for this decision was that the issue of State immunity in the context of arbitration was regarded as but a part of a more general and complex problem having an obviously political and public international law character’’. Eighteen of the 80 adopting jurisdictions directly inserted the Model Law’s ‘commercial footnote’ into their national arbitration statutes. It is submitted, however, that those remaining jurisdictions which adopted the Law verbatim without the footnote would be well advised to interpret the term ‘commercial’ accordingly in order to remain in line with the Model Law.

As a member of the New York convention since 1987, China declared that ‘it will apply the Convention only to disputes which are considered as commercial under its national law<sup>18</sup>

Relating to the argumentation below, the word international seems to be something crossing the boundaries of a national and single one territory Both the Geneva Protocol, the New York Convention and the UNCITRAL Model Law doesn’t give a definition to the word commercial. The two previous international norms only refer to the term commercial in order to designate some kind of matters those can be solved by arbitration. While the UNCITRAL Model Law by the mean of Article 1 footnote give a list of activities considered as commercial. For us the term commercial can be seen as all activities between two or more persons consisting in an exchange of goods or services.

## **Section2: Internationality of the commercial arbitration agreement**

### **Paragraph1: The Commercial Arbitration Agreement**

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<sup>16</sup> G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 259-72(4<sup>th</sup> ed. 2007).

<sup>17</sup> It is also awkward to treat consumer transactions, which are usually defined with reference to a specific financial amount, as ‘non-commercial’ when slightly larger transactions would be categorized as ‘non-commercial’. The sounder analysis is to treat consumer transactions as non-arbitrable because of policy concerns about the use of the arbitral process.

<sup>18</sup> *Zhang v Shanghai wool and jute Co Ltd* [2006] VSCA 133 (Supreme Court of Victoria, court of Appeal).

There is no specific meaning to the terms commercial arbitration agreement but throughout an approach of each term we will define (A) it before talking about the different types of Arbitration Agreement (B)

### **A- Definition**

Arbitration is ‘the hearing or determining of a dispute between parties by a person chosen, agreed between the parties, or appointed by virtue of a statutory obligation’.<sup>19</sup> Arbitration is also a method of setting private disputes between two or more parties by the reference of the dispute to some neutral third party of their choosing, for that third party’s final and binding decision in the form of an arbitral award by which the disputing parties have previously contracted to abide. Article 2 of the Model Law is concerned with certain definitions and rules of interpretation, which apply to the entire law. Subparagraphs (a) to (c) contain the definition of the term ‘arbitration’. Since the Model Law deals with international commercial arbitration, it is logical that this term should have a legal definition. yet, this seems less obvious if one takes a closer look at other international arbitration statutes, such as the New York Convention, the Panama Convention and the ICSID convention, where no ‘arbitration’ definition exists and knowledge of this term’s meaning is taken for granted. Among the relevant international arbitration instruments, only the European Convention defines the term. The Model Law, like most conventions and national laws on arbitration, does not define the term ‘arbitration’. It merely clarifies, in its article 7(1), that it covers any arbitration ‘whether or not administered by a permanent arbitral institution’. Thus, it applies to pure ad hoc arbitration and to any type of administered or institutional arbitration. Of course, the term ‘arbitration is not to be construed as referring only to on-going arbitrations. It is also about the time before and after such proceedings, as is clear, for example, from the provisions on recognition of arbitration agreements, and later, of arbitral awards. While the Model Law is generally intended to cover all kinds of arbitration, two qualifications should be mentioned here which are not immediately apparent from the text but may be expressed by any State adopting the Model Law. The Model Law is designed for consensual arbitration, arbitration based on voluntary agreement of the parties (as regulated in article 7(1)); thus it does not cover compulsory arbitration.

The ‘Arbitration Agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not<sup>20</sup>. Commercial Arbitration is ‘A form of arbitration which is designed for use within commercial relationship and not personal, family law or labor law relationship.’<sup>21</sup>

These two definitions put together, for us, the commercial arbitration agreement can be defined as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them within their commercial relationship. Arbitration has traditionally been limited to commercial, business or trade relationships but with the increasing public malaise with the civil court system, arbitration has grown dramatically as an alternative dispute resolution measure. In order to exclude from the field of arbitration some disputes intervening in the areas of family law, the adjective of commercial has been added to arbitration. However, some jurisdictions continue to name their arbitration statutes by the older name of simply arbitration act and to then, just as with most commercial arbitration agreement, exclude family law disputes from the application of the statute, and to enact separate legislation in regards to

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<sup>19</sup> Macquarie dictionary.

<sup>20</sup> Article 7 UNCITRAL Model Law.

<sup>21</sup> Duhaime Legal dictionary.

labor and labor disputes. Jurisdictions also distinguish between commercial arbitration and international commercial arbitration. The commercial arbitration relates to disputes which are exclusively domestic in nature while international commercial arbitration, involve disputes crossing the boundaries of national state and involving other State or States. Having defined the terms ‘Commercial Arbitration Agreement’, let’s talk about the different types of arbitration agreement.

### **B- Types of Arbitration Agreement**

There are three types of arbitration agreement, namely: arbitration clauses; submission agreements (arbitration deeds); and agreements incorporated by reference.

An arbitration Clause is a clause in a contract that requires the parties to resolve their disputes through an arbitration process. Many commercial agreements nowadays contain an arbitration clause within their commercial agreement. The purpose of the arbitration clause is to regulate the method of resolving any possible future disputes. Such clause should contain, as minimum, details of the arbitration rules that will govern the proceedings and the institution, if any, which is to administer the process; the seat, or legal place of the arbitration, the number of arbitrators, and the language of the arbitration. If one of these criterion is missed, the clause can be invalid. For example, if the clause does not state the number of arbitrators and no agreement is made on such issue, this will need to be determined by the institution administering the arbitration. The arbitration clause does not impose on one of the parties an obligation in favor of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. And there is this very material difference, that whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced by the machinery of the arbitration acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but its enforcement.<sup>22</sup>

Also known as ‘arbitration deeds’, the submission agreements are agreements to arbitrate made after the dispute has arisen. It refer to conflict that have already arisen. Hence, it can include an accurate description of the subject matter to be arbitrated. Some national law require the execution of a submission agreement regardless of the existence of a previous arbitration clause. In such cases, one of the purpose of the submission agreement is to complement the generic reference to disputes by a detailed description of the issues to be resolved. It is less common than arbitration clause then used to be much longer because it happen after the dispute has arisen. Submission agreement will contain details of the dispute and the issues between the parties, and clearly record that it is being referred to arbitration. It will then contain the same important information like an arbitration clause, such as the seat of arbitration and the number of arbitrators. A submission agreement which does not clearly give these details may be declared null and void, along with any award made according to it. Submission agreement can be made during litigation to remove the dispute from the jurisdiction of the court provided the Court of First instance has not yet issued its judgment and the pleadings stage is still taking place. It may be assumed that having an arbitration clause means that there is no need for a submission agreement. The purpose of a submission agreement is to define and specify the scope of arbitration so as to enable the court later on to ensure that the arbitral award was issued within the limits specified by the parties. It can be argued that an arbitration clause fulfills this purpose as it limits any arbitration to issues arising from or connected to the agreement, even

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<sup>22</sup> Duhaime Legal dictionary.



though the limits are wide. UAE Law however is not clear on this. Article 203(3) of the UAE Civil Procedural Law states that the subject of the dispute must be defined in an arbitration clause or during the examination or during the examination of the claim, and 261(1) (a) provides that the arbitral award can be annulled for lack of an ‘arbitration document’. It is not clear if this means arbitration clause or more substantial document such as a submission agreement. It is therefore always recommended that, even though there may be an arbitration clause that a submission agreement be signed in any arbitration proceedings whether there is an arbitration clause in the disputed contract or not.

The third type of arbitration agreement, the Arbitration Agreement incorporated by reference, is common to be found in construction contracts, where the contract may make reference to standard FIDIFC conditions which contain a standard arbitration agreement. In this regard, the Court of Cassation stated that: ‘it is sufficient in a construction contract to make a referral, so that in case a dispute arises between the client and the contractor in respect of the construction contract, it becomes resolved through the general conditions of construction. This means that the parties agreed to arbitration in respect of all the disputes arising out of the obligations stated in said contract without the need to refer to the details of such condition, where the referral to it is sufficient...’.

Below are the three types of arbitration agreement. The arbitration clause is established before by the parties, previously to disputes which may arise in their commercial relationship while the submission agreement occurs when disputes have arisen between the parties. The third one, the arbitration agreement incorporated by reference is much more relative to construction contract. Between these three types of arbitration agreement, the most important for us is the submission agreement because it can include more details about the rules to follow for the litigation of the claims, it is more explicit and its purpose is to solve an actual dispute.

Paragraph 2: Scope of application of UNCITRAL Model Law on international commercial arbitration

### **A- Internationality of the arbitration**

An arbitration is international if :( Art 1 (3) UNCITRAL Model Law on international commercial arbitration)

- (a) ‘the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country’<sup>23</sup>

**B- Substantive and territorial scope of application according to the UNCITRAL Model Law on international commercial arbitration**

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<sup>23</sup> Article 1(3) UNCITRAL Model Law.

A definition to the term "commercial", could be found in a note contains in Article 1, knew as "a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not". The problem is that this footnote doesn't give a real definition of the term commercial but provides an illustrative list of relationships that are to be considered commercial. Then emphasizing the width of the suggested interpretation and indicating that the determinative test is not based on what the national law may regard as "commercial".

Another aspect of applicability is the determination of the territorial scope of application. According to article 1(2), the Model Law was enacted in a given State would apply only if the place of arbitration is in the territory of that State. However, there is an important and reasonable exception. Articles 8(1) and 9 which deal with recognition of arbitration agreements, including their~ compatibility with interim measures of protection, and articles 35 and 36 on recognition and enforcement of arbitral awards are given a global scope. They apply irrespective of whether the place of arbitration is in that State or in another State and, as regards articles 8 and 9, even if the place of arbitration is not yet determined. The strict territorial criterion, governing the content of the provisions of the Model Law, was adopted for the sake of certainty and in view of the following facts. The arbitration place is considered as the only criterion by most of national laws and, the remark is that parties always refuse to apply the procedural law of other countries when national laws give them the opportunity to make a choice. The Model Law, by its liberal contents, further reduces the need for such choice of a "foreign" law in lieu of the Model Law of the place of arbitration, not the least because it grants parties wide freedom in shaping the rules of the arbitral proceedings. This includes the possibility of incorporating into the arbitration agreement procedural provisions of a "foreign" law, provided there is no conflict with the few mandatory provisions of the Model Law. Furthermore, the strict territorial criterion is of considerable practical benefit in respect of articles 11, 13, 14, 16, 27 and 34, which entrust the courts of the respective State with functions of arbitration assistance and supervision.

## **INTERNATIONAL COMMERCIAL ARBITRATION AGREEMENT VALIDITY CONDITIONS AND LEGAL EFFECTS**

### **Section1: Conditions for a valid international commercial arbitration agreement**

Paragraph1: conditions relative to the parties and substantive conditions

#### **A- Condition relative to the party: the capacity**

A party concluding an arbitration agreement must have legal capacity to enter into a legally binding contract. In other words, such party must have capacity to sue and be sued. In most legal systems, an adult person without any legal impediment can conclude an arbitration agreement. The authors of Russell on Arbitration are of the opinion that:

“ It is important to give consideration to the capacity of the parties to an arbitration agreement in order to establish whether they are capable of creating a legally enforceable obligation to arbitrate and to determine the nature of their role”<sup>24</sup>.

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<sup>24</sup> Russell on Arbitration.

The legal capacity of an individual or entity is regulated under the personal law of the individual and the law of the place of incorporation or registration of the legal entity. Since the arbitration agreement derive from the underlying transaction, it is the same law that governs questions of legal capacity of the parties under the main contract that will determine the same question as it affects the arbitration agreement. Legal capacity is necessary as a requirement because the arbitration agreement is a contract entered into by the disputing parties. The parties to an arbitration agreement must have legal capacity to contract under the relevant regulatory law. This may be the law of the individual's place of habitual residence or domicile or the law of the place where the company is registered or has its principal place of business.

In most jurisdictions, an individual who is an adult, not prohibited by law and mentally fit can conclude a binding contract; then a legal entity duly incorporated in accordance with the relevant company law and authorized by its articles of association or company constitution can also conclude a contract. Generally, it is legal entities that dominate the realism of international commercial arbitration as disputants so that challenges of lack of capacity to contract are usually raised against or by such corporations. These matters arise in the context of one party alleging that it lacked capacity to enter into the arbitration agreement (usually as a corollary to lack of capacity to conclude the underlying contract) in support of a jurisdictional challenge. This allegation may be upheld where the agent of the company acting on its behalf did not have the requisite authority to enter into the arbitration agreement on behalf of the company.

As a binding contract, the arbitration agreement need for the parties to have legal capacity because a party without capacity cannot sue and cannot even be sued if that party refuse to go to arbitration. The legal capacity, we think, is an important condition for the validity of the arbitration agreement. A straight have to be put on it in order to prevent parties to use their incapacity as a way to escape to their contracting obligations

### **B-Substantive conditions**

An arbitration agreement must fulfil the ordinary requirements for the conclusion of a contract. The parties must have agreed on arbitration, their disputes must be covered by the Arbitration Agreement and their agreement must not be vitiated by related external factors. The substantive validity of the arbitration agreement involves an agreement between the parties and also other conditions.

Consent to arbitration is easy to establish if the arbitration clause is contained in a contract negotiated between and signed by the parties. In practice, however, many contracts are concluded by reference to general conditions. The arbitration clause may not have been the object of specific attention by the parties, since they general conditions or any other document containing the arbitration clause may not be attached to the contract itself. The parties may conclude a contract without reference to an arbitration clause but in the context of a series of contracts which include an arbitration agreement. Questions as consent to arbitration may arise if claims are brought by or against parties who are not expressed to be a party to the contract containing the arbitration agreement. This could be where such party is closely involved with the implementation or performance of the contract or where the contract and arbitration agreement have been assigned to a third party. In these cases the central issue is whether under general principles of contract law the arbitration agreement can be extended to a non-signatory,

in US law these principles include incorporation by reference, assumption, agency veil piercing<sup>25</sup> and estoppel.<sup>26</sup>

It is generally accepted that an arbitration clause can be included in general conditions<sup>27</sup>. If these standard terms and conditions are on the reverse side of a document usually a generic reference to the conditions is sufficient to incorporate the arbitration clause in the contract. No special reference to the arbitration clause is required to assume that the parties consented to arbitration. The situation is more complex where the general conditions and the arbitration agreement are contained in a separate document. The prevailing view is that provided the document is available to both parties at the time of contracting a valid arbitration agreement exists<sup>28</sup>. There are, however court decisions which require a specific reference to the arbitration agreement contained in the general conditions<sup>29</sup> and that the arbitration clause is conspicuous<sup>30</sup>. If the parties have a long standing relationship based on the general conditions of one side it is unnecessary for the general conditions to be referred to in each new contract. As long as no objection is raised it is sufficient that the other side has received the general conditions at an earlier stage<sup>31</sup>. Arbitration agreement may also be incorporated by reference to other documents, including earlier contracts between the parties. The question has been how specific the reference must be. The prevailing view seems to be that a general reference is sufficient<sup>32</sup>. The reference may be to a contract between only one of the parties and a third party. This is typically the case where an arbitration clause in a charter party is included in a bill of lading by a mere general reference.<sup>33</sup> In other countries the prevailing view seems to be that a specific reference is required. The position in England was summarized by Lord Justice Bingham. ‘...it is clear that an arbitration clause is not directly germane to the shipment carriage and delivery of goods. ...it is, therefore, not incorporated by general words in the bill of lading. If it is to be incorporated, it must either be by express words in the bill of lading itself...or by express words in the charter party itself...if it is desired to bring in an arbitration clause, it must be done explicitly in one document or the other’<sup>34</sup>. Similarly, the German ZPO section 103(4) provides that a specific reference to the arbitration clause in the charter party makes it part of the bill of

<sup>25</sup> Legal decision to treat the rights or duties of a corporation as the rights or liabilities of its shareholders; [en.wikipedia.org/Piercing\\_the\\_corporate\\_veil](http://en.wikipedia.org/Piercing_the_corporate_veil).

<sup>26</sup> Thomson-CSF, SA vs American Arbitration, Ass’n, 64 F 3d 773, 776 (2d Cir 1995); see also Smith Enron Cogeneration Ltd Partnership, Inc. et al v Smith Cogeneration International Inc. ( Brit virgin islands), XXV YBCA 641 (2000), Choctaw Generation Ltd Partnership v American Home Insurance Company, 17(1) Mealey’s IAR C-1 (2002) (2d Cir 2001).

<sup>27</sup> In domestic consumer contracts the inclusion of an arbitration agreement in standard conditions may be invalid according to the legislation on unfair contract terms; see e.g., the German decision, Bundesgerichtshof, 10 October 1991, XIX YBC 200 91994) 202 et seq. See also Drahozal, ‘Unfair’ Arbitration Clauses, U III L rev 695 (2001) 696 et seq. reporting on the non-enforcement of such arbitration clauses in the US for consumer protection reasons.

<sup>28</sup> See. E.g., Progressive Casualty Insurance Company (US) et al v CA Reaseguadora Nacional de Venezuela, XIX YBCA 825 (1994) (2D Cir, 6 Avril 1993) with further references.

<sup>29</sup> Concordia Agritrading Pte Ltd v Cornelder Hoogewerff Pte Ltd, 3 Intl ALR N-42 (2000) (Singapore High Court, 13 October 1999).

<sup>30</sup> See. e.g., Brower v. Gateway 2000 Inc., 676, NYS 2d 576 (NYAD 1998), where a particular term relating to arbitration was unconscionable and, at least in part, unenforceable. This is particularly relevant in relations to consumer contracts.

<sup>31</sup> See Oberlandesgericht Schleswig, 30 March 2000, 46 RIW 706 (2000) 707. See further the Belgian Cases referred to in Van Houtte ‘Consent to Arbitration Thought Agreement to Printed Contract: The Continental Experience’, 16 Arb Int 1 (2000) 10 et seq.

<sup>32</sup> See Macon (BVI) Investment Holding Co Ltd v. Heng Holdings SEA (PTE) Ltd, 2000 (3 Int) ALR N-54 (Singapore High Court, 13 October 1999).

<sup>33</sup> Compania Espanola de Petroleos SA v Nereus Shipping SA 527 F 2d 966, 973 (2d Cir 1975); see also for the same problem in the insurance/ reinsurance area Progressive Casualty Ins Co v CA Reaseguadora Nacional de Venezuela, XIX YBCA 825 (1994) 833, para 24, 991 F 2d 42 (2d Cir 1993); see also Philippines Supreme Court, 26 April 1990, National Union Fire Insurance Company of Pintsburg et al v Stolt-Nielson Philippines, Inc. XXVII YBCA 524 (2002)

<sup>34</sup> Federal Bulk Carrier Inc. v C Itoh & Co Ltd, the ‘Federal Bulker’ [1989] I Lloyd’s Rep 103, 108; see also the ‘Delos’ [2001] I Lloyd’s Rep 703. The same view is taken by Canadian and Italian courts; see Thyssen Canada Ltd v Mariona Maritime SA, 2001 1(1) Arbitration monthly 5 (Federal Court of Appeal of Canada, March 2000).

lading. Once there is such a specific reference it is irrelevant that the wording of the clause in the charter party only refers to the original parties. The same applies in English law<sup>35</sup>.

Consent to arbitration may also exist if a contract does not contain an arbitration clause but forms part of a contractual network which includes an arbitration agreement. This happens where parties enter into a framework agreement, containing an arbitration clause, governing their future relationship within which they conclude a number of separate contracts<sup>36</sup>. An arbitration agreement may also exist if the contract is part of series of contracts between the same parties the majority of which consistently contain arbitration clause<sup>37</sup>. This depends on the facts of the case. In ICC Case 7154<sup>38</sup> three out of four ship repair contracts contained an arbitration clause, a tribunal sitting in Geneva in relation to the fourth contract denied jurisdiction because Article 178 PIL required an express reference to the other contracts. The arbitration clause in the main contract may also extend to follow up or repeat contracts concluded in close connection and in support of a main contract. This is usually a question of interpretation; this may be the case if the subsequent agreements amend or complete the main contract<sup>39</sup>. But not where the additional contracts go beyond the implementation of the main contract<sup>40</sup>. Therefore the arbitration clause contained in a construction contract with the general contractor does not usually cover the general contractor's contract with the subcontractor<sup>41</sup>. The same applies in relation to bank guarantees or letters of credit issued on the basis of a contract containing an arbitration clause. It cannot be assumed that the bank has consented to arbitration on the basis of a contract containing an arbitration clause. It cannot be assumed that the bank has consented to arbitration on the basis of the underlying contract if the guarantee or the letter of credit does not provide for arbitration<sup>42</sup>. However, in *Choctaw Generation v American Home Assurance*, the US Court of Appeal for the Second Circuit held that a signatory to an arbitration clause may be bound under the doctrine of estoppel<sup>43</sup> to arbitrate claims against the bank, where the issues 'the non-signatory is seeking to resolve in arbitration are intertwined with the agreement the estopped party has signed'<sup>44</sup>. An arbitration agreement

<sup>35</sup> The *Rena K* [1978] 1 Lloyd's Rep 545; the *Nerano* [1996] 1 Lloyd's Rep 1. Under US law, however the wording of the arbitration clause was considered to be an obstacle to inclusion by reference; see *Steel Corp v Mississippi valley Barge Line Co*, 351 F 2d 503, 506 (2d Cir 1965); *Continental UK Ltd v Anagel Confidence Compania Naviera SA*, 658 F sup 809, 814-815 (SDNY 1987).

<sup>36</sup> See e.g., Cour d'appel de Paris 31 May 2001 *UNI-KOD Sarl v. quralqali XXVI YBCA 1136 (2001) 1138*: arbitration agreement in joint venture covers contract concluded between members in the implementation of the joint venture: *JJ Ryan and Sons, Inc. v. Rhone Poulenc Textile, SA et al* 863 F2d 315, XV YBCA 543 (1990) 547 et seq (4<sup>th</sup> Cir 1988); arbitration agreement in exclusive distributorship agreement covered all contracts concluded under the agreement; in Germany *Oberlandesgericht Schleswig* 19 October 2000, 16 Sch 1/00; arbitration agreement in framework agreement for the sale of cabbages covers all sales executed under the agreement; *Raeschte-kessler and Berger, recht und praxis*, para 276.

<sup>37</sup> *David, Arbitration in International Trade*, para 227; *Raeschte-kessler and Berger, Recht und praxis*, para 227; Cour d'appel Paris, 25 March 1983, *Societe Sorvia v. Wein stein International Disc Corp*, Rev Arb 363 (1984) 365; see also *A & B v C & D* [1982] Lloyd's Rep 166. For the opposite case where the lack of an arbitration agreement in one contract led to an interpretation of a connected contract which struck out an arbitration agreement see *MH Alshaya Company WLL v. RETEK Information Systems* (2000) WL 33116470.

<sup>38</sup> ICC Case 7154, 121 Clunet 1059 (1994).

<sup>39</sup> *Maxim Foundation, Inc. v Salus Corp*, 779 F 2d 974, 978 (4th Cir 1985); *Hart Enterprises Int. Inc. v Anhui Provincial Import & Export Corp*, 888 F sup 587-591, XXI YBCA 767 (1996) (SDNY 1995).

<sup>40</sup> See ICC Case No 8420, XXV YBCA 328 (2000) 338-340.

<sup>41</sup> Under US Law this may be so even when the subcontract contains a reference to the main contract, the arbitration clause of which is, however, in its wording limited to the original parties. See the decision in *Intertec Contracting A/S et al v Turner Steiner International SA*, XXVI YBCA 949 (2001) 955, para 15-21, 34 (SDNY 2000, 2d Cir 2001).

<sup>42</sup> *Grundstatt v Ritt*, 106 F 3d 201 (7<sup>th</sup> Cir 1997).

<sup>43</sup> A legal principal that bars a party from denying or alleging a certain fact owing to that party's previous conduct, allegation, or denial. There are two general types of estoppel: equitable and legal; legal-dictionary.thefreedictionary.com.

<sup>44</sup> *Choctaw Generation Ltd Partnership v American Home Assurance Company*, 17(1) Mealey's IAR C-1 (2002) C-2 (2d Cir 2001); see also *JA Jones, Inc. et al v The Bank of Tokyo-Mitsubishi Ltd et al* XXV YBCA 902(2000) 904 (EDNC

may exceptionally exist by virtue of trade usages in a certain industry. In the light of the writing requirement such an option is primarily limited to countries which do not require any strict form for arbitration agreements<sup>45</sup>.

Questions on consent also arise if an arbitration clause is to be extended to third parties which have not signed the contract or have signed it in a different capacity. In ICC Case 5721<sup>46</sup>, the person who had signed an arbitration agreement in his capacity as a managing director of a company was personally made respondent in an arbitration. The tribunal found that the legal entity was the normal business vehicle, and refused jurisdiction over the director. The tribunal stated the following principle: ‘A tribunal should be reluctant to extend the arbitration clause to a director who has acted as such. The extension requires that the legal person is nothing but a business instrument of the natural person in such a way that one can transfer the contract and obligations entered into by the former to the latter. The presumptions listed below do not permit to reach an absolute certainty in this respect’<sup>47</sup>. The certainty required has been found in a number of cases where the arbitration clause was extended to parent<sup>48</sup> and subsidiary<sup>49</sup> companies from the same group which had not signed the arbitration agreement. The underlying argument, where a parent or subsidiary company plays an active role in the conclusion and performance of the contract, is that the agreement is with the group and not with a single member of the group. In such cases it would be contrary to good faith and economic reality to treat the companies of a group as separate legal entities<sup>50</sup>. This argument has also been extended to the relations between a state and its oil and trading company<sup>51</sup>. Such an extension is justified if the applicable company law allows the corporate veil to be lifted or the companies have created an appearance of or been presented as having the power of agency for another company<sup>52</sup>.

Parties are generally free to assign their contractual rights to a third party<sup>53</sup>. Where those rights are covered by an arbitration agreement the prevailing view in international arbitration is that

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1999); For the application of the doctrine of equitable estoppel in other cases. See *International Paper Company v Schwabedissen Mashimen & Antagen GmbH*, XXV YBCA 1146(2000) 1149-1150 .

<sup>45</sup> See e.g., *Bundesgerichtshof*, 3 December 1992, XX YBCA 666 (1995) 668 para 5. With note Berger, *DZWiR* 466 (1993), See also *Chelsea Square Textile Inc. et al v Bombay Deying and Manufacturing Company Ltd*, 189 F 3d 289 XXV YBCA 1035 (2000) (2d Cir 1999); eligible arbitration clause becomes part of contract as trade usage. David, *Arbitration in International Trade*, para 226.

<sup>46</sup> ICC Case no 5721 (1990) 117 *Clunet* 1019 (1990).

<sup>47</sup> *Ibid*, 1021: authors’ translation. See general Blessing, ‘The Law Applicable to the Arbitration Clause and Arbitrability’’. ICCA Congress series no 9, 169, 177. See also another example from the US. *First Option of Chicago, Inc. v Kaplan. Et uxor and MK investment, Inc.* 115 S Ct 1920; 131 L Ed 2d 985 (1995), 1995 US LEXIS 3463 XXII YBCA 278 (1997).

<sup>48</sup> *JJ Ryan & Sons v Rhone Poulenc Textile SA.* 863 F 2d 315, 320-321, XV YBCA 543 (1990) (4th Cir. 1988); interim Award in ICC Case no 4331 of 1982, *Daw Chemical France et al v Isover saint Gobain, IX*, YBCA 131 (1984) 133 seq. see also ICC Case no 5730 (1988), 117 *Clunet* 1029 (1990) where the corporate veil was pierced to reach the owner of the company personally.

<sup>49</sup> ICC Case 2375, 103 *Clunet* 973 (1976); denied in ICC Case no 4504, 113 *Clunet* 1118 (1986) 1119 et seq

<sup>50</sup> Interim award in ICC Case no 4131 (1982) *Dow Chemical France et al v Isover saint Gobain, IV* YBCA 131 (1984) 134 et seq; ICC Case no 6519, 118 *Clunet* 1065 (1991) 1066 et seq; ICC Case no 1434. 103 *Clunet* 978 (1976) 979; ICC Case no 2375, 103 *Clunet* 973 (1976) 974; *Cour d’appel Paris*, 30 Novembre 1988 *Societe Korsnas Manas v Societe Durand-Auzias*, *Rev Arb* 692 (1989) 694 .

<sup>51</sup> This was rejected in *Cour d’appel de Paris*, 16 June 1988, *Societe Swiss Oil v Societe Petrogap et Republique du Gabon*, *Rev Arb* 309 (1989) 314.

<sup>52</sup> *Raeschte-kessler and Berger*, *Recht and Praxis* para 301 et seq; ICC Case no 6519, 118 *Clunet* 1065(1991) 1067; ICC Case no 4381, 113 *Clunet* 1102 (1986); ICC Case no 5730 (1988), 117 *Clunet* 1029 1990 1030; ad hoc award, 15 September 1989, *E v z ICA Z and Societe M. ASA Bulletin* 270 (1990) 272; ad hoc award, (1991), *ASA Bulletin* 202 (1992) 215; For US law see *Rhone Poulenc and Resin Intermediates SAS et al v El Du Pont de Nemours and Company*, XXVII YBCA 779 2002 781 et Seq.

<sup>53</sup> See *Kotz in IECL. Vol VII, Chapter 13, para 60 et seq. Girsberger and Hausmaniger. ‘Assignment of Right and Agreement to Arbitrate’*. 8 *Arb Int* 121 1992; see also discussion and validity of in *Iran-US Claims Tribunals award in case*

the assignee automatically becomes a party to the arbitration agreement. Courts in various countries, such as France<sup>54</sup>, England<sup>55</sup>, Sweden and Germany, have consistently held that the assignee can sue and can be sued under the arbitration agreement<sup>56</sup>. The Cour d'appel Paris went as far as considering it a general principle of arbitration law<sup>57</sup>. The reason for this automatic assignment is that arbitration agreements are not personal covenants but form part of the economic value of the assigned substantive right. Furthermore, as the Court of Appeal of New York stated in *Hosiery Mfg. Corp v Goldstone*, arbitration contracts would be of no value if either party could escape by assigning a claim subject to arbitration between the original parties to a third party<sup>58</sup>. Otherwise it would be possible for a party to circumvent the arbitration agreement by assigning the main claim. However, there are cases where tribunals and courts have rejected the idea of an automatic transfer of the arbitration agreement. An express approval by the assignee or the original debtor was precondition for the transfer of the right to arbitrate. No automatic transfer takes place when the parties have excluded an assignment of the arbitration agreement. Non-assignment clauses in relation to the substantive right are often considered to exclude any assignment of the arbitration agreement as well.<sup>59</sup> An exclusion may exist where the agreement to arbitrate is entered into on the basis of a special personal relationship. Furthermore the assignment should not lead to a deterioration of the original debtors' position. That would be the case, for example, where due to the financial situation of the assignee the reimbursement for costs may be endangered. An automatic transfer may also be excluded when the assignment takes place while arbitration proceedings are already pending. Under English law, for example, the assignee does not automatically become a party to those proceedings; a notification to the other party and the arbitrators is required<sup>60</sup>. This may be of particular importance where the original party no longer exists. If the necessary notifications are not made in time, the tribunal may lose jurisdiction as one of the parties has been dissolved. Any award rendered in such a situation will be null and void<sup>61</sup>. The extent to which the assignor remains bound by the arbitration agreement is primarily an issue of interpreting the arbitration agreement. On the basis of an arbitration agreement contained in

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no 225 (176-255-3), 26 April 1985, *DIC of Delaware, Inc. et v Tehran Redevelopment Corp*, The Government of the Islamic Republic of Iran, VI YBCA 332 (1986) 333-335 .

<sup>54</sup> Cour de Cassation 5 January 1999, *Bank Worms v Bellot* , Rev Arb 85 (2000) 86; Cour de Cassation , 8 February 2000, *Societe Taurus Film v Les Films du Jeudi*, Rev Arb 280 (2000); Cour d'appel de Paris, 25 November 1999, *SA Burkinabe des ciments et materiaux v Societe des ciments Abidjan*, Rev Arb 165(2001) 168 ; but see the decision in Cour d'appel Paris, 26 May 1992, *Societe Guyapche v Abba Import Akriebolag*, Rev Arb 624 (1993) 626, where the assignment of single right was held not to entail the assignment of the arbitration clause .

<sup>55</sup> *Shayler v woolf* [1946] Ch 320, *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertading* [1997] 2 Lloyd's Rep 279; this follow also from English Arbitration Act section 82(2) which states that "a party to an arbitration agreement include any person claiming under or through a party to the agreement" .

<sup>56</sup> See also for Swiss Law, Tribunal Federal, 9 May 2001, *Nextron Holding SA v Watkins International SA*, 5 Int ALR N-15 (2002) , Tribunal Federal, 16 October 2001 *Societe X v Societe O ATF 128 III 50* where the assignment was denied since the parties excluded assignments. For a recent clarification of Chinese arbitration law by the PRC Supreme Court , 16 August 2000, *CNIEC Henan corporation v Liaoning Bohai Nonferrous Metals I/E Ltd*, 4 Int ALR N-11 (2001) .

<sup>57</sup> Cour d'appel Paris, 25 November 1999 *SA Burkinabe de ciments et materiaux v Societe des Ciments d'Abidjan*, Rev Arb 165 (2001) 168 ; See also *Banque de Paris et des Pays-Bas v Amoco Oil Company*, 573 F Sup 1464 (SDNY 1983) 1469 which considered it to be a basic principle of case law

<sup>58</sup> The Foreign Trade Arbitration Commission at the USSR Chamber of Commerce and Industry, award in case no 109/1989. 9 July 1984 All-Union Foreign Trade Association "Sojuzneftcexpos" (USSR) v *Joc Oil Ltd (Bermuda)* XVIII YBCA 92 (1993) Para 17.

<sup>59</sup> See, e.g., Swiss tribunal Federal, 9 April 1991 8(2) Int'l Arb 21 (1991); Tribunal Federal, 16 October 2001, *Societe X v Societe O*, ATF 128 III 50; *United States v Panhandle Eastern Corp*, 672 F Sup 149 (D del 1987); assignee not deemed to be bound to the arbitration clause because the assignment contract excluded any transfer of obligation to the assignee.

<sup>60</sup> *Merkin*, Arbitration Act para 2-33, 2-37; *Montedipe SpA v JTP-RO Jugotantier* [1990] 2 Lloyd's Rep 11; *Charles M Willie & Co (shipping) Ltd v Ocean Laser shipping Ltd* , the *Smaro* [1999] 1 Lloyd's Rep 225, 241-243; *Baytur SA v Finagro Holding SA* [1992] QB 610.

<sup>61</sup> *Baytur SA v Finagro Holding SA* [1992] QB 610.

the shareholder who had left the company. Where the dispute related to a breach of contract in connection with leaving the company<sup>62</sup>.

Other Factors can affecting the validity of the agreement, in fact, an arbitration agreement might be invalid for each reason. Such as misrepresentation in relation to the arbitration agreement, or the dissolution of the chosen institution. Other factors which might affect the validity of the arbitration agreement are ambiguity<sup>63</sup>, mistakes as to the relationship between an arbitrator and parties<sup>64</sup>, the insolvency of the parties, the exclusion of statutory rights or remedies and the lack of arbitrability. Where a contract is invalid due to illegality, as a result of the doctrine of separability of the arbitration agreement remain valid<sup>65</sup>.

The substantive conditions relatives to the validity of the arbitration agreement requires an agreement between the parties. This agreement can be made by reference to standard terms and conditions, by related agreement, by consent of third party and by assignment. Parties' agreement to arbitrate is important in the way that it describes their intention and to arbitral .resolution of their dispute. In another hand, parties consent to arbitrate is necessary because it avoid misrepresentation, ambiguity and others factors susceptible to invalidate the arbitration agreement.

Paragraph2: Conditions relative to the form of the international commercial Arbitration Agreement

#### **A- The requirement of a written agreement**

Two aspects can be recognize to the writing requirement. First, the writing requirement is intended to ensure that the parties actually agreed on arbitration. As the agreement to arbitrate may lead to renunciation by the parties of their constitutional right to have their disputes decided in court, the written form aims to prevent the agreement going unnoticed. Second, writing provides a record of the agreement which helps to prove the existence and the content of an arbitration agreement in subsequent proceedings.<sup>66</sup> In fact under the New York Convention enforcement of the arbitration agreement any award requires a written arbitration agreement. The drafters of the Model Law did not want to set up form requirement in conflict with the New York Convention.<sup>67</sup> Form requirements sometimes do not always reflect business practice. While in certain areas of trade parties often rely on oral agreements, strict form requirement can defeat an agreement to arbitrate, the existence of which is beyond doubt. It has been criticized correctly that the parties can orally agree a multi-million dollar contract which will be considered to be valid but for the arbitration clause.<sup>68</sup> The arbitration agreement would be invalid irrespective of whether it can enforce the substantive provisions of a contract while being able to walk away from the agreement to arbitrate concluded at the same time.

<sup>62</sup> See German Bundesgerichtshof. 1 August 2002, III ZB 66/01.

<sup>63</sup> See, e.g., Hissan Trading Co Ltd v Orkin Shipping Corp. (1994) XIX YBCA 273(High Court of Hong Kong, 8 September 1992).

<sup>64</sup> See cour de cassation, Consorts Ury v SA Galeries Lafayette. 13 April 1972, Rev Arb 235 (1975).

<sup>65</sup> See, e.g., the decision by the Court for the Southern District of New York, Bleship Navigation Inc. v Sealift Inc. XXI YBCA 799 (1996) where the arbitration clause in a charter party violation the US embargo against Cuba was held to be valid despite the illegality of the main contract

<sup>66</sup> Model Law article 7(2); for other Model Law countries see Sanders, Quo Vadis Arbitration? 101, 155.

<sup>67</sup> See first Working Group Reports, A/CN9/216, para 23; Commission Report, A/40/17, para 85.

<sup>68</sup> Kaplan 'Is the need for writing as Expressed in the New York Convention and the Model Law out of Step with commercial practice?' 12 Arb Int 27 (1996) 30 et Seq; Hermann 'the Arbitration Agreement as the Foundation of Arbitration and its Recognition by the Courts'. ICCA congress series No 6, 41, 46. Blessing, Introduction to Arbitration, para 486.



There is no justification to submit arbitration to stricter form requirements than other contractual provisions. Arbitration is no longer considered a dangerous waiver of substantial right. Form requirements do not necessarily promote legal certainty; they are often the source of additional disputes. For these reasons the writing requirements in most national laws and under the New York Convention have been liberally interpreted. This all supports the complete abolition of the 'in-writing' requirement or at least the submission of the issue of formal validity to a substantive rule of interpreted dynamically in the light of modern means of communication. Arbitration clauses included in contracts negotiated and concluded by e-mail are valid.<sup>69</sup>

#### B- The form requirement according to international norms: the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration

Before giving the position of these two international norms on the form requirement, let's introduce them briefly. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, (the 'New York Convention') is being monitored by the Yearbook Commercial as of its inception in 1976 in the form of reporting of court decisions in which the Convention is interpreted and applied and Commentaries in which those decisions are analyzed and compared. The New York Convention describes two basic actions. The first action is the recognition and enforcement of foreign arbitral award while the second action contemplated is the referral by a court to arbitration. Relatively to the form of Arbitration Agreement, Article II (1) of the New York convention provides:

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Article II (2) of the New York Convention continues with a definition of 'writing'

The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Today, contract are frequently entered into orally or by emails or faxes, without much attention to formalities. In many countries, such contracts are valid. If an arbitration agreement is valid under the pertinent national law, should it not be enforceable under the New York Convention? In some cases, courts have strictly upheld the writing requirement, invalidating arbitration agreements even though parties may have appeared to have reached agreement by conduct or trade practice. When this happens, the Convention becomes a less effective means of enforcing parties' arbitration agreement. Although an amendment to make the writing requirement less rigid may be in order, it is difficult to amend an international convention that has more than 140 adherents, and impossible to ensure that it would be amended uniformly. However, there are some ways, of trying to ensure that the purpose of the Convention to provide for prompt enforcement of arbitration agreement and awards is not undermined by an insistence upon

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<sup>69</sup> UNCITRAL Model Law on Electronic Commerce Article 6 provides that where the law requires information to be in writing, that requirement is met by the data message if the information contained is accessible so as to be useable for subsequent reference. Many countries with a developed E-commerce practice consider electronic and data message to be equivalent to written documents. There are also US cases which upheld the validity of arbitration agreements which form part of an online contract. See *Lieschke v Realnetworks, Inc.* no 99C 7274, 99C 7380, 2000 WL XXV YBCA 530 (2000) (ND3, 2000) where the arbitration clause was held to be bind on the parties

formalities that appears inconsistent with the realities of today's transactions. While Article II(2) defines what "in writing" means. The writing requirement may be met either by a clause in the contract or a separate agreement (a submission agreement), "signed by the parties" or it can be satisfied by an exchange of letters or telegrams<sup>70</sup>this definition of writing represents the state of technological development in 1958 when the convention was agreed. The New York Convention requires the arbitration agreement to be signed so that where the arbitration agreement is contained as a clause in the main contract then the signature of execution of the main contract suffices for purposes of the validity of the arbitration clause. Since 1958 there has been (and continues to be) great technological advancement in the area of communication. The commercial world has embraced these developments and frequently utilizes them in their international commercial transactions. Thus in the modern age there are many more means of communication (especially in electronic format) so that national law are now more concerned with drafting provisions that will recognize any means of communication that will create a record of the arbitration agreement and reproduce this when required. A number of interpretive issues are presented by the language of paragraph 2. First, does the signature requirement apply both to the contract containing the clause, as well as to the submission agreement, and only to the submission agreement? Second, does the signature requirement also apply to the exchange of letters or telegrams? Different courts have taken different positions. The U.S. Fifth Circuit Court of Appeals has suggested that only the separate agreement must be signed, and not the contract containing the clause<sup>71</sup>. On the other hand, the U.S. Second and Third Circuits have disagreed with this interpretation,<sup>72</sup>stating that the signature requirement apply to both. With respect to the exchange of letters and telegrams, a Swiss court has held that if the parties expressed their intention to enter into an arbitration agreement by an exchange of document, signature were not necessary.<sup>73</sup> Similarly, the U.S. Third Circuit has held that the arbitral agreement 'may be unsigned if it is exchanged in a series of letters'<sup>74</sup>. It is generally the rule today in most jurisdictions that both the contract containing the arbitration clause, or the submission agreement, must be signed, but there is no signature requirement for the exchange of document.<sup>75</sup>Courts differ, however, on how strictly they will interpret the Convention's writing requirement to invalidate an arbitration agreement. Some are quite strict in following the law: the arbitration agreement is only valid if it is in a contract or in a separate agreement signed by the parties, or in an exchanges of documents.<sup>76</sup> In some instances, courts have strictly required express written acceptance, even if denying validity appeared contrary to principles of good faith<sup>77</sup> the question of the arbitration agreement's validity normally arises when one party is trying to enforce an agreement to arbitrate. However, the issue may come up

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<sup>70</sup> New York Convention, art. II(2)

<sup>71</sup> See *Sphere Drake INS. PLC v Marine Towing I6 F.3d 666,667-69(1994)*, cert. denied, *Marine Towing v. Sphere Drake Ins. P.L.C.*, 515 U.S. 871 (1994).

<sup>72</sup> See, e.g., *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, 186 F.3d 210, 217-18 (2d CIR. 1999); *Standard Bent Glass Corp. v. Glassrobots OY*, 333 F.3d 440, 449 (2003).

<sup>73</sup> *Compagnie de Navigation et Transports S.A. v. MSC (Mediterranean Shipping Company) S.A.* (Swiss Federal Tribunal, 16 January 19960, *YEARBOOK COMMERCIAL ARBITRATION XXI* (1996).

<sup>74</sup> *Standard Bent Glass Corp. v. Glassrobots OY*, 333 F.3d 440, 449 (2003).

<sup>75</sup> With respect to an arbitral clause in a contract, the clause itself does not have to be separately signed. It is sufficient for the parties to sign the contract as a whole. See van den Berg, *supra* note 7, at 192 91981).

<sup>76</sup> See, e.g., the Netherlands, Court of First Instance of Dordrecht, *North American SOCCER League Marketing, Inc. ( USA) v. Admiral International Marketing and Trading BV ( Netherlands0 and Frisol Eurosport BV( Netherlands)*, 18 August, 1982, ( *YEARBOOK COMMERCIAL ARBITRATION X* at 490 (1985); Germany, Brandenburg Court of Appeal, 13 June, 2002 ( No 8, Sch 2/0I); Spain, Supreme Court, *Delta Cereales Espana SL (Spain) V. Barredo Hermanos SA*, 6 October, 1998( *YEARBOOK COMMERCIAL ARBITRATION XXVI*, at 854 (2001).

<sup>77</sup> See, e.g., Italy, Supreme Court, *Robobar Limited (UK) v. Finncoold SAS ( Italy)* 28 Oct. 1993, *YEARBOOK COMMERCIAL ARBITRATION XX* at 739 (1995) ( formal requirements cannot be derogated from , even where contesting arbitration agreement's validity is contrary to good faith).

again at the award enforcement stage, when one party tries to prevent enforcement by asserting that the agreement to arbitrate was invalid. Perhaps the most common situation that produces a divergent judicial response is when there is clearly a contract, but the arbitration clause within that contract does not meet the form requirements of the Convention. For example, assume that parties reach an oral agreement by telephone. One of the parties sends a written confirmation, which contains an arbitration clause. The other party performs under the contract, for example, it ships goods, but it never sends a written response to the first party's written confirmation. Most courts would have no difficulty finding that a contract was formed. But quite a few would say that the arbitration clause was not valid<sup>78</sup>. There was no "exchange" of documents, because only one document was sent. Some commentators believe that tacitly concluded agreements to arbitrate are simply not enforceable under the New York Convention<sup>79</sup>.

On the other hand, some courts will find a way to interpret such an arbitration agreement as valid, frequently by using domestic law. Assuming the agreement falls under the convention. Article II should supersede domestic law regarding the proper form of an arbitration agreement<sup>80</sup>. However, State courts have not always viewed the Convention as superseding their domestic law.<sup>81</sup> Moreover, even when a court applies the New York Convention, its interpretation may be influenced by its national law. For example, the domestic law could affect a national court's interpretation to the extent that a judge perceives the Convention to be silent, ambiguous, or out of date. As commentators have noted, "Many national courts ... interpret [] Article II (2) in the light of Article 7(2) of the Model Law and their more liberal national arbitration laws."<sup>82</sup>

The UNCITRAL Model Law on International Commercial Arbitration was prepared and adopted by the United Nations Commission on International Trade Law on 21 June 1985. In 2006 the model law was amended, it now includes more detailed provisions on interim measures. The model law is not binding, but individual states may adopt the model law by incorporating it into their domestic law. Relatively to the Arbitration Agreement form requirement, Article 7 of the Model Law provides:

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been orally, by conduct or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages, magnetic, optical or similar means, including but not limited to electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.

<sup>78</sup> See Frey et al. v. Cucaro e Figli, Italy, YEARBOOK COMMERCIAL ARBITRATION I, at 193 (1976) (Of four contracts that were performed, court only enforced arbitration agreement I two, because only two were signed and returned).

<sup>79</sup> See Di Pietro & Platt, supra note 7, at 75-78.

<sup>80</sup> See Van den Berg, supra note 7, at 170.

<sup>81</sup> See, e.g., France, Court of Appeal, Paris, Societe Abilio Rodriguez v. Societe Vigelor (1990) (Rev, Arb.1990) at 170.

<sup>82</sup> Di Pietro & Platte, supra note 7, at 691.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Thus an arbitration agreement in writing is still the best evidence of the promises made by the parties on this issue and is still to be encouraged. The Model Law takes into account modern forms of communication including in particular electronic communication. The option carefully does not mention signature. This reflects the generally accepted view that signature is not required as long as the arbitration agreement is in writing or its existence not denied by one party when alleged by the other party. Although the fax (Telecopier) was not expressly mentioned in Art. 7, those who adopted the UML formula could firmly rely on the open-ended 'other means' wording. The same argument could subsequently be extended to other emerging means of telecommunication such as e-mail, although the 'record of the agreement' in the case of electronic messages would exist in a fairly volatile form. Perhaps more importantly, the very notion of record (translated into some languages) indicated a shift in focus from the written form as an essential requirement of the validity of the agreement to its evidentiary function. This view was, however, not supported by doctrine in all countries.

Another extension of the meaning of 'writing' was also added in 1985: an agreement in writing would also be considered to exist if there was 'an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. If this legal language is slightly simplified, it meant that a written agreement would exist even if there was no agreement at all, if objection as to the jurisdiction of the arbitrators was not raised in due time. This wording was in fact confusing, at least partially. 'Exchange of letters, since the latter had to contain the agreement, whereas the statement 'alleging the existence' had to refer to a previous agreement (that was perhaps never validly concluded). Failure to object to the jurisdiction of the arbitral tribunal does not have, strictly speaking, anything to do with the form of the agreement.

Two positions on the writing requirement of the arbitration agreement derived from the argumentation below. According to the New York Convention, an agreement to arbitrate is in writing if it is signed by the parties. The signature seems to be a condition for the validity of the arbitration agreement according to the New York Convention. While for the UNVITRAL, an arbitration agreement don't need to sign by the parties in order to be valid. The basis of that position is that many contracts are nowadays passed orally and also by other electronic means of communication. The technology going beyond and beyond, we feel logical to sustain the position of the UNCITRAL Model Law in the way that signature is not compulsory for the validity of the arbitration agreement to be 'in writing'.

## **Section2: Legal effects of a valid international commercial Arbitration**

### Agreement

The direct effect of a valid arbitration agreement is to confer jurisdiction on the arbitration tribunal (paragraph2) to decide the dispute between the parties. By corollary it is a contractual obligation of the parties to have their disputes submitted to arbitration (paragraph1). The arbitration agreement vests the arbitrators either expressly, or through the rules chosen or the law which governs the arbitration, with all powers necessary for this task.

### Paragraph1: Effect on the parties

The principle is that after a valid arbitration agreement, parties are obliged to litigate their claim in tribunal(A) but this principle can know an exception in case of one party objection(B)

A-Parties obligation to litigate their claim in tribunal: the principal

Both Article 1 of the Geneva Protocol and Article II(1) of the New York Convention require Contracting States ‘recognize’ written agreements by which parties undertake ‘to submit to ‘arbitration’ specified disputes.<sup>83</sup> Pursuant Article II(1) of the Convention, Contracting States ‘shall recognized an agreement in writing under which the parties undertake to submit to arbitration all or any differences...’.<sup>84</sup>

The premise of Article I of the Geneva Protocol and Article II (1) of the New York Convention is that the parties’ obligation to arbitrate includes, most importantly the affirmative duty to accept the submission of their disputes arbitration and to participate cooperatively in arbitral proceedings to resolve such disputes. In agreeing to arbitrate, the parties do not merely negatively waive their legal rights or access to judicial remedies, but instead affirmatively agree to participate in the resolution of their disputes through the arbitral process. This positive obligation to participate in dispute resolution process is the foundation of the arbitration agreement. The obligation of parties to submit their dispute to arbitration is dealt with under the Geneva Protocol, the New York Convention and other international arbitration conventions by giving effect to the parties’ agreement that is, by requiring ‘recognition’ of that agreement rather than by stating a generally-applicable and abstract ‘obligation to arbitrate’. This approach is consistent with the basic consensus and contractual character of the international arbitral process. This approach is confirmed by Article IV (1) of the Geneva Protocol and Article II (3) of the New York Convention. According to Article II(3) New York Convention:

‘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...refer the parties to arbitration’<sup>85</sup>

Article IV and Article II(3) provide mechanisms for giving effect to the undertakings contained in arbitration agreements, rather than imposing any free-standing or independent obligation to arbitrate. In so doing, these provisions implement both the positive effects as well as the negative effects. Following the New Convention, Article 1 of the Inter-American Convention provides that an agreement by parties to ‘submit to arbitral decision’ their differences shall be treated as ‘valid’.<sup>86</sup> That language rests on the premise that the parties’ arbitration agreement includes a positive obligation to ‘submit’ their disputes to arbitration instead of pursuing other means of dispute resolution), and not merely a negative waiver or relinquishment of access to judicial remedies. The European Convention also impliedly recognizes the obligation to participate in arbitral proceedings, setting forth reasonably detailed provisions regarding the constitution of tribunals and consideration of jurisdictional objections.<sup>87</sup>

<sup>83</sup> Geneva Protocol, Art. I; New York Convention, Art. II (1). Article 1 of the Geneva Protocol required Contracting States to recognize: ‘the validity of an agreement...by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract...’ Geneva Protocol, Art. I (emphasis added).

<sup>84</sup> New York Convention, Art. II(1)

<sup>85</sup> New York Convention, Art. II (3) phrase ‘refer the parties to arbitration’ was based on the language of Article IV (1) of the Geneva Protocol and was included in the New York Convention without detailed discussion. See A Van den Berg, *The New York Arbitration Convention of 1958* 129 (1981) (use of phrase ‘refer the parties to arbitration’ was ‘continued in the New York Convention without any discussion’).

<sup>86</sup> Inter-American Convention, Art. I.

<sup>87</sup> European Convention, Arts IV & V.

In the same way, Article 7(1) of the UNCITRAL Model Law defines an arbitration agreement as “an agreement by the parties to submit to arbitration all or certain disputes...”<sup>88</sup>, Article 8(1) of the Model Law provides that:

“A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests...refer the parties to arbitration”<sup>89</sup>

Such as the New York Convention, these provisions do not create free-standing duties to arbitrate, but instead give effect to the parties’ contractual obligation to submit the resolution of their disputes by arbitration and to participate affirmatively in the arbitration to which the parties are referred. Other national arbitration legislation similarly deals with this obligation of the parties to submit their disputes to arbitration.<sup>90</sup> It is this indirect effect of the arbitration agreement which plays the central role in its enforcement. It is not really practical to enforce an arbitration agreement in the same way as an ordinary contract. Damages is not an appropriate remedy as it is hard, if not impossible, to quantify the damages which result from the referral of a dispute to state courts. Remedies available for breach of the obligations to solve the dispute by arbitration are complicated. The New York Convention (and other authorities) make it clear that the negative effects of an arbitration agreement are capable of being enforced, and shall principally be given effect, through orders directing specific performance. That is, a national court will give effect to the parties’ commitment not to litigate their disputes by dismissing or staying actions purporting to pursue such litigation or by antisuit injunctions<sup>91</sup>.

Enforcement of arbitration agreements against reluctant parties must be done indirectly. A claimant trying to breach the arbitration agreement by initiating court proceedings is prevented from doing so by the courts’ obligation to stay such proceedings. The claimant can either commence an arbitration or not pursue its claim at all as, if a stay is granted, there is no third option of having the issue dealt with by the courts. There is no other legal course of action open to it. The respondent’s obligation to participate in an arbitration is also enforced indirectly. If it does not participate, it may be faced with a binding and enforceable default award.

A valid arbitration agreement obliges parties to litigate their claim by arbitration. Parties must do so because they are bound by the arbitration agreement. Sometime it is possible to see a party trying to escape this obligation. In that case the question remains to know how to enforce the agreement to arbitrate. Generally, it is too complicated to find remedies for breach of the arbitration agreement however in U.S specific performance can be required to a party in breach of the arbitration agreement. As a contract, it is reasonable to have remedies for breach of the agreement to arbitrate but we think that specific performance is not adequate because one principle of arbitration is parties consent. So by forcing a party to have a claim litigated by arbitration when she doesn’t want any more seems to be a violation of that principle. None of the Convention’s Contracting States or Model Law’s adherents enforce arbitration agreements by way of orders directing a party specifically to perform the positive aspects of such

<sup>88</sup> UNCITRAL Model Law Article 7(1).

<sup>89</sup> UNCITRAL Model Law Article 8(1). See P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law jurisdictions* pp 2-078 to 2-093(2d ed. 2005); I. Dore, *The UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 302(1989); Beraudo, *Case Law on articles 5, 8 and 16 of the UNCITRAL Model Arbitration Law*, 23 *J. Int’l Arb. Int’l* 313 (2001); Sanders, *UNCITRAL’s Model Law on International and Commercial Arbitration, Present Situation and Future*, 21 *Arb. Int’l* 443, 446(2005).

<sup>90</sup> U.S. FAA, 9 U.S.C. section 4; English Arbitration Act, 1996, section 9; Swiss Law on Private International Law, Art. 7; Singapore International Arbitration Act, section 7.

<sup>91</sup> An order by the court to a party to stop proceedings or to prevent a party to start another proceeding for the same case since there is a proceeding already. The purpose of anti-suit injunction is to avoid parallel proceedings.

agreements.<sup>92</sup> Rather, the consistent approach is only to dismiss or stay litigation brought in breach of an agreement to arbitrate, and not to affirmatively order or compel participation in arbitral proceedings. The only major exception to this approach is the United States, where FAA provides for the issuance of orders compelling arbitration<sup>93</sup>. These provisions empower a U.S. court to grant what amounts to an injunction requiring a party to arbitrate pursuant to its arbitration agreement. In the words of one U.S. lower court, a request for affirmative relief under section 4 (or section 206 and 303) ‘‘is simply a request for an order compelling specific performance of a contract’’.<sup>94</sup> As a contract and then obeying to contract rules, the arbitration agreement has a binding effect.

This binding effect is recognized in Ivorian Civil Code in these terms: ‘the conventions legally formed are binding as a law on parties whom made them. These conventions can be revoked if the parties mutually agree or for some cases where the law authorizes it. There must be executed in good faith’.<sup>95</sup> According to Ivorian Civil Code, when the arbitration agreement is valid, parties must submit their claims to arbitration whichever these parties are States or public entities. The binding effect of arbitration agreement is also talked about in the OHADA legislation. In fact, the Uniform Act relative to arbitral tribunal constitution states that parties must solve their claim by arbitration and then only the arbitral tribunal has jurisdiction to know about the dispute. This principle can be waived only if it is manifest that the arbitration agreement is null<sup>96</sup>. The article also states that when parties decide to solve their disputes which has arisen or which may arise between them in the field of their commercial relationship it must remain so. In these cases, any Court can know about this dispute. ‘‘any Court seized about this kind of dispute must declare itself incompetent’’.<sup>97</sup> The Supreme Court of Ivory Coast estimated that the Court of Appeal violated the law when she declared her jurisdiction about a case when parties decided to find an arbitral litigation. Ivory Coast arbitration law based on OHADA law is much stricter on the binding effect of a valid arbitration agreement on the parties which also give jurisdiction to the arbitral tribunal exclusively.

### **B- Exception: in case of parties objection**

Parties can agree to terminate or waive the arbitration agreement and have their disputes decided by the courts. This can be done by agreement or by not objecting to the jurisdiction of

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<sup>92</sup> E.g., A. Redfern & M. Hunter (eds.), *Law and Practice of International Commercial Arbitration* p1-12 (4<sup>th</sup> ed.2004); A. van den Berg, *The New York Arbitration Convention of 1958* 129-39 (1981) (‘the meaning of the expression in its technical procedural sense must be deemed to be the court directive staying the court proceedings on the merits’). Such a court directive is unknown in the majority of countries’); Samuels, *Arbitration Statutes in England and the US*, 8 *Arb. & Disp. Res. L.J.* 2(1999).

<sup>93</sup> U.S. FAA, 9 U.S.C. section 4 section 206 & section 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. Such court may also appoint arbitrators in accordance with the provisions of the agreement’’). See G. Born, *International Commercial Arbitration* 380(2d ed. 2001). Some commentators have apparently suggested that section 206 does not contemplate orders compelling arbitration. A. van den Berg, *The New York Arbitration Convention of 1958* 130 (1981) (‘the thrust of section 206 is not the compulsion to arbitrate but rather the possibility for a United States court to direct that arbitration can be held in another country’). This is not consistent with either the statutory language or U.S. historical practice, or with U.S. judicial applications of the provision.

<sup>94</sup> *Joseph Muller Corp. v. Commonwealth Petrochem. Inc.*, 334 F.Supp.1013 (S.D.N.Y. 1971). See also *Slatnick v. Deutsche Bank AG*, 2006 U.S. Dist. LEXIS 94836, at 15 (S.D. Cal.2006) (‘A motion to compel arbitration ‘‘is simply a suit in equity seeking specific performance of that contract.’’); *Fujian Pac. Elec. Co v. Bechtel Power Corp.*, 2004 U.S. Dist. LEXIS 23472, at 12-13(N.D. Cal. 2004) (‘a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract’).

<sup>95</sup> Article 1134 Ivorian Civil Code.

<sup>96</sup> Article 5 OHADA Uniform Act relative to Arbitral tribunal constitution.

<sup>97</sup> OHADA Uniform Act relative to Arbitral tribunal constitution, article 13 al 1, 2.

the court in which proceedings are brought. In general, the right to rely on the arbitration agreement is lost once a party has taken the first step in court proceedings without objecting to the court's jurisdiction. Article 8 (1) of Model Law provides:

‘‘A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed’’<sup>98</sup>

English Arbitration Act section 9(3) provides that no right to apply a stay to court proceedings exists after a party ‘has taken any step in those proceedings to answer the substantive claim’’<sup>99</sup>. In interpreting the German version of this provision<sup>100</sup>. The Bundesgerichtshof held that the time limit for raising a defense to court proceedings on the basis of an arbitration agreement is not affected by shorter time limits set by the courts for answering a claim. In this case the defendant had not raised a defense within the time limit set by the court for answering the claim brought against him but had invoked the existence of an arbitration agreement before making any statements on the merits. The Supreme Court held that section 1032 ZPO was the only relevant provision. What constitutes a ‘statement on the substance of the dispute’’ or ‘a step in the proceedings’’ has given rise to considerable case law. Lord Denning held in *Eagle Star Insurance v Yuval Insurance* that, to constitute a ‘step in the proceedings’’ depriving a party of its recourse to arbitration, the action of this party must be one which impliedly affirms the correctness of the proceedings and the willingness of the party to go along with a determination by the Courts of law instead of arbitration<sup>101</sup>. Consequently a step is generally taken when the defendant answers the substantive claim. It does not matter whether that answer is in accordance with the procedural rules or not<sup>102</sup>. Any conduct of a party which indicates its intention to abandon its right to arbitration and has the effect of invoking the jurisdiction of the court will be considered a step in the proceedings. This is not the case with an application to have a default judgment set aside which does not constitute a step in the action.

The English Court of Appeal held that where the defendant challenged the jurisdiction of the court but applied for a summary judgment in the case, the arbitration agreement should be upheld. The application for a stay led to...the result that a step which would otherwise be a step in the proceedings, namely the application for summary judgment, is not so treated<sup>103</sup>. The right to arbitrate may be waived if a party, after an unsuccessful challenge to the court's jurisdiction, defends on the merits<sup>104</sup>. Several national laws and the Model Law recognize that an application to a court for interim relief cannot be considered a waiver of the right to arbitrate. However, if the request for relief cannot go beyond the preservation of evidence on the maintenance of the status quo it may be considered a waiver. US courts have held on several occasions that a party cannot invoke its right to arbitration after having initiated or participated

<sup>98</sup> Article 8(1) Model Law.

<sup>99</sup> English Arbitration Act, section 9(3).

<sup>100</sup> Section 1032 ZPO modified Model Law article 8 so that the relevant event is not ‘‘first statement on the support of the dispute but the beginning of the oral hearing on the substance of the dispute’’.

<sup>101</sup> *Eagle star Insurance Co Ltd v Yuval Insurance Co Ltd* 1 Lloyd's Rep 357, 361; see also

<sup>102</sup> *London Central and Suburban Development Ltd v Gary Banger*, 8 ADLRJ 119 (1999) 122 et Seq. in Malaysia there are conflicting decision as to whether the entrance of an unconditional appearance can already be considered as a step in the proceedings.

<sup>103</sup> *Capital Trust Investment Ltd v Radio Design TJ AB and others* (2002) All ER (Comm) 514, 530 para 60

<sup>104</sup> *Marc Rich & Co AG v Societa Italiana Impianti PA* ( the Atlantic Emperor No 2), (1992) 1 Lloyd's Rep 624 (CA), where an injunction to restrain Impianti to pursue proceedings in Italy was denied, since it was held that Marc Rich had waived its rights to arbitration by pleading on the merits in the Italian proceedings after its challenge to the jurisdiction of the Italian Court had been rejected by the Corte di cassazione



in pre-trial discovery proceedings<sup>105</sup>. The inaction of a party to commence arbitration proceedings for a certain time may also be seen as a waiver of the right to arbitrate or a frustration of the arbitration agreement<sup>106</sup>. In general, however, the mere inaction of a party is not sufficient to constitute a waiver. US courts have consistently held that the strong policy in favor of arbitration in the Federal Arbitration Act and the New York Convention no waiver should be assumed in the absence of clear and unambiguous language. Ambiguities are generally resolved in favor of the right to arbitrate so that, for example, a service of suit clause, does not operate as a waiver of the right to arbitrate<sup>107</sup>. In cases where litigation had already been started a waiver was only assumed when the party seeking to enforce the arbitration agreement had substantially invoked the judicial process to the other parties' detriment<sup>108</sup>. In *Downing v Al Tameer*<sup>109</sup> the English Court was faced with the situation that one party denied the existence of any contractual relationship with the other party. The case concerned an alleged contract for the joint exploitation of a patent to separate crude oil from water. The dispute resolution clause provide that the parties should try to settle disputes amicably and, should that fail, for arbitration. In pre-action correspondence the defendant always denied having concluded any binding agreement with the claimant. When the claimant initiated court proceedings in England the defendant applied for a stay relying on the arbitration clause contained in the alleged contract. The Court of Appeal rejected this application on the basis that the arbitration agreement had been repudiated by the defendant's constant denial of the existence of any contractual relationship. It held that by alleging that there is no contract between the parties'' prior to the issue and service of proceedings, the defendants were plainly evincing an intention not to be bound by the agreement to arbitrate''. This repudiator breach of the agreement to arbitrate was accepted by the claimant when it initiated court proceedings. The consequence of this decision is that a party who alleges that it is not bound by an agreement risks losing any right to rely on the arbitration agreement. If this party wants to reserve the right to arbitrate it must say so clearly when contesting the existence of the contract.

Parties can decide to waive and terminate the arbitration agreement and solve their dispute in court. This situation is quiet easy because both parties agree to do so. Parties can also waive to the arbitration agreement by introducing another proceeding for the same case in court while there is an arbitration agreement. If the other party do not interfere or do not contest this ''parallel proceedings'' the obligation to ligate the claim in tribunal can be waived.

Paragraph2: Effects on the proceedings

When the arbitration agreement is valid, the arbitral tribunal has jurisdiction (A) to know about the dispute and can freely conduct the arbitral proceedings (B).

### **A- The jurisdiction of the arbitral tribunal**

The extent of the arbitral tribunal jurisdiction is about its power to rule on its own jurisdiction (competence-competence) and also its power to order Interim Measures we are going to talk in details latter.

<sup>105</sup> See *PPG Industry, Inc. v Webster Auto parts, Inc.* 128 F 3d 103 (2d Cir 1997); *SATCOM international Group plc v ORBCOMM International Partners, LP*, XXV YBCA 949 (2000), 955, para 11, 49 F 2d 331 (SDNY1999)

<sup>106</sup> *Terminix Co v Carroll*, 953 SW 2d 537 (Ct App 1997)

<sup>107</sup> *Suter v Munich Reinsurance Co*, 15(8) mealey's IAR B 1 (2000) B 6-9 (3<sup>rd</sup> Cir 2000)

<sup>108</sup> *Certain underwriters at Lloyd's et al v Bristol-Myers Squibb Co et al* XXV YBCA 968 (2000), para 22-41 (9<sup>th</sup> District, Texas Court of Appeal)

<sup>109</sup> *John Downing v Al Tameer Establishment, Shaikh Khalid Al Ibrahim* (2000) All ER (Comm) 545

Arbitral tribunal jurisdiction is the power of the tribunal to resolve disputes. The arbitration agreement empowers the arbitral tribunal to make a decision resolving a dispute which the parties are obliged to submit to it. That decision will be binding on the parties, and it may be rendered enforceable by the courts.

The arbitral tribunal jurisdiction to decide its own jurisdiction, however, requires further analysis. According to article 16 of the UNCITRAL Model Law on International Commercial Arbitration,

- (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
- (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
- (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

The fact that arbitrators have jurisdiction to determine their own jurisdiction known as ‘‘competence-competence’’ principle is among the most important, and contentious, rules of international arbitration. It has given rise to much controversy and misunderstanding, and behind the appearance of unanimity most laws now recognize the principle in some form it continues to be the subject of considerable divergence between different legal systems. Even the terminology used contains a paradox. Traditionally the rule that the arbitrators have jurisdiction to decide their own jurisdiction was expressed by the German phrase ‘‘Kompetenz-Kompetenz’’. That expression has been used for many years by French and other European legal authors. The working papers and commentaries of the UNCITRAL Model Law also referred to the rule in those terms. Yet, the origin of the expression has never been very clear. Even today, the competence-competence principle is all too often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators’ jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award. Nevertheless, the competence-competence rule ties in with the idea that there are no grounds for the prima facie suspicion that the arbitrators themselves will not be able to reach decisions which are fair and protect the interests of society as well as those of the parties to the dispute. This same philosophy is also found in the context of arbitrability, where it serves as the basis for the case

law which entrusts arbitrators with the task of applying rules of public policy( in areas such as antitrust law and the prevention of corruption), subject to subsequent review by the courts. However, it is important to recognize that the competence-competence rule has a dual function.

Like the arbitration agreement, it has or may have both positive and negative effects. The positive effect of the competence-competence principle is to enable the arbitrators to rule on their own jurisdiction, as is widely recognized by international conventions and by recent statutes on international arbitration. However the negative effect is equally important it is to allow the arbitrators to be not the sole judges, but the first judges of their jurisdiction. In other words, it is to allow them to come to a decision on their jurisdiction prior to any court or other judicial authority, and thereby to limit the role of the courts to the review of the award. The principle of competence-competence thus obliges any court hearing a claim concerning the jurisdiction of an arbitral tribunal regarding, for example, the constitution of the tribunal or the validity of the arbitration agreement to refrain from hearing substantive argument as to the arbitrators' jurisdiction until such time as the arbitrators themselves have had the opportunity to do so. In that sense, the competence-competence principle is a rule of chronological priority. Taking both of its facets into account, the competence-competence principle can be defined as the rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, subject to subsequent review by the courts. From a practical standpoint, the rule is intended to ensure that a party cannot succeed in delaying the arbitral proceedings by alleging that the arbitration agreement is invalid or non-existent. Such delay is avoided by allowing the arbitrators to rule on this issue themselves, subject to subsequent review by the courts, and by inviting the courts to refrain from intervening until the award has been made. Nevertheless, the interests of parties with legitimate claims concerning the invalidity of the arbitration agreement are not unduly prejudiced, because they will be able to bring those claims before the arbitrators themselves and, should the arbitrators choose to reject them, before the courts thereafter.

The power of the arbitral tribunal to order interim measures is talked about by the UNCITRAL Model Law on International Commercial Arbitration in the article 17

‘A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration’<sup>110</sup>

According to this article some conditions have to be fulfilled by the party requesting an interim measure. In fact, a party requesting an interim measure shall satisfy the arbitral tribunal that:

‘‘Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination’’.<sup>111</sup>

And also these can apply only if the arbitral tribunal considers it appropriate.<sup>111</sup>

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<sup>110</sup> Article 17 UNCITRAL Model Law.

<sup>111</sup> Article 17A of the Model Law on international commercial arbitration, United Nation document A/61/17, annex I (as amended by the United Nations Commission on International Trade Law on July 7, 2006).

Arbitral tribunal jurisdiction are composed of the power to rule on its own jurisdiction and also the power to order interim measures. The power of the arbitral tribunal to rule on its own jurisdiction also known as competence-competence, is the rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, subject to subsequent review by the courts. This principle has positive and negative effects. The negative effect of this principle for us put down the authority of the arbitrators in the sense that there are not the only judges and then this also can see like a conflict of competence in the way that courts can have their opinion in a decision delivered by arbitral tribunal while there are two different entities. According to the power of arbitral tribunal to order interim measures, it seem to be an extension of arbitral tribunal jurisdiction

### **B- Conduct of the arbitral proceedings**

In most international commercial arbitration, there is no pre-existing or generally-applicable code of procedural rules that govern conduct of the arbitral proceedings. It is well-settled in virtually all developed jurisdictions that arbitrators are not required to apply local civil procedure rules applicable in national court litigation, in an international arbitration.

The major procedural steps in the UNCITRAL Model Law on International Commercial Arbitration are resumed in the chapter V. The first principle in the conduct of arbitral proceedings is the principle of equal treatment of the parties. According to Article 18:

“the parties shall be treated with equality and each parties shall be given a full opportunity of presenting its case”

This principle, sometimes referred to as the rules of natural justice, is given express recognition in the New York Convention, which states in Article V.1 (b):

“Recognition and enforcement of the award may be refused...if...the party against whom the award was made was...unable to present his case”<sup>112</sup>

Most institutional arbitration rules incorporate this principle. The requirement that the parties must be treated equally may possibly operate as a restriction on party autonomy. For example, a provision in an arbitration agreement that only one party should be heard by the arbitral tribunal might well be treated as contrary to public policy under the law of the country of enforcement even if both parties had agreed to it. The UNCITRAL Secretariat in its report leading to the Model Law noted: “It will be one of the more delicate and complex problems of the preparation of a Model Law to strike a balance between the interest of the parties to freely determine the procedure to be followed and the interests of the legal system expressed to give recognition and effect thereto”<sup>113</sup>

The next step, relative to the determination of rules of procedure, is talked about in Article 19 of the UNCITRAL Model Law on International Commercial Arbitration. It states that:

“ (1) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provision of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon

<sup>112</sup> Article 18 UNCITRAL Model Law on International Commercial Arbitration, equal treatment of the parties

<sup>113</sup> UNCITRAL Secretariat report leading to the Model Law.

the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence”<sup>114</sup>.

There are two kinds of arbitration those are the Ad hoc arbitration and the institutional arbitration.

Further, in ad hoc arbitration who is one which is not administered by an institution such as the ICC, LCIA, DIAC or DIFC. The parties will therefore have to determine all aspects of the arbitration themselves - for example, the number of arbitrators, appointing those arbitrators, the applicable law and the procedure for conducting the arbitration. Provided the parties approach the arbitration with cooperation, ad hoc proceedings have the potential to be more flexible, faster and cheaper than institutional proceedings. The absence of administrative fees alone provides an excellent incentive to use the ad hoc procedure. The arbitration agreement, whether reached before or after a dispute has arisen, may simply state that 'disputes between parties will be arbitrated'. It is infinitely preferable at least to specify the place or 'seat' of the arbitration as well since this will have a significant impact on several vital issues such as the procedural laws governing the arbitration and the enforceability of the award. If the parties cannot agree on the detail all unresolved problems and questions relating to the implementation of the arbitration - for example, how the tribunal will be appointed or how the proceedings will be conducted – will be determined by the 'seat' or location of the arbitration. However, this approach will only work if the seat of the arbitration has an established arbitration law.

Ad hoc proceedings need not be kept entirely separate from institutional arbitration. Often, appointing a qualified arbitrator can lead to the parties agreeing to designate an institutional provider as the appointing authority. Additionally, the parties may decide to engage an institutional provider to administer the arbitration at any time. An example of a set of rules specially intended to be used by the parties in ad hoc arbitrations is the UNCITRAL Arbitration Rules.<sup>34</sup> These rules contain a complete set of provisions concerning different questions related to the organization of arbitration proceedings. As Professor Gray puts it, these rules are widely regarded as very satisfactory and have the added attraction of having been drafted with the participation of Third-World countries.<sup>115</sup> In international arbitration, the parties are often reluctant to accept the administration of the arbitration or –in ad hoc arbitration– the reference to rules of institutions based in the country of one of them. The confidence inspired by a prestigious multilateral organization such as UNCITRAL makes these rules an attractive option in ad hoc arbitrations without having to agree upon every single condition for the arbitration

While institutional arbitration is one in which a specialized institution intervenes and takes on the role of administering the arbitration process. Each institution has its own set of rules which provide a framework for the arbitration, and its own form of administration to assist in the process. Some common institutions are the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), the Dubai International Finance Centre (DIFC) and the Dubai International Arbitration Centre (DIAC). There are approximately 1200 institutions worldwide which offer arbitration services, and some will deal with a particular trade or industry. Care should be taken in the selection process as some institutions may act under rules which are not adequately drafted. Often the contract between two parties will contain an arbitration clause which will designate a particular institution as the arbitration administrator. If institutional administrative charges are not a concern for the parties, this

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<sup>114</sup> Article 19 UNCITRAL Model Law on International Commercial Arbitration.

<sup>115</sup> GRAY, Whitmore, op. cit.

approach is usually preferred to less formal 'ad hoc' methods of arbitration., the submission to arbitration implies the adoption of the rules of procedure of the institution in question. No set of rules provides for all the questions that may be put forward throughout an arbitration process. They generally contain solutions to the most common problems or situations, and leave a wide margin of discretion to the arbitrators to resolve the procedural questions not covered by the rules. An example of this is article 15 of the ICC Arbitration Rules:

“1. The proceedings before the Arbitral Tribunal shall be governed by these rules, and, where these rules are silent by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

2. In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.”<sup>116</sup>

The importance of this provision is explained in the UNCITRAL Notes on

Organizing Arbitral Proceedings:

“4. Laws governing the arbitral procedure and arbitration rules that parties may agree upon typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings. This is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.

5. Such discretion may make it desirable for the arbitral tribunal to give the parties a timely indication as to the organization of the proceedings and the manner in which the tribunal intends to proceed. This is particularly desirable in international arbitrations, where the participants may be accustomed to differing styles of conducting arbitrations. Without such guidance, a party may find aspects of the proceedings unpredictable and difficult to prepare for. That may lead to misunderstandings, delays and increased costs.”<sup>117</sup>

After the rules of procedure, parties have to determine the place of arbitration

“1 the parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties

2 Notwithstanding the provisions of paragraph (1) Of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.”

Relatively to this article we may say that it is important for the parties to an international arbitration to specify the seat or place of arbitration in the arbitration agreement. There are three different criteria to take into consideration at the time of choosing the seat of arbitration.

They may be strategic, practical and legal. Strategic criteria have two aspects: neutrality and effectiveness. Apart from the strict impartiality of arbitrators, neutrality in arbitration also

<sup>116</sup> Article 15 of the ICC Arbitration rules

<sup>117</sup> UNCITRAL Note on Organizing Arbitral Proceedings

depends on its location. Naturally, the country of either of the parties is often discarded. Yet, even the election of third countries may affect neutrality. Effectiveness depends on the enforceability of the award made by arbitrators. Under the New York Convention, the place of arbitration may, indirectly and in the absence of express agreement, determine the law applicable to the validity of the arbitration agreement.<sup>118</sup> Friedland and Hornick explain its importance: “Parties rarely make an explicit selection as to the law governing their arbitration agreement, even where they do make an explicit choice of governing substantive law. Hence, as a practical matter, the importance of article V.1.a is to make the law of the place of arbitration the applicable law, at the award enforcement stage, to disputes regarding the existence or validity of an arbitration agreement”<sup>119</sup> Practical criteria give due consideration to such aspects as comfort, security and practicality for carrying out arbitration activities, i.e. closeness to the parties’ domicile or to the place where most evidence (documents or witnesses) is; availability of supporting services (suitable offices in which to hold hearings, communications, legal assistance); costs; personal security of arbitrators, etc. The legal criteria are connected to the natural consequence of the choice of the place of arbitration. In principle, the place of arbitration determines the procedural law applicable to the arbitration and the extent of the intervention of national courts.<sup>120</sup> Although in theory the terms “seat of arbitration” and “procedural law” refer to different questions, there is a natural relationship between them inasmuch as the procedural law applicable to arbitration is the law of the place of arbitration. Professor Le Para explains: “...the place of arbitration is significant because it determines the procedural law applicable to the arbitral proceedings, which in turn determines to which national law the award will belong. Once we accept, as the New York Convention does, that parties may select a procedural law other than the law of the place of arbitration, the selected procedural law eclipses the principle of territoriality. Lawyers rarely let clients execute an international contract without a designated substantive law, but often leave the place of arbitration open.”<sup>121</sup>

In consequence, the natural effect of the selection of the place of arbitration, unless the parties expressly agree on a different procedural law, is that it designates the procedural law applicable to the arbitration and the court jurisdiction in charge of solving any incidents taking place before or during arbitration. For this reason, before choosing the place of arbitration, the parties must make sure that the procedural law and the courts of that place are suitable (or that they are at least not overtly hostile) to solve the problems that may arise before or during the arbitration process. The seat of arbitration is also significant because it provides the award with a “nationality”, which is important to determine the applicable rules for the enforcement of the award. Most institutional rules establish that the award is deemed made in the place designated as the seat of the arbitration. According to the most widely accepted criterion, an award is

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<sup>118</sup> Article V.1: Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

<sup>119</sup> FRIEDLAND, Paul D. and HORNICK, Robert N.: “The relevance of international standards in the enforcement of arbitration agreements under the New York Convention”, *The American Review of International Arbitration*, The Parker School of Foreign and Comparative Law, Columbia University, New York, 1995, Vol. 6, N° 2.

<sup>120</sup> Model Law (article 1.2): “The provisions of this Law, except for articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State”. Model Law (article 6): “The functions referred to in articles 11.2, 11.4, 13.3, 14, 16.3 and 34.2 shall be performed by... (each State enacting this Model Law specifies the court, courts or, where referred to therein, other authority competent to perform this functions)”.

<sup>121</sup> LE PERA, Sergio: “Where to vacate and how to resist enforcement of foreign arbitral awards: ISEC vs. Bidas S.A.”, *The American Review of International Arbitration*, The Parker School of Foreign and Comparative Law, Columbia University, New York, 1991, Vol. 2, N° 1.

considered “foreign”, for the purposes of deciding whether the rules on recognition and enforceability of foreign awards are applicable to it, when it has been rendered out of the territory of the country where its recognition and enforcement is sought.<sup>122</sup> The term “seat” is indistinctly used to refer to a country or a city. In order to avoid doubts or mistakes, it is preferable to refer to a city. This recommendation is particularly significant if the country in question has a federal system, since the reference to a country may involve different jurisdictions and even different laws. The concept of “seat” is therefore a legal rather than a physical concept. It is not essential that all procedural acts be carried out there, since arbitrators may order procedural acts, even hearings, to be carried out in different places.

In institutional arbitration, not designating the place of arbitration implies delegating the power to determine it to the arbitral institution or to the arbitrators, as the case may be. In ad hoc arbitrations, if the parties choose the UNCITRAL Rules, they provide for a similar solution: unless the parties have agreed upon the place where the arbitration is to be held, it will be determined by the arbitral tribunal, having regard to the circumstances of the arbitration (Article 16.1).

Article 21 of the UNCITRAL Model Law on International Commercial Arbitration, relative to the commencement of arbitral proceedings states that:

“ Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent”<sup>123</sup>

In fact, the respondent’s receipt of the request for arbitration generally establishes the time within which the answer must be filed<sup>124</sup>. A request for arbitration is a document that usually serves the same basic functions as a civil complaint or writ under national litigation rules. That is the purpose of the notice or request for arbitration is “to inform the respondent... that arbitral proceedings have been started and that a particular claim will be submitted for arbitration,” to “apprise the respondent of the general context of the claim asserted against him” and “to enable him to decide on his future course of action”<sup>125</sup>. In addition, the request will often identify the claimant’s claims and requested relief, specify the basis for jurisdiction and provide the claimant’s nomination of an arbitrator (or its views concerning the appropriate number, and means of selection, of the arbitrators).<sup>126</sup>

The required contents of a request for arbitration vary depending on the parties’ arbitration agreement<sup>127</sup> any applicable institutional rules<sup>128</sup> and applicable national law. Any or all of these

<sup>122</sup> New York Convention, article I.1: This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.

<sup>123</sup> Article 21 UNCITRAL Model Law on International Commercial Arbitration.

<sup>124</sup> See, e.g., ICC Rules, Art.5 (1); LCIA Rules, Art 2(1). Compare ICDR Rules, Arts. 2(2), 3(1); ICSID Institution Rules, Rule 6 (Secretary General shall determine whether or not to register the request for arbitration; proceeding shall be deemed instituted upon date of registration).

<sup>125</sup> Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade, UNCITRAL, Eighth session, UN Doc, A/CN.9/97, VI UNCITRAL Y.B 163, 167 (1975).

<sup>126</sup> See UNCITRAL Rules, Art. 3; ICC Rules, Art.3; ICDR Rules, Art.2; ICSID Institution Rules, Rules 2, 3.

<sup>127</sup> Arbitration agreements generally do not impose requirements for the contents of a request for arbitration. Occasionally, an arbitration agreement will require that the request for arbitration nominate a co-arbitrator or (less frequently) identify the alleged dispute and the exhaustion of contractual ADR procedures.

<sup>128</sup> E.g., UNCITRAL Rules, Art.3; ICC Rules, Art.4. Less formally, civil law practice will sometimes favor more detailed initial notices (or submissions), supported by documentary evidence, while common law systems may incline towards



sources may require that a request for arbitration include specified information in order to be valid. Additionally, under some legal systems, the arbitral proceedings are only formally commenced upon receipt of the request for arbitration by the respondent.<sup>129</sup> This may have relevance for statute of limitations purposes,<sup>130</sup> as well as with regard to the application of *Lis pendens* principles<sup>131</sup>. Although seldom relevant in practice, it is theoretically necessary to prove the respondent's receipt of the request for arbitration (either with or without the aid of presumptions).<sup>132</sup>

Another important step in the conduct of arbitral proceedings is the determination of the language. Article 22 of UNCITRAL Model Law on International Commercial arbitration states: ‘(1) the parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.’<sup>133</sup>

Pursuant this Article, the observation we can make is that, in conflicts involving parties of different nationalities, the selection of the language of arbitration is not a minor issue. Once a conflict arises, it is difficult to solve differences on this subject, since each party will try to use its own language. The question, however, does not come down to a mere language problem. On several occasions, choosing the language entails a decision on the arbitrators' culture. A Hispanic arbitrator is not likely to apply the same legal reasoning as one who has received his legal training in English or Arabic. In institutional arbitrations, the lack of agreement between the parties concerning the language may be supplied by the institution. In ad hoc arbitrations, conversely, this question is resolved by the arbitral tribunal.

Article 23 of UNCITRAL Model Law on International Commercial Arbitration relatively to Statements of claims and defense states that:

‘(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defense in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal

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relatively skeletal ‘notice’ pleading. Elsing & Townsend, Bridging the Common Law-Civil Law Divide in Arbitration, 18 *Arb. Int'l* 59, 59-60 (2002).

<sup>129</sup> See, e.g., UNCITRAL Model Law, Art.21; German ZPO, section 1044; Japanese Arbitration Law, Art.29 (1).

<sup>130</sup> Issues of statutes of limitations will generally be matters of substantive law, governed by national legal systems.

<sup>131</sup> See discussing *Lis pendens* as applied to international arbitrations.

<sup>132</sup> D. Caron, L. Caplan & M. Pellonpaa, *The UNCITRAL Arbitration Rules: a Commentary* 379 (2006) (drafters of UNCITRAL Rules considered, but could not reach agreement on, proposals for a rule creating ‘a presumption of receipt’; ‘the wording of Article 2(1) represents an attempt by the Committee to formulate a compromise solution to a very complicated problem’).

<sup>133</sup> Article 22 UNCITRAL Model Law on International Commercial Arbitration, language

considers it inappropriate to allow such amendment having regard to the delay in making it'.<sup>134</sup>

According to Article 24 of UNCITRAL Model Law,

“(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.<sup>16</sup> UNCITRAL Model Law on International Commercial Arbitration

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties<sup>135</sup>

In fact, most institutional rules require that the tribunal hold a hearing<sup>136</sup> or require a hearing if either one of the parties requests it.<sup>137</sup> Parties can agree, of course, to have the tribunal decide the dispute on documents only. Arbitrators may encourage parties, in the interest of efficiency, to agree to have the decision made on the documents. But most counsel prefer to be heard orally in order to be available to respond to the arbitrators' questions and to satisfy their concerns or provide clarification or explanation. In a three-arbitrator proceeding, parties will often agree that the chair alone can make decisions about procedural issues<sup>138</sup>. The chair might decide, for example, a question involving disclosure of documents or a time limitation for witness testimony. This permits matters to move along much more swiftly than if all three arbitrators were required to confer before rendering a decision. Under the UNCITRAL Model Law and under the LCIA Rules, however, the parties do not need to consent; if the co-arbitrators consent, the chair may make procedural rulings alone<sup>139</sup>. Concerning the scheduling of the hearings, it should be done early in the process, and may occur at the preliminary meeting. It is important to set hearing dates early, because finding a convenient time can be difficult, particularly when there are three arbitrators, as well as a number of lawyers, parties, and witnesses whose schedules must be coordinated. Parties will estimate the amount of time needed for the hearing, and, depending on the estimates, the decision must be made whether to have one hearing that may last a week or more, or whether to schedule several shorter hearings. Sometimes the problem will be that busy arbitrators do not have more than three or four days in a row when they can meet. When hearings are held in a number of shorter segments, however, it can greatly increase the cost, since usually everyone is required to travel internationally to get to the

<sup>134</sup> Article 23 UNCITRAL Model Law on International Commercial Arbitration, statements of claim and defense.

<sup>135</sup> Article 24 UNCITRAL Model Law on International Commercial Arbitration, hearings and written proceedings.

<sup>136</sup> See, e.g., ICDR Rules, art.20 (i).

<sup>137</sup> See, e.g., ICC Rules, art. 20(2); LCIA Rules, art. 19.1; UNCITRAL Rules, art. 15(2); WIPO Rules, art. 53 (a).

<sup>138</sup> See UNCITRAL Model Law art. 29

<sup>139</sup> See UNCITRAL Model Law, art.29 (“questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.”); LCIA Rules, art. 14.3(“In the case of a three-member Arbitral Tribunal the chairman may, with the prior consent of the other two arbitrators, make procedural ruling alone”).

hearing. David Wagoner stresses the importance of making a schedule, and keeping to it<sup>140</sup>. Relatively to the place of the hearing, it is normally determined in the arbitration clause, but if not, the arbitrators will choose a seat, usually one that is neutral in the sense of not being in the country of either party. Once the seat is chosen, the tribunal can, on occasion, decide to hold meetings elsewhere, without changing the legal site of the arbitration.<sup>141</sup> For example, if a site visit is necessary, one set of hearings could be held near the site, since all parties would generally want to be present for the site visit. The language of the hearing, and of the arbitration generally, is also normally determined by the arbitration clause. If not, and if the parties cannot agree on the language, the arbitrators will determine the language. If all of the contract documents have been in one language, such as French, then French is likely to be chosen as the language of the arbitration, although this will not necessarily be the choice. It is important, of course, that the arbitrators are all able to understand the language of the arbitration. Although everything such as documents, witness testimony, and legal argument could be translated for an arbitrator who did not speak the language of the arbitration, this would be very costly and would slow down the process enormously. The IBA Rules of Ethics actually require an arbitrator not to accept an appointment unless she has an adequate command of the language of the arbitration.<sup>142</sup> This works well when the language of the arbitration is known in advance, but that may not be the case in some arbitrations. Parties and witness who are native speakers of the language of the arbitration have the right to testify in their own language, but generally must pay for a translator. Documents not in the language of the arbitration must also be translated.

Because arbitrations are private matters, a hearing is not open like a court room. Although parties have a right to be present at the hearing, any witness can be excluded whenever he or she is not testifying.<sup>143</sup> The parties may determine that they want a verbatim record of the proceedings. This can be expensive, particularly if provided on a daily basis. Parties will generally share the cost of the transcript. Sometimes that party may be required to share the transcript not only with the arbitrators, but also with the other side. The time of the hearing may be limited by arbitrators. The tribunal must strive for a balance, of course, between managing the hearing efficiently, and ensuring that the parties are treated equally, and that they have a fair opportunity to present their case.<sup>144</sup> When the time is set by the parties, arbitrators must always use their common sense to ensure fairness and equal treatment. In practice, it may not always be fair to provide exactly equal time to the parties, because one side may have more witness or may have a much heavier burden of proof.

Depending upon the rules, the initial pleadings of the parties may be succinct or detailed. If the pleadings are succinct, the tribunal will probably ask for additional written submissions later that will set forth the issues, define the scope of the arbitrator's mandate, and identify the facts and law underlying the parties' claims and defenses. On the other hand, if the parties have

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<sup>140</sup> "It is important to set hearing dates early, typically at the first prehearing conference, and not change them without a strong showing of need. If the hearing is expected to take two weeks, add a day or two for contingencies and for deliberations of the tribunal. Schedule the hearing on consecutive weeks at the earliest time available to counsel and the tribunal. During the hearing the tribunal should take steps to insure that the hearing will be completed on schedule. If rescheduling becomes necessary, it could be six months or a year before it is possible to reschedule and complete the hearing."

Interview with David E. Wagoner, March 2007.

<sup>141</sup> See UNCITRAL Model Law, art. 20; LCIA Rules, art. 16.2; SCC Rules, art. 20

<sup>142</sup> IBA Rules of Ethics, art. 2(2).

<sup>143</sup> See, e.g., ICDR Rules, art. 20(4) ("the tribunal may require any witness or witnesses to retire during the testimony of other witness.")

<sup>144</sup> See e.g., UNCITRAL Model Law, art. 18 ("the parties shall be treated with equality and each party shall be given a full opportunity of presenting its case.")

submitted extensive information in their pleadings, the arbitral tribunal may or may not wish to receive additional written submissions.<sup>145</sup> The tribunal should provide specific information to the parties as to its expectations with respect to any written submissions, possibly including the issues it wishes to be discussed, whether it only wants to know about facts supporting specific issues or all issues whether it wants any discussion of law, and a page limit or range. If the submissions essentially constitute the statement of claim and the response, they will probably be submitted sequentially. On the other hand, if the parties are both knowledgeable about their respective positions on the issues as a result of prolific pleadings, but there is a question about which the arbitrators want to know more, for example, about a particular issue of law, the parties could be required to submit post memoranda simultaneously. The arbitrators should make very clear to the parties exactly what they expect for example, whether the memoranda should deal with all the issues of the arbitration, or simply certain points that the arbitrators would like to have clarified.

Pursuant Article 25 of UNCITRAL Model Law<sup>146</sup>, if the claimant initiates proceedings but then fails to communicate the statement of claim, in many cases the proceedings can be dismissed, and the claimant can be ordered to pay cost.<sup>147</sup> If the respondent does not appear at the hearing, despite proper notice, its default of appearance does not give the claimant an automatic win. Rather, the claimant still has the burden of proving its case. Therefore, the tribunal should also, at every stage of the process, make efforts to contact the respondent and give it the opportunity to participate in the hearing, and to make written submissions. Because a nonparticipating party is likely to challenge any award rendered against it, a prudent tribunal, in any award granted after an ex parte procedure, should set forth all of the efforts it made to permit respondent a fair opportunity to participate in the proceedings.

Article 26 of UNCITRAL Model Law states

“(1) unless otherwise agreed by the parties, the arbitral tribunal

(a) May appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) May require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate

<sup>145</sup> See, e.g., ICDR Rules, art. 17(1) (“the tribunal may decide whether the parties shall present any written statements in addition to statements of claims and counterclaims and statements of defense.”).

<sup>146</sup> Article 25 UNCITRAL Model Law, default of a party

“Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defense in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations;

(c) Any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.”

<sup>147</sup> See UNCITRAL Model Law, art. 25(a); SCC Rules, art. 30(1)

in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue”<sup>148</sup>

When international arbitrations involve highly technical issues, such as what caused cracks in the concrete of a new bridge, and whether the cracks make the bridge unsafe, or who bore the responsibility for an explosion at a recently completed oil refinery, the testimony of an expert may be required. Unlike fact witnesses, experts provide opinions based on their expertise, which are applied to the facts at hand. When an expert is needed, the parties generally decide whether each side will call an expert, or whether they prefer that the tribunal choose one. The tribunal generally has the discretion to choose an expert even if the parties have not asked it to do so. Selecting an expert witness seems to be the most important decision made by counsel in the arbitration after the selection of the arbitrators. Counsel need to exercise great care and diligence in finding the best international expert in the particular field. If counsel is able, for example, to retain the leading expert in the field, and he agrees with counsel’s view of the issues, the case will be very likely to settle.

If the tribunal is appointing an expert, it is likely to first consult with the parties, and invite them to agree on the choice of expert. One of the concerns when a tribunal has appointed an expert is whether it is simply delegating its decision-making authority to the expert. The tribunal does not have the authority to delegate its power to decide.<sup>149</sup> It should therefore make clear in its award that it has not just adopted an expert report as its final decision, but has scrutinized all the evidence, including the parties’ various comments and objections to the expert’s report. The expert is normally empowered to obtain from the parties’ information he or she needs to render an opinion. This could take the form of documents, goods, samples, or even access to property for a site inspection. The expert normally prepares a report, which is provided to each of the parties. The report contains opinions and conclusions, and usually describes how the expert reached those conclusions, the method, information, and evidence that were relied upon.

Article 27 of UNCITRAL Model Law describes the last step of conduct in arbitral proceeding in those words:

“The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence”

In fact, in International arbitration, rules or procedures regarding the taking of evidence tend to be within the discretion of the tribunal. The tribunal generally has the power to determine the admissibility and the weight of the evidence.<sup>150</sup> Most arbitrators are not going to apply the rules of evidence that may be part of the procedural law of the seat of arbitration. Rather, they will use a flexible approach to establish the facts of case. Because of the different approaches to evidence in the common law and civil law systems, the IBA in 1999 adopted Rules on the Taking of Evidence in International Commercial Arbitration (“IBA Rules of Evidence”).<sup>151</sup> The IBA Rules of Evidence themselves promote flexibility, starting in the Preamble that parties and tribunals may adopt them in whole or in part, or may vary them or simply use the Rules as

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<sup>148</sup> Article 26 UNCITRAL Model Law on International Commercial Arbitration, Expert appointed by arbitral tribunal.

<sup>149</sup> See Redfern & Hunter et al., *supra* note 52, at section 6-92

<sup>150</sup> See, e.g., ICDR Rules, art. 20(6) (“the tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party.”).

<sup>151</sup> Available at [www.ibanet.org](http://www.ibanet.org) under ‘Publications/Guides and Free Material.’”.

guidelines. The IBA Rules of Evidence have contributed to harmonizing the approach used in many international arbitrations for the taking of evidence. Most parties and arbitrators prefer that the IBA Rules of Evidence remain in category of guidelines, rather than being imposed on the arbitrators by party agreement. This permits flexibility as needed to make the arbitral process responsive to the needs of the particular case. Pierre Karrer, for example, likes to put in the terms of Reference that the arbitrators will be “inspired though not bound” by the IBA Rules of Evidence.<sup>152</sup> Some arbitrators, on the other, prefer for the IBA Rules of Evidence to be adopted as binding, because they believe there is less discussion about evidentiary issues if the Rules are considered binding. Each party is supposed to have the burden of proof to establish its claim or defense<sup>153</sup> but in practice it is not the case. Relatively to the documentary Evidence, international arbitration is about to follow the civil law model. The documentary Evidence can be a Hearsay Evidence<sup>154</sup> and the documents have to be Authentic otherwise the other party or the tribunal may request to produce the documents. Article 3(3) of IBA Rules of Evidence<sup>155</sup> talk about the content of the request to produce. Finally the arbitrator have the discretionary power to refuse to admit irrelevant, duplicative, defamatory unduly burdensome, or inappropriate evidence. While witnesses can make a testimony prior to the hearing and also a statement. This statement is generally prepared by the counsel<sup>156</sup>. Without German law who provide that a party cannot testify as a witness for its own cause, although it can be “called by the opponent to give a party’s statement”<sup>157</sup>, everybody can testify even a party. The witnesses can even meet and also have to be examined.

## CONCLUSION

The conceptual analysis helps us to know about the real meaning of the concept of International Commercial Arbitration Agreement. Throughout the conditions of a valid arbitration agreement we are able to know that the agreement to arbitrate is an important part in all arbitration. Two types of conditions are involved in the validity of the commercial arbitration agreement. Those are the conditions relative to the parties and the substantives one, and the conditions relative to the form of the commercial arbitration agreement. The conditions relative to the parties are about the capacity of contracting parties to conclude a valid arbitration agreement. The law governing the capacity of the parties to be able to conclude a valid arbitration agreement is law of the place of arbitration and the conditions are the same like all contract. The lake of capacity or the incapacity of a party can cause the invalidity of the arbitration agreement while the substantive condition are about the existence of an agreement between the parties, also other conditions capable to invalidate the arbitration agreement. To

<sup>152</sup> Interview with Pierre Karrer, March 2007.

<sup>153</sup> See, e.g., ICDR Rules, art. 19(1); UNCITRAL Rules, art.24 (1).

<sup>154</sup> Statement by one person contained in a document, reporting that a second person has made a particular statement, and the statement of the second person is being offered to establish the truth of the matter in question. It is considered not reliable because the second person is not available to be cross-examined.

<sup>155</sup> A request to Produce shall contain:

a (i) a description of a requested document sufficient to identify it, or  
 (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;  
 b. a description of how the documents requested are relevant and material to the outcome of the case; and  
 c. a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.

<sup>156</sup> See David P. Roney, Effective Witness Preparation for International Commercial Arbitration, 20 J. Int’l Arb.429, 430, n.6 (2003).

<sup>157</sup> Arbitration World, Germany, 102, section 12.1.

be valid, an arbitration agreement have to be writing as required by the New York Convention but nowadays most of contract are passed orally so the condition of written agreement seems to be not effective. The UNCITRAL Model Law is much more comprehensible and aware of the evolution of the technology so talk about some new methods of passing contract and by the way is not too exigent in the writing and signed form of arbitration agreement as required by the New York Convention. As mentioned above, all contract have some legal effects when there are conclude. The legal effects of the arbitration agreement are perceptible on the parties and also on the proceedings. The effects on the parties are that they are in principle obliged to litigate their claims in arbitral tribunal when the agreement to arbitrate is valid but in case of objection of one party this obligation can be waived. On the other hand the effects on the proceedings involves the jurisdiction of the arbitral to tribunal to statute on its own jurisdiction through the principle of competence-competence, its power to deliver interim measures, and also the conduct of the arbitral proceedings. For the latter, there are specific steps those intervene. A notice of arbitration have to be submitted by the claimant to the respondent, then the arbitrators are appointed following the parties agreement. Then it's the stage of the oral hearings. The stage can be short or long. At the end of hearings there may be short closing statement and the arbitrators may request post-hearing submission. Then the arbitral proceedings are closed by the final award gave by the arbitrator. For us the arbitration seems to be a good way for parties to litigate their claims. It is not expensive, confidential and efficacy. Otherwise the question of the requirement of a written agreement for us seem to be not effective because of the evolution of the contacts today so it will be better to not consider this requirement as a condition for a valid arbitration agreement. Our position is based on the UNCITRAL Model Law but a bit beyond by the suppression of the written requirement as condition for a valid arbitration agreement. Our work will end by a question we hope can inspired many lawyers. The suppression of the written form requirement of arbitration agreement will not constitute a good thing for the evolution of the arbitration?

## **ABBREVIATIONS**

ART: Article

UNCITRAL: United Nation Commission of International Trade

ICSID: International Commission for

ICC: International Chamber of Commerce

ICCA: International Council for Commercial Arbitration

IBA: International Bar Association

FAA: Federal Arbitration Act

PIL: Private International Law

LCIA: London Court of International Arbitration

DIAC : Dubaï International Arbitration Centre

DIFC: Dubaï International Finance Centre

YBCA : Year Book Commercial Arbitration

OHADA: Organization for the Harmonization of Business Law in Africa

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1925: Geneva Protocol

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1958: New York Convention

1965: International Centre for Settlement of Investment Disputes (ICSID)

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