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5.2 The Arbitration Agreement



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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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WHAT YOU WILL LEARN

Arbitration is private justice born out of the parties' will. By including an arbitration clause in a contract, the parties choose to settle their disputes –in the event any arise– out of court. Those disputes will be submitted to arbitrators.

This module provides an overview of the agreement by which the parties decide to submit their disputes to arbitration. More specifically, the following sections will focus on the conditions and the content of such an agreement and issues related with its enforcement. This module also discusses the issue known as “separability of the arbitration agreement” and the related principle known as “*Kompetenz-Kompetenz*”. We will also provide some guidelines about how to draft an arbitration clause in order to make arbitration a final and binding resolution of the disputes.

Many legal systems are involved in international arbitration. That is why many of the issues addressed here will not have a unanimous answer, but will rather depend on the different solutions provided under the applicable legislation. Even though this module will contain some references to domestic legal rules, we shall mainly focus on the provisions of the UNCITRAL Model Law (hereinafter, the “Model Law”) and on the rules of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (hereinafter, the “New York Convention”).

1. CONCEPT AND ENFORCEMENT OF ARBITRATION AGREEMENT

Objectives

On the completion of this section, you will be able to:

- **Compare the meaning of the terms: “arbitration agreement”, “arbitration clause” and “submission agreement”;**
- **Recognize the consequences of including an arbitration clause in a contract;**
- **Describe the meaning and enforcement of the term “arbitration agreement” under the Model Law.**

1.1 Definition. Arbitration agreement, arbitration clause and submission agreement

In general, the arbitration agreement provides the basis for arbitration. It is defined as an agreement to submit present or future disputes to arbitration.

This generic concept comprises two basic types:

- a) A clause in a contract, by which the parties to a contract undertake to submit to arbitration the *disputes that may arise* in relation to that contract (arbitration clause); or
- b) An agreement by which the parties to a dispute that has already arisen submit the dispute to arbitration (submission agreement).

The arbitration clause therefore refers to disputes not existing when the agreement is executed. Such disputes, it must be noted, might never arise. That is why the parties may define the subject matter of the arbitration by reference to the relationship out of which it derives.

The submission agreement refers to conflicts that have already arisen. Hence, it can include an accurate description of the subject matters to be arbitrated. As we shall discuss later, some national laws require the execution of a submission agreement regardless of the existence of a previous arbitration clause. In such cases, one of the purposes of the submission agreement is to complement the generic reference to disputes by a detailed description of the issues to be resolved.

1.2 Enforcement of an arbitration agreement

By entering into an arbitration agreement, the parties commit to submit certain matters to the arbitrators’ decision rather than have them resolved by law courts.

Thus, the parties:

- a) Waive their right to have those matters resolved by a court; and
- b) Grant jurisdictional powers to private individuals (the arbitrators).

We shall call these two main effects of the agreement “negative” and “positive”, respectively.

1.2.1 Negative enforcement: Lack of jurisdiction of courts

An arbitration agreement precludes judges from resolving the conflicts that the parties have agreed to submit to arbitration. If one of the parties files a lawsuit in relation to those matters, the other may challenge the court’s jurisdiction on the grounds that the jurisdiction of the courts has been waived.

The judge’s lack of jurisdiction is not automatic, nor can it be declared *ex officio*. Instead, it must be raised by the defendant no later than when filing the answer to the complaint. That is so because arbitral jurisdiction is waivable, and the waiver would be presumed if the plaintiff filed a complaint and the defendant failed to challenge the court’s jurisdiction.

To sum up, once a conflict has arisen over any of the subjects included in the arbitration agreement, the courts will have no jurisdiction to resolve it unless both parties expressly or tacitly agree to waive the arbitration agreement.

1.2.2 Positive enforcement: the “submission agreement”

The arbitration agreement grants jurisdiction to arbitrators. By “jurisdiction” we mean the powers conferred on arbitrators to enable them to resolve the matters submitted to them by rendering a binding decision.

The negative enforcement of the arbitration agreement is universally accepted and does not depend on the kind of agreement. Conversely, the positive enforcement is inextricably linked to the applicable law. That is so because some local arbitration laws still do not grant the arbitration clause an autonomous status. In fact, some traditional laws require that, even when there is a previous arbitration clause, the parties execute a new agreement called “submission agreement”, which must contain the names of the arbitrators and clearly identify the matters submitted to them.¹

When a submission agreement is required, the arbitration clause becomes insufficient. Once there are concrete issues in dispute, the parties must enter into an agreement, whether or not they have previously signed an arbitration clause. Under those laws, the arbitration clause at best compels the parties to sign the submission agreement. However, since this obligation is not always complied with voluntarily, such laws provide for a court’s intervention to enforce the arbitration clause. The judge must supplement the content of the

¹ This is the case of Argentine and Brazilian laws.

submission agreement, and his judgment – which replaces the will of the party who has refused to sign it – is treated as a submission agreement. Lack of cooperation by one of the parties in the execution of the submission agreement or insuperable differences between the parties as to what should go into it are settled by a court.²

The legal requirement of the submission agreement as a condition to arbitrate has been considered one of the main obstacles to arbitration, even in the cases in which it could be supplied by a court. In fact, if one of the parties resists arbitration, the refusal to execute the submission agreement allows it to obstruct the constitution of the tribunal and delay the arbitration itself. This forces the opposite party to enter into a judicial process to obtain the submission agreement. Arbitration is therefore deprived of one its main comparative advantages, i.e. expeditiousness.

That is why, taking the concept from the Geneva Protocol on Arbitration Clauses,³ the New York Convention and the new arbitration laws, modeled upon the Model Law, do not require a submission agreement and grant full and immediate enforcement to the arbitration agreement, regardless of whether or not it refers to future or present controversies. The arbitration laws that still require the submission agreement are deemed to be outmoded and should be revised in order to make their provisions congruent with the modern trends on international arbitration.

1.3 Enforcement of an arbitration agreement under the UNCITRAL Model Law and the New York Convention

The Model Law defines the arbitration agreement as:

article 7.1

“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” .

According to the New York Convention,

article II.1

“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” .

² As an example, the Arbitration Law of Brazil (N° 9,307 of 1996) states: “There being an arbitration clause and reluctance to submit to arbitration, the interested party may request that the other party be summoned to appear before a court in order to conclude the submission agreement, to which effect the judge shall set a special hearing...”

§ 7°. The judgment granting the request shall be treated as a submission agreement” (article 7).

³ The 1923 Geneva Protocol on Arbitration Clauses establishes that “ Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences...” (article 1).

Concerning the enforcement of an arbitration agreement, the Model Law establishes that:

article 8

“(1) 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.

“(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court”.

Article 8.1 of the Model Law mostly follows the text of Article II.3 of the New York Convention.⁴ However, the provision of the Model Law is more specific, since it establishes that the request must be made “not later than when submitting his first statement on the substance of the dispute”. The Convention, on the other hand, does not say when the petition must be made.

As explained above (see 1.2.1), the decision to decline jurisdiction and refer the parties to the arbitration proceedings they have agreed upon is not automatic, but must be requested by the interested party. This is so because the obligatory nature of the arbitration agreement derives from the parties’ will. They may agree to submit their disputes to a court decision even after having previously agreed to enter into arbitration. We shall see later (*infra* 4.1) that this agreement may occur tacitly if one of the parties brings an action before a court and the other does not raise the arbitration agreement as a defense to prevent the court from intervening.

Article II.3 of the New York Convention, as well as article 8.1. of the Model Law, is mandatory. When the appropriate conditions for its application are met, the court is obliged to refer the dispute to arbitration. This means that the court must not intervene (i.e. it must decline its jurisdiction). It is the law governing the judicial proceeding that will determine whether an appeal can be made to the court’s decision to admit the defendant’s request and refer the case to arbitration, or to retain its jurisdiction on the grounds that the arbitration agreement is null and void, inoperative or incapable of being performed.

The Model Law (article 8.2) provides that while this question is being addressed in court, arbitral proceedings may nevertheless be commenced or continued. What is more, the law even empowers the arbitral tribunal to render an award. This rule is meant to protect arbitration from dilatory tactics, thus preventing the mere filing of a legal action from postponing the commencement of the arbitration process while the issue is pending before a court.

⁴ “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed”.

1.3.1 *Competence of the arbitral tribunal to rule on its own jurisdiction*

According to Model Law article 16 the respondent may raise the defence in the arbitral tribunal that the tribunal has no jurisdiction. This may happen after the court has found that the arbitration agreement was not “null and void, inoperative or incapable of being performed” pursuant to Model Law article 8.2. It more often arises because the arbitration has commenced prior to any action in court. The issue may even arise during the course of the arbitration if one of the parties alleges that the arbitral tribunal is exceeding the scope of its authority. The grounds for the plea of lack of jurisdiction may be similar to those in article 8.2, but they may also be based on the argument that the claim put forth by the claimant is not comprehended by the arbitration agreement. The defence must be raised not later than the submission of the statement of defence or as soon as the matter alleged to be beyond the scope of the tribunal’s authority is raised during the arbitral proceedings.

The court always has the last word, however. If no appeal to the court from a decision of the arbitral tribunal recognizing its own jurisdiction is permissible during the course of the arbitration, the courts of the place of arbitration would have the authority to set aside the eventual award. Furthermore, the court asked to enforce the award would be authorized under the New York Convention, article V(1)(c) to refuse enforcement of an award that “The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, ...” The latter two possibilities would mean that the parties would have had to spend considerable time, effort and money before a court were in a position to rule on the jurisdiction of the arbitral tribunal. On the other hand, if an appeal to the courts from the decision of the arbitral tribunal recognizing its own jurisdiction is permitted immediately, there is the risk that the respondent will appeal for the sake of delaying the arbitration.

The position taken in the Model Law, article 16(3) is that “if the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may [appeal to the court], within thirty days after having received notice of the ruling, ...” While the matter is pending in the court, the arbitral tribunal may continue the arbitral proceedings. The decision of the court is subject to no appeal.

The combination of the provisions of articles 8 and 16 restricts the court’s role in determining whether the arbitration clause is null and void. Any determination of the arbitrator’s jurisdiction is made by the arbitrator pursuant to article 16.

CASE LAW: Ontario Court of Justice-General Division, March 1st, 1991, Rio Algom Limited v. Sammi Steel Co.⁵

The parties had agreed that the buyer would purchase some of the seller's steel manufacturing business. The agreement provided that the parties should prepare a Closing Date Balance Sheet as soon as possible after closing. Arbitration was provided for if the parties could not resolve any dispute arising out of the Closing Date Balance Sheets. Such a dispute did arise. The buyer followed the required procedure and submitted the matter to an arbitrator. The seller commenced an action in a Canadian court challenging the jurisdiction of the arbitrator and seeking an order staying the arbitration proceedings. The Chambers judge granted the order finding that the arbitrator's jurisdiction is a threshold issue of contract construction to be decided by the court. On appeal, the Chambers judge's order was reversed. The appellate court found that the Chambers judge's decision had been erroneously based on principles of the domestic arbitration act rather than those found in the Model Law as enacted by the International Commercial Arbitration Act, Statutes of Ontario, 1988, c.30. In particular the court cited article 16, which provides the arbitral tribunal with the power to rule on its own jurisdiction. The court further noted article 8 that restricts court involvement to a determination of whether the arbitration agreement is null and void.

The Model Law is not mandatory as to whether arbitration proceedings may be commenced or continued while the issue is pending before a court. The rule authorizes, but does not oblige, arbitrators to do so. In practice, when they are in doubt about the validity or enforceability of the arbitration agreement, arbitrators generally wait for the question to be definitively resolved by judges in order to avoid incurring unnecessary expenses. On the contrary, arbitrators often decide to proceed with the arbitration when they are sure about the validity or enforceability of the arbitration agreement. It is not clear, however, whether the law allows the court to order the suspension of the arbitral proceedings. This issue was addressed in article 8.2 at an early point during the drafting of the Model Law. One of the first versions contained a paragraph establishing that arbitrators could continue with the arbitration proceedings "unless the Court orders a stay or suspension of the arbitral proceedings". This paragraph was suppressed from the final text approved. Some authors⁶ believe that such judicial order would clash with article 5 of the Model Law, which restricts the court's intervention to the questions expressly set forth in the Law.

⁵ CASE LAW ON UNCITRAL TEXTS, <http://www.uncitral.org/>, Case 18.

⁶ BROCHES, Aron, *Commentary on the UNCITRAL Model Law, International Handbook on Commercial Arbitration*, suppl. 11, January, 1990.

1.4 Summary

In order to determine the enforcement of the arbitration agreement, we need to look at the requirements laid down by the applicable law.

If the applicable law is one of the modern arbitration laws based upon the Model Law, the parties will not need to sign a new agreement later, and the arbitration clause may set the arbitration proceedings in motion.

If, on the contrary, the applicable law requires that a submission agreement be signed even if there is a previous arbitration clause, it is necessary to see what the requirements for this new agreement are and how it can be executed in case one of the parties refuses to cooperate.

1.5 Test your understanding

1. Which of these concepts, “arbitration agreement”, “arbitration clause” or “submission agreement”, is broader?
2. If the parties include an arbitration clause in a contract, are they allowed to go to court?
3. Does the arbitration clause always have full enforcement? What may be needed for this? What does it depend on?
4. Does the Model Law require a submission agreement?
5. What main differences can you find between article 8.1 of the Model Law and Article II.3 of the New York Convention?
6. Suppose you are a judge in Feudalia, a country that has adopted the Model Law as the arbitration law. An action for breach of contract is pending resolution before your court. In his first appearance, the defendant raises your lack of jurisdiction as a defense and requests that the parties be referred to arbitration as the contract in question contains an arbitration clause. Can you directly resolve the matter or must you hear the plaintiff first? In what situation could you retain your jurisdiction and reject the defendant’s claim?

2. THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT

Objectives

On the completion of this section, you will be able to:

- **Classify the most common criteria for determining the law applicable to the arbitration agreement;**
- **Identify the predominant criterion under the Model Law;**
- **Compare the Model Law's main criterion with the one governing the New York Convention;**
- **Answer the question whether the New York Convention contains any choice-of-law directive to govern the issue at the award enforcement stage?**

2.1 Criteria for determining the law applicable to the arbitration agreement

The law applicable to the arbitration agreement governs the formation, validity, enforcement and termination of the arbitration agreement. It deals with such aspects as the formal requirements of the arbitration agreement, the arbitrability of its subject matter, its autonomy in relation to the contract in which it is contained, the arbitrators' capacity to rule on their own jurisdiction and the extent to which judicial review is admissible. The applicable law also determines whether or not the submission agreement is required.

There are different criteria for determining the law applicable to the arbitration agreement. We shall focus on the most common ones:

- **The law chosen by the parties**

Some laws allow the parties to choose the law applicable to the arbitration agreement, irrespective of the law governing other question relating to the arbitration.

- **The law applicable to the contract**

Some authors claim that the law applicable to the arbitration agreement is usually the law applicable to the contract that contains the clause.⁷ These authors nevertheless admit that the law applicable to the agreement could be different, since the arbitration agreement is separable from the main contract (see Chapter 5).

- **The procedural law applicable to the arbitration**

Another criterion consists of applying to the arbitration agreement the procedural law that governs the arbitration. As shall be discussed (*infra* 6.4.7 and 6.4.8), in the absence of an agreement the procedural law is in principle the law of the place of arbitration. Although rare in practice,

⁷ SUTTON, David St. John, KENDALL, John & GILL, Judith, "Russel on Arbitration", 25th edition, Sweet & Maxwell, London, 1997, p. 71.

the parties have the right to choose a procedural law other than the law of the place of arbitration.

- **The law of the place of the arbitration**

Parties seldom indicate either a special law applicable to the arbitration agreement or a specific procedural law. Consequently, the place of arbitration becomes important because it will then determine the law applicable to the arbitration agreement (see *infra* 6.4.7 and 6.4.8).

2.2 The Model Law

In this connection, the Model Law does not contain rules of choice of law to determine the law applicable to the arbitration agreement. When adopted by any country, the issue of the applicable law is solved, because the Model Law sets forth the validity requirements for an arbitration agreement providing for international commercial arbitration in that State.

2.3 The New York Convention

The New York Convention adopts, to a greater extent than does the Model Law, the principle that the parties are free to determine a law different from the law of the place of arbitration as the law applicable to the arbitration agreement.

The question of the existence and validity of the arbitration agreement may arise in two different situations:

- a) Initially, when one of the parties requests a court to recognize the arbitration agreement (for instance, by requesting the court to decline its jurisdiction or to appoint an arbitrator); or
- b) At the end of the arbitration, when it is raised as a defense to challenge recognition or enforcement of the arbitral award.

The New York Convention provides rules of conflicts of law for this last situation, but is silent about the first case.

When a dispute regarding the existence or validity of the arbitration agreement arises at the stage of enforcing an award, Article V.1 provides that

“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...”

Under this provision, the parties are free to determine the rules to which they submit the validity and scope of the arbitration agreement. The parties' free will in this sense, however, is not unlimited, since it is generally required that the rule of law chosen must have some connection with some of the elements (the legal transaction or the controversy). If nothing has been agreed upon by the parties, the Convention refers to the local rules of the country where the award was made. Thus, the determination of the place of arbitration becomes particularly important inasmuch as the award is considered made at that place (see *infra*, 6.4.7).

For the situation described in a) above, Article II.3 of the Convention establishes:

“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed”.

As article II does not contain any choice-of-law directive, as does article V.1.a, opinions by commentators on the Convention vary:

- For some, the same choice-of-law rules that govern at the award-enforcement stage under article V should apply as well at the earlier agreement enforcement stage under article II.⁸
- For others, an autonomous interpretation of article II is possible. What is meant by autonomous interpretation?
 - The formal requirements for the validity of an arbitration agreement, laid down in article II.2, should supersede national law.⁹
 - As the applicable law is not indicated, courts may under this wording be allowed some latitude: they may find an agreement incapable of performance if it offends the law or the public policy of the forum.¹⁰
 - The standards that the Convention intends to establish for determining enforcement or arbitral agreements are international standards.¹¹

⁸ A systematic interpretation of the Convention, in principle, allows the application by analogy of the conflict rules of article V.1.a. to the enforcement of the agreement. It would appear inconsistent at the time of the enforcement of the award to apply the Convention's uniform conflict rules and at the time of enforcement of the agreement to apply possibly different conflict rules of the forum. VAN DEN BERG, Albert J.: *The New York Arbitration Convention of 1958*, Kluwer Law and Taxation Publishers, 1981, p. 126.

⁹ SANDERS, Pieter: "A twenty-year's review of the Convention on the recognition and enforcement of foreign arbitral awards", *The International Lawyer*, Vol. 13, N° 2, 1979.

¹⁰ HAIGHT, George: "Convention on the recognition and enforcement of foreign awards: summary analysis of record of United Nations Conference" cited by 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.

2.4 Summary

The law applicable to the arbitration agreement is defined as the law governing the questions relating to the formation, validity, enforcement and termination of the arbitration agreement.

Broadly speaking, the parties may choose the law specifically applicable to the agreement. Otherwise, the most common criteria are: the law applicable to the contract containing the clause; the procedural law applicable to the arbitration; or the substantive law chosen by the parties or determined as applicable to settle the conflict.

Under the New York Convention, the validity of the arbitration agreement is, in the first place, subject to the law chosen by the parties. Otherwise, the law of the place of arbitration shall apply. This solution, clearly established when recognition or enforcement of an award is requested in court, may also reasonably be applied when the question is raised at the moment of requesting recognition of the arbitration agreement in court.

2.5 Test your understanding

- 1. What are the aspects regulated by the law applicable to the arbitration agreement? Does this same law govern the questions relating to the termination of the arbitration agreement?**
- 2. Suppose you are a judge in Feudalia, a country that has adopted the text of the Model Law as the arbitration law. Pending resolution before your court is an action seeking the appointment of a sole arbitrator under a contract containing an arbitration clause. The defendant contends that the clause is null and void due to formal defects. What law would you apply to determine whether the clause is valid or invalid?**
- 3. Can the parties agree upon the application of a specific law to regulate the existence and validity of the arbitration agreement?**
- 4. Under the New York Convention, what is the applicable law to determine the validity of the arbitration agreement?**

¹¹ 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.*

3. REQUIREMENTS FOR THE ARBITRATION AGREEMENT

Objectives

On the completion of this section, you will be able to:

- **Identify the most common general principles to consider an arbitration agreement valid;**
- **Examine the validity of an arbitration agreement that submits to arbitration “all the legal relationships between the parties”;**
- **Identify the rules for determining the capacity of the parties to agree to submit to arbitration;**
- **Explain the meaning of “agreement in writing” under the Model Law and the New York Convention;**
- **Answer or address the following questions:**
- **What matters can be arbitrated?**
- **How is the “arbitrability” of the matter submitted to arbitration determined?**

In order to determine the validity requirements for an arbitration agreement, account should be taken of the specific conditions required by the applicable law. This is important, as the invalidity of an arbitration agreement is one of the grounds for requesting the setting aside of an arbitral award or challenging its enforcement. Notwithstanding other specific requirements laid down by specific legislation, the most common are the ones described in this section.

3.1 It must arise out of mutual consent

The parties’ consent is the basic requirement for the arbitration agreement. Their intention to submit to arbitration must unequivocally arise from the agreement. The New York Convention (article II.1) requires that in their agreement the parties “undertake to submit to arbitration” their disputes. This expression means that:

- The agreement must contain a mandatory, rather than permissive, undertaking, and
- The agreement must provide for arbitration, rather than another process of dispute resolution.

The agreement must have originated from the parties’ free will. Therefore, if one of them has acted induced by error or as a consequence of fraud, coercion or undue influence, there has been no real consent and the agreement to arbitrate is not valid.

3.2 The parties must have legal capacity

3.2.1 Consequences of the lack of capacity

The parties' lack of capacity to submit to arbitration entails the invalidity of the arbitration agreement. Broadly speaking, the manifestation of will by a party who is not legally entitled to assume obligations has no legal effects. Capacity is one of the general requirements to enter into any agreement. The arbitration agreement is subjected to the same rules applicable to the validity of contracts in general, which means that the lack of capacity usually makes the whole act void. If the arbitration agreement is invalid or null and void, this could be declared in the following stages:

- When discussing the enforceability of the arbitration agreement:

Article 8.1, Model Law: *“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”*.

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, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed”*.

- When the arbitral award is challenged by a party in set aside proceedings:

Article 34, Model Law: *“(2) An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was 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 this State...”*

- When the enforceability or recognition of the arbitral award is claimed by a party:

Article 36, Model Law: *“(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement referred to in article 7 was 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 ...”*



Article V, New York Convention: “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...”.

3.2.2 Law applicable to the legal capacity

The New York Convention establishes that the parties’ capacity is governed by the “the law applicable to them” (article V.I.a). This concept does not appear in the Model Law.

There is no uniform understanding concerning the law applicable to the legal capacity of individuals. It will depend on the system of conflicts of law of the forum called to consider the arbitration agreement. The prevailing criterion is that legal capacity should be governed by the *personal law* of each party.¹² This, in turn, opens a new range of possibilities since that “personal law” may be the one governing either the parties’ nationality or their domicile.¹³

3.2.3 The legal capacity to enter into an arbitration agreement

Laws usually contain specific provisions on the capacity of the parties to an arbitration agreement. In domestic arbitration, the question has to do with the capacity of the parties to carry out business transactions (Argentina: article 738, Procedural Code; Ecuador: article 4, Arbitration Law of 1997); or to compromise (Belgium: article 1676, Judicial Code, amended 1998); or to dispose of assets (France, article 2059, Civil Code). In international arbitration the most common problems related to the issue of legal capacity are those referred to the ability to act on behalf of legal entities (usually corporations or governments) by the persons who execute the arbitration agreement. The provisions of the laws vary: some require that the signatory agent be entrusted with special proxy to submit to arbitration (Argentina: article 1882, Civil Code); while in others the arbitration agreement is subject to the same requirements as those to enter into the agreement that is the subject matter of the arbitration (Belgium, article 1676, Judicial Code).

¹² The Spanish Arbitration Law (N° 36, 1988) states: “The capacity of the parties to enter into an arbitration agreement shall be the same as the one required by their own personal law to dispose of in the controverted subject matter (article 60).

¹³ Argentina, for example, provides in articles 6 and 7 of the Civil Code that the capacity or incapacity of individuals is strictly ruled by the domicile, regardless of their nationality and the place in which those acts are performed.

3.3 The agreement must be made in writing

Both the Model Law and the New York Convention require that the agreement be made “in writing”. However, the notion of “in writing” is broad and includes situations in which the agreement has not been printed on paper and signed by the parties.

The New York Convention provides that

“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” (article II.2).

The Model Law is even more precise:

“An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract” (article 7.2).

It is worth making a brief analysis of some specific situations.

3.3.1 *Must the agreement be contained in the same document?*

According to the New York Convention, 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 (article II.2). Following a similar rule, the Model Law defines that

“An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement...” (article 7.2).

3.3.2 *Are signatures necessary for the validity of an arbitration agreement?*

The Model Law and the New York Convention require that the agreement be signed. Some commentators have considered this circumstance as a disadvantage in relation to more modern laws that do not consider the signature a validity requirement. For example, the English Arbitration Act (1996) states

that there is an agreement in writing if the agreement is made in writing, whether or not it is signed by the parties (section 5.2.a). Without the signature, however, it may be more difficult to prove that the party against whom it is invoked consented to it.

The Model Law provision was nevertheless understood as having a wide meaning.

CASE LAW: High Court of Hong Kong, July 30, 1992, Pacific International Lines (PTE) Ltd. & Another v. Tsinlien Metals and Minerals Co. Ltd.¹⁴

The plaintiff, owner and manager of a vessel chartered to the defendant, sought payment of damages for breach of the charter-party. The plaintiff appointed an arbitrator pursuant to an arbitration clause contained in the charter-party. The defendant failed to appoint a second arbitrator and the plaintiff applied in accordance with article 11(4) of the Model Law for the court to appoint a second arbitrator. Although the charter-party was not signed by both parties, the court found that there was a charter-party between the plaintiff and the defendant, since there was no doubt from the facts and the pre-voyage communications that the defendant had chartered the vessel of the plaintiff and had paid also certain sums to the plaintiff in accordance with that charter-party. The court concluded that article 7 of the Model Law requiring a written agreement to arbitrate had been complied with and gave the defendant seven days to appoint a second arbitrator; otherwise the court would appoint him.

Moreover, the signature requirement is not as obsolete as it may seem if it is interpreted together with others set forth by UNCITRAL. Specifically, we are referring to the *UNCITRAL Model Law on Electronic Signatures* (2001). Its article 6 states:

1. *Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.*
2. *Paragraph 1 applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.*
3. *An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph 1 if:*
 - (a) *The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;*
 - (b) *The signature creation data were, at the time of signing, under the control of the signatory and of no other person;*

¹⁴ CASE LAW ON UNCITRAL TEXTS, <http://www.uncitral.org/>, Case 40.

- (c) Any alteration to the electronic signature, made after the time of signing, is detectable; and
 - (d) Where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.
4. Paragraph 3 does not limit the ability of any person:
- (a) To establish in any other way, for the purpose of satisfying the requirement referred to in paragraph 1, the reliability of an electronic signature; or
 - (b) To adduce evidence of the non-reliability of an electronic signature.

Article 2 defines “*Electronic signature*” as data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message.

Accordingly, then, even though the Model Law on Arbitration sets out the signature requirement, its interpretation in the context of the UNCITRAL model provisions makes it possible to significantly broaden the concept of “signature” for the purposes of the arbitration agreement.

It is important to point out that the Working Group II of UNCITRAL has been working to update this rule. There is general agreement that the writing requirement as it is currently drafted in the Model Law, but more importantly in the New York Convention, reflects a distrust of arbitration that was common in 1958 when the New York Convention was adopted that is no longer appropriate at a time when international commercial arbitration has become the preferred mode of international dispute resolution. There is, however, a lack of consensus as to how far it would be appropriate to go in admitting various techniques for showing that an agreement to arbitrate had been concluded. A more difficult problem is whether the Model Law should recognize arbitration agreements that would probably not qualify as written arbitration agreements under the most widely accepted interpretations of the New York Convention. As a result of these conceptual and practical difficulties, at its Thirty-fifth session the Commission considered that time should be given for consultations before the matter was taken up again. As of the time of writing, the Working Group has not been able to return to the subject.¹⁵

3.3.3 Is a tacit consent to arbitration valid?

There is also general consensus that the arbitration agreement arises from the exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. This principle, expressly recognized in some laws, is based on the general legal principle

¹⁵ Report of the United Nations Commission on the work of its Thirty-fifth Session, 17-28 June 2002 (A/57/17).

whereby consent can be validly assumed when a party “does what he would not have done, or does not do what he would have done if he did not intend to accept the proposal.” The plaintiff’s decision to submit the case to arbitration, consented to by the defendant, may validly be considered a tacit agreement to arbitrate.

The Model Law mentions, as equivalent to “written agreement”, an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and is not denied by another. This is not the position under the New York Convention. Such omission makes it doubtful whether awards made in arbitration proceedings born in this way could be recognized under the New York Convention, since they do not strictly comply with the requirements set out by article II of the Convention.

3.3.4 Can arbitration be agreed upon “by reference”?

The Model Law admits a third form equivalent to a written arbitration agreement: the reference in a contract to a document containing an arbitration clause, provided that the contract is in writing and the reference is such as to make that clause part of the contract. The provision does not require the existence of a specific reference to the arbitration clause. If the other two requirements are fulfilled (i.e., the contract has been made in writing and the reference unequivocally states that the clause is part of it), it is enough for the clause to make a general reference to the document.

3.3.5 Summary

Almost all arbitration laws require that the agreement be in writing. However, not all laws give this content the same scope. This is why the formal requirement defined as “in writing” should be complied with in accordance with the specific provisions of the applicable law.

The most widespread criteria consider that the written form requirement may be met in several ways:

- If the agreement is contained in a single document written on paper and signed by the parties;
- If it is contained in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement;
- If it is contained in an exchange of submissions or statements of claim and defence (in arbitration or court proceedings) in which the existence of an agreement is alleged by one party and not denied by the other;
- If there is a reference in a contract to a document containing an arbitration clause, provided that the contract is in writing and the reference is such as to make that clause part of the contract;

- If the agreement is evidenced in writing, which includes the record by one of the parties or by a third party, with the authority of the parties to the agreement;
- If the parties agree otherwise than in writing by reference to terms that are in writing.

3.4 It must arise out of a defined legal relationship

Both the New York Convention (article II.1.) and the Model Law (article 7.1.) establish that the arbitration agreement must refer to differences which have arisen or which may arise between them *in respect of a defined legal relationship*, whether or not contractual.

In addition to those generic requirements, the arbitration agreement must refer to a concrete and specific legal relationship between the parties. The parties must have a legal link, which has given or may give rise to the controversies submitted to arbitration. Although this legal relationship will most frequently be of a contractual nature, it may well be non-contractual, provided that it can be identified and delimited.

An arbitration agreement written in terms too ambiguous or generic, which does not restrict its scope to the disputes arising from a particular juridical relation, would not be acceptable. For instance, the parties could not agree to submit to arbitration “any dispute that could arise between them.” Such clause could be questionable, as it would entail waiving the court’s jurisdiction in too generic and indiscriminate terms.

3.5 The subject matter must be arbitrable

The disputes submitted to arbitration by the parties under an arbitration agreement must be “arbitrable.” The concept of arbitrability is related to the nature of the disputed rights.

Arbitration, as has been said, is a dispute resolution system arising out of an agreement whereby the parties confer upon the arbitrators the function of administering justice. Individuals that are not public officers, provided that their intervention is related to rights that do not affect public or general interests, can exercise this task, in principle performed by the judiciary. The possibility of choosing how to exercise a right means that the parties can waive it or agree on its use. As a consequence of that character, it is agreed that conflicts referring to such rights may be settled by these “private judges” (arbitrators) who do not belong to the judiciary.

The Model Law does not directly lay out the requirement for arbitrability. This requirement is nevertheless not unfamiliar to the Model Law, which indirectly incorporates it in two ways: a) In defining its field of application, the Model Law establishes that it shall not affect any other domestic law by

virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law (article 1.5); and b) If the subject matter on which the arbitrators made the award was not arbitrable, that would be a ground for requesting the setting aside of the award or for rejecting its recognition or enforcement (article 34.b.i and article 36.b.i). What was decided in the Working Group was not to attempt either to list non-arbitrable subject matters in the Model Law or to require each state to do so when adopting the Law.¹⁶

Unlike the Model Law, the New York Convention expressly sets out that the content of the agreement must be “concerning a subject matter capable of settlement by arbitration” (article II.1). Apart from this general rule, the New York Convention includes arbitrability of the subject matter as a requirement whose omission precludes recognition or enforcement of the award, in similar terms to those of the Model Law (Article V.2.a).

In international arbitration, the question as to whether a dispute is arbitrable arises most often in regard to such matters as antitrust, securities exchange or disputes involving other statutes expressing a strong public policy. Disputes involving those matters had traditionally been considered to lie outside the scope of arbitration. During the last fifteen years, however, there have been decisions in different courts that have ruled in favour of arbitrability. The Supreme Court of the United States stated that while **arbitration** focuses on specific disputes between the parties involved, so does judicial resolution of claims, yet both can further broader social purposes. Various laws, including antitrust and securities laws and the civil provisions of the Racketeer Influenced and Corrupt Organization Act, are designed to advance important public policies, but claims under them are appropriate for **arbitration**.¹⁷

In regard to antitrust issues, there is now a consistent case law acknowledging its arbitrability. Some examples illustrate this development.

CASE LAW: Appeal Court of Paris, May 19, 1993, Labinal v. Mors, *Revue de l'arbitrage*, 1993, p. 957).¹⁸

The case involved two parties (a French and a British corporation) related by a joint venture agreement that included an arbitration agreement. The French party alleged that the counterparty entered into an agreement with its main competitor and filed a suit asking for damages. Taking into account the existence of an arbitration agreement, the Appeal Court of Paris ruled that the arbitrators should decide on their own jurisdiction and on the arbitrability of the matter subjected to them, even though their decision might be subject to judicial control in a subsequent setting aside procedure.

¹⁶ BROCHES, Aron, *Commentary on the UNCITRAL Model Law*, *op.cit.*

¹⁷ 500 U.S. 20, 1991.

¹⁸ *Revue de l'arbitrage*, 1993, p. 957

CASE LAW: US Supreme Court, July 2, 1985, *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*¹⁹

The parties were related by a sales agreement that contained a clause providing for arbitration in Japan. The dispute arose when, because of a slackening of sales, the purchaser requested the seller to delay or cancel shipment of several orders. Seller refused and commenced an action against the purchaser to compel arbitration. The purchaser filed an answer and counterclaims, asserting causes of action under the Sherman Antitrust Act and other statutes. The District Court ordered arbitration of most of the issues, including the federal antitrust issues, traditionally excluded from the scope of arbitration, a position reversed by the Court of Appeals. The Supreme Court held that there was no reason to depart from the federal policy favouring arbitration where a party bound by an arbitration agreement raised claims founded on statutory rights. Relying on the leading case *Scherk v. Alberto-Culver Co.*,²⁰ the Supreme Court ruled that respondent's antitrust claims were arbitrable, at least in an international transaction. Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all required enforcement of the arbitration clause. So too, the potential complexity of antitrust matters did not suffice to ward off arbitration; nor did an arbitration panel pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes. And the importance of the private damages remedy in enforcing the regime of antitrust laws did not compel the conclusion that the remedy might not be sought outside an American court.

CASE LAW: Audiencia Provincial de Barcelona, July 19, 1995.²¹

Questions concerning antitrust are arbitrable, with the only exception of those related to criminal issues. Notwithstanding the fact that those matters involve not only the private interest of the corporations implicated but also the public interest in order to preserve a fair competition in the market, the question of whether the parties have violated or not an antitrust agreement and the judgment of the resulting economic consequences are able to be settled by arbitrators.

The US Supreme Court also ruled in favour of arbitration in cases involving statutory rules preventing fraud in securities transactions:

¹⁹ 473 U.S. 614, 1985.

²⁰ 417 U.S. 506.

²¹ *Rev. Vasca de Derecho Procesal y Arbitraje, N° 1, San Sebastián, 1997, p.184.*

CASE LAW: U.S. Supreme Court, June 8, 1987, Shearson/American Express Inc. v. McMahon.²²

Respondents were customers of petitioner Shearson/American Express Inc. (Shearson), a brokerage firm registered with the Securities and Exchange Commission (SEC), under customer agreements providing for arbitration of any controversy relating to their accounts. Respondents filed suit in Federal Court against Shearson, alleging violations of the antifraud provisions in the Securities Exchange Act, the SEC Rules and the Racketeer Influenced and Corrupt Organizations Act (RICO). Petitioners moved to compel arbitration of the claims. The Supreme Court, relying on the federal policy favouring arbitration, ruled that the dispute was arbitrable. The obligation arising from an arbitration agreement is not diminished when a party raises a claim founded on statutory rights. There was no merit to respondents' contention that the arbitration agreements affected an impermissible waiver of the Exchange Act's substantive protections. Respondents' RICO claim was also arbitrable: nothing in the text of RICO or in its legislative history even arguably evinced congressional intent to exclude civil RICO claims for treble damages from arbitration, nor was there any irreconcilable conflict between arbitration and RICO's underlying purposes. The public interest in the enforcement of RICO did not preclude submission of such claims to arbitration.

Another kind of issue where arbitrability has been discussed is in regard to labour claims. In some countries there are special labour courts to which all disputes must be submitted. Nevertheless, most countries permit the parties to submit labour disputes to arbitration. A peculiar case, which is worth mentioning here, involved both labour and statutory rights.

CASE LAW: U.S. Supreme Court, May 13, 1991, Gilmer v. Interstate/Johnson Lane Corp.²³

Petitioner Gilmer was required by respondent, his employer, to register as a securities representative with, among others, the New York Stock Exchange (NYSE). His registration application contained an agreement to **arbitrate** when required to by NYSE rules that provided for **arbitration** of any controversy arising out of a registered representative's employment or termination of employment. Respondent terminated Gilmer's employment at age 62. Thereafter, he brought suit in the District Court, alleging that he had been discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA). Respondent moved to compel **arbitration**, relying on the agreement in Gilmer's registration application. The Supreme Court finally accepted the motion, declaring

²² 482 U.S. 220, 1987. See also U.S. Supreme Court, May 15, 1989, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 1989.

²³ U.S. Supreme Court, May 13, 1991, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 1991.

that an ADEA claim could be subjected to **arbitration**. Since neither the text nor the legislative history of the ADEA explicitly precluded **arbitration**, Gilmer was bound by his agreement to **arbitrate** unless he could show an inherent conflict between **arbitration** and the ADEA's underlying purposes. Moreover, there was no inconsistency between the important social policies furthered by the ADEA and enforcing agreements to **arbitrate** age discrimination claims. The Supreme Court also pointed out that the unequal bargaining power between employers and employees was not a sufficient reason to hold that **arbitration** agreements were never enforceable in the employment context, specially when Gilmer, an experienced businessman, was not coerced or defrauded into agreeing to the **arbitration** clause.

As was shown, there is a remarkable trend toward a pro-arbitration policy, which in turn has led the judiciary to rule in favour of the arbitrability of a broad range of claims, including those based on statutory rights, and have reaffirmed the suitability of arbitration as a fair and effective means of resolving international commercial disputes.²⁴

3.6 Summary

In order to be valid and enforceable, an arbitration agreement must:

- *Be the result of a meeting of minds*

Consequently, cases are excluded in which one of the parties had no discretion or freedom at the moment of concluding it.

- *Clearly state submission to arbitration*

It must unequivocally arise from that agreement that the parties agree to enter into arbitration.

- *Be made between parties having legal capacity to submit to arbitration*

The parties must be legally entitled to assume legal duties, in accordance with the law applicable to that question.

- *Be made by a representative with authority to bind the principal to arbitration*

Corporations, governments and other legal persons can act only by way of representatives and the representative may need special authorization to bind the principal.

- *Be in writing*

The notion of "in writing" is broad and includes situations in which the agreement is not printed on paper and signed by the parties. The agreement is considered to be written if it is contained in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; if it arises from an exchange of

²⁴ HOELLERING, Michael F.: "Arbitrability", in *Commercial Arbitration for the 1990's*, American Bar Association, 1991, p. 13.

submissions or statements of claim and defence (in arbitration or court proceedings) in which the existence of an agreement is alleged by one party and not denied by the other; if there is a reference in a contract to a document containing an arbitration clause, provided that the contract is in writing and the reference is such as to make that clause part of the contract; if the agreement is evidenced in writing, which includes the record by one of the parties or by a third party, with the authority of the parties to the agreement; or if the parties agree otherwise than in writing by reference to terms which are in writing.

- *Refer to a defined legal relationship*

There must be a legal relationship between the parties that may have given or may give rise to the controversies submitted to arbitration. This legal relationship may be either contractual or non-contractual.

- *Be on arbitrable subject matters*

Subject matters are, in general, arbitrable when they refer to economic or disposable private rights.

3.7 Test your understanding

- 1. Mention and briefly describe at least three of the generally accepted validity requirements for an arbitration agreement.**
- 2. Suppose you are a legislator in the country of Feudalia and have to draft a rule to define the capacity of the parties for entering into arbitration. What formula would you use?**
- 3. Can the parties agree to arbitrate conflicts that arise out of a non contractual legal relationship?**
- 4. What forms are deemed to be included in the “agreement in writing” requirement? Is the signature of the parties a validity requirement for the arbitration agreement under the Model Law? What is meant by “signature”?**
- 5. Suppose you are a judge in Feudalia, a country that has ratified the New York Convention. Pending resolution before your court is the enforcement of a foreign award. The defendant has raised no defence to the award. However, you realize that although the matter resolved in the award is not arbitrable under your own law, it is arbitrable under the law of the place where it was made. Can you refuse the enforcement of the award on those grounds? Give your reasons.**

4. TERMINATION OF THE ARBITRATION AGREEMENT

Objectives

On the completion of this section, you will be able to:

- Classify the different ways of terminating an arbitration agreement
- Answer or address the following questions:
- Is the right to go to arbitration waived if one of the parties submits to a court's decision matters that are referred to in an arbitration agreement as being within its scope?
- What other grounds for termination of the arbitration agreement are usually provided by domestic laws on arbitration?

4.1 Termination of the arbitration agreement by mutual consent

Just as arbitration arises out of an agreement, the parties may terminate it by mutual consent.

This new agreement can be express or tacit. It is express when the new agreement between the parties is executed in accordance with the provisions previously agreed upon. Implied waiver operates when one of the parties files a lawsuit about matters contained in the arbitration agreement, and the other does not timely object to the court's lack of jurisdiction.

As an example, the Spanish arbitration law provides that the arbitration agreement shall be deemed discharged if a complaint is filed and the defendant does not raise lack of jurisdiction as a defence (art. 11.2).

4.2 Other possible grounds for termination

4.2.1 Grounds related to the parties

The death of one of the parties does not, as a rule, cause the termination of the arbitration agreement. Under legal systems that adopt the principle of universal succession, the *mortis causae* successor to a person inherits all the rights and duties of the deceased, except those that could have only been exercised or performed personally (*intuitu personae*). However, this is a question to be solved under the applicable law:

Prior to the year 2000 the Paraguayan Procedural Code (article 793) provided that if one of the parties died before the rendering of the award, the arbitration proceeding would be terminated and the parties or their successors could go to court.²⁵

²⁵ This provision was abolished by the new Arbitration Law N° 1,879 of 2002.

By contrast, Section 8 of the English Arbitration Act states:

*“(1) Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party.
(2) Subsection (1) does not affect the operation of any enactment or rule of law by virtue of which a substantive right or obligation is extinguished by death.”*

With respect to legal entities, other examples of universal succession could be mergers and acquisitions, liquidation or general bankruptcy. In general, mergers, acquisitions or liquidations will bear no impact to the arbitration agreement. The universal successor will be bound by the arbitration agreement.

Bankruptcy proceedings are issues resolved by domestic legislations and generally they cannot be displaced by private agreements. The legislation of each country will determine the impact of bankruptcy on the arbitration agreement. In Argentina, for example, the Bankruptcy Law provides that arbitration proceedings may continue even if one of the parties is declared in bankruptcy where the arbitration tribunal has already been appointed.

4.2.2 *Grounds related to the arbitrator*

The death of the arbitrator is not a ground for termination of the arbitration agreement, either. Again, although we should analyze the provisions of the applicable law, the common solution is to replace the arbitrator. Thus:

- *Section 26.2 of the English Arbitration Act provides that the authority of an arbitrator is personal and ceases on his death. Section 27 provides the way to fill the vacancy. In that case, the parties are free to agree whether and, if so, how the vacancy is to be filled. If there is no such agreement, the provisions of sections 16 (procedure for appointment of arbitrators) and 18 (failure of appointment procedure) apply in relation to the filling of the vacancy as in relation to an original appointment.*
- *The Brazilian law provides that the submission agreement is extinguished when one of the arbitrators dies or he cannot render his vote, provided that the parties have expressly declared that they will not accept substitutes (article 12). The Portuguese law has a similar provision (article 3).*

4.3 Summary

The arbitration agreement may be terminated by the parties who made it by means of a new stipulation. This stipulation may be express or implied. This last form of discharge operates when one of the parties files a complaint about matters contained in the arbitration agreement, and the other does not raise

lack of jurisdiction as a defence at the right time in the process.

Apart from this ground, the laws provide other grounds for termination of the arbitration agreement:

- Although the death of one of the parties is not generally considered a ground for termination of the agreement, it is expressly provided for under some laws.
- The death of the arbitrators is not normally a ground for terminating the arbitration agreement, either. Some laws set forth otherwise when the parties regard the intervention of a specific arbitrator as a condition for the arbitration.

4.4 Test your understanding

- 1. What are the grounds for termination of an arbitration agreement? Must the termination by mutual agreement of the arbitration agreement be express or can it be tacit as well?**
- 2. What are the consequences if one of the parties to a contract containing an arbitration clause files a lawsuit on a matter included in the arbitration clause? Does termination of the arbitration agreement automatically follow?**
- 3. Does the death of one of the parties terminate the arbitration agreement? What about the death of the sole arbitrator?**

5. SEPARABILITY OR AUTONOMY OF THE ARBITRATION AGREEMENT

Objectives

On the completion of this section, you will be able to:

- **Describe and compare the concepts of “separability of the arbitration agreement” and “Kompetenz-Kompetenz”;**
- **Identify the cases in which both principles are applied;**
- **Solve the question of whether arbitrators must decline their jurisdiction and refer the case to a judicial court when their jurisdiction is challenged on the grounds of invalidity of the arbitration agreement.**

5.1 The problem and its solution

Historically, it was held that an arbitration agreement contained in a contract was accessory to the main contract and that the invalidity of the contract also entailed the invalidity of the arbitration agreement. On the basis of that interpretation, arbitral jurisdiction was frequently restricted by challenges to the validity of the contract, since those challenges involved the arbitrators’ jurisdiction as well.

The argumentative line was as follows:

- If the main contract is null and void, so is the arbitration agreement that is accessory to it;
- If the arbitration agreement is considered null and void, arbitrators lack jurisdiction to solve any of the question relating to such contract, including whether the contract is invalid or not;
- As the validity of the arbitration agreement is being questioned, arbitrators must not intervene until a court decides the matter.

In this way, the mere filing of such a defence would entail an obstacle to arbitration.

In order to avoid that situation, most laws and regulations on arbitration have included two very important principles:

- “Separability”, “autonomy” or “independence” of the arbitration clause; and
- “Kompetenz-Kompetenz” or “*compétence de la compétence*”.

The two principles mentioned refer to different situations. The “Kompetenz-Kompetenz” principle aims at giving arbitrators the possibility to examine and decide in first instance on any objection to their jurisdiction. According to the principle of “separability of the arbitration clause”, if the arbitrators decide,

within the scope of their jurisdiction, that the contract containing the arbitration clause is null and void, that does not entail the loss of their jurisdiction. In practice, however, the two principles complement one another, since the contentions are usually made at the same time. The invalidity of the contract, the invalidity of the arbitration agreement and the consequent lack of jurisdiction of arbitrators are often part of a common defense strategy.

The principles described have been upheld by the authors, accepted in case law and recognized by statutes. Their purpose is to enable arbitrators to retain jurisdiction and solve the disputes, even those related to the validity or invalidity of the contract. Otherwise, the mere contention of invalidity of the contract would imply neutralizing the effects of the arbitration agreement. This would, in turn, mean invalidating the method chosen by the parties to settle the conflict.

The ultimate argument of these provisions is that the arbitration clause is not just another clause within a contract. Its special purpose—to confer jurisdiction upon those who must solve the differences arising under the contract—entails empowering arbitrators to rule on all questions related to the contract, even those relating to their own jurisdiction.

There are also other reasons behind these rules. The possibility of removing the arbitrators by just raising a plea that the contract is invalid would constitute a simple way of avoiding arbitration. If the matter of the arbitrator's jurisdiction was dependant on a previous court decision on the validity of the contract, arbitrators' intervention could easily be avoided. This would entail disregarding the original common intention of the parties to submit conflicts arising out of the contract to arbitration.

Although these principles are widely accepted, recourse to the courts is usually provided to review the arbitrator's ruling on competence, either through a direct right to review (when the issue of competence was subject to a previous partial award) or at the stage of setting aside the award (when the issue was part of the final award).

5.2 The UNCITRAL Model Law

Article 16 of the Model Law upholds these two principles when it says:

“(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 defence. 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.”

As can be seen, this rule does not confer upon arbitrators full powers to rule on the contention of lack of jurisdiction. They are allowed to decide this matter initially, as a way of preventing the mere raising of the plea from causing their removal. By examining the background to the case, the arbitral tribunal may decide to what an extent the defenses raised by the parties are legally effective. In the meantime, however, the arbitration clause must be considered valid in order to allow arbitrators to rule on its existence, validity or duration.

CASE LAW: Ontario Superior Court of Justice, July 29, 1999, NetSys Technology Group AB v. Open Text Corp.²⁶

NetSys is a Swedish corporation that provides internet-related services to customers in Scandinavia. Open Text is an Ontario corporation that develops, owns, licenses, and sells computer software products and programs for creating, hosting and using searchable indexes on the internet. The parties entered into a series of written agreements that included provisions for arbitration. After the agreements broke down, NetSys began court proceedings in Ontario against Open Text, which then instituted arbitral proceedings. NetSys objected that some of the matters brought to arbitration were not within the scope of the arbitration agreement, while Open Text sought a stay of all court proceedings. In resisting the stay, NetSys argued that since Open Text was claiming that the agreements were null and void in the arbitration claim, it could not rely on article 8 of the Model Law and force arbitration. The Court rejected this argument. It relied on article 16 of the Model Law to conclude that the arbitrator was competent to determine the validity of the contract and that this competence was independent of the validity of the arbitration agreement that was contemplated in article 8. On the question of the scope of the arbitration clause, the Court considered whether it should remit the issue to the arbitral tribunal as provided by

²⁶ CASE LAW ON UNCITRAL TEXTS, <http://www.uncitral.org/>, Case 367, O.J. No. 3134, 1 B.L.R. (3d) 307.

article 16(3) of the Model Law. In concluding that it should, the Court noted that the adoption of the Model Law in Ontario signalled a significant trend to circumscribe judicial intervention in arbitral proceedings. The Court thus ordered a stay of judicial proceedings to remain in force until the final disposition of the jurisdictional issue by the arbitral tribunal, whether as a preliminary decision or in the final award.

However, as is laid down in paragraph 3, this arbitrators' decision is subject to judicial review. In this connection –the commentators of the Model Law explain– the issue is not the finality of the arbitrator's decision on their jurisdiction and the consequent ouster of the jurisdiction of the courts, but rather when and the conditions under which the courts may play their role as the final authority on the question of arbitral jurisdiction. The basic problem is how to reconcile the realization of the objectives of commercial arbitration, which would be defeated if an arbitral tribunal would have to suspend or cease its proceedings every time a party pleaded invalidity of the arbitration agreement, with an effective measure of court supervision to ensure that the arbitral tribunal does not finally confer on itself a jurisdiction that by reason of the contractual nature of arbitration can only derive from the parties' agreement.²⁷

5.3 Summary

Historically, it used to be interpreted that when the arbitration agreement was in the form of a clause contained in a contract, the clause was accessory to the contract. It was thus concluded that the invalidity of the contract also entailed the invalidity of the arbitration agreement. On the basis of that interpretation, whenever a party pleaded invalidity of the main contract and perforce of the arbitration agreement, thereby challenging the arbitrators' jurisdiction, the arbitrators were obliged to suspend the arbitration proceedings until the question was decided by a court.

In order to avoid this situation, most modern laws and rules on arbitration have included two main principles: the principle of “separability”, “autonomy” or “independence” of the arbitration clause, and that of “*Kompetenz-Kompetenz*” or “*compétence de la compétence*”.

Since the arbitration agreement is currently regarded as autonomous or separate from the main contract, the invalidity of the contract does not entail the automatic invalidity of the arbitration agreement. Moreover, as arbitrators are empowered to examine and rule on pleas raised against their jurisdiction, the arbitration is not terminated or suspended by the mere raising of a motion that the arbitrators lack jurisdiction.

²⁷ BROCHES, Aron, *Commentary on the UNCITRAL Model Law*, *op. cit.*

The Model Law expressly incorporates these two principles. However, it must be noted that even though the principle of *Kompetenz-Kompetenz* empowers arbitrators to initially decide the plea for lack of jurisdiction, their decision is subject to subsequent judicial review.

5.4 Test your understanding

- 1. What practical problems do the principles known as “Separability of the arbitration clause” and “*Kompetenz-Kompetenz*” seek to solve?**
- 2. What is the conceptual difference between the two principles?**
- 3. Suppose you are an arbitrator. The place of arbitration is Feudalia, which has adopted the Model Law as its arbitration law. The defendant contends that the arbitration clause from which your jurisdiction arises is contained in a contract that is null and void. On the basis of this argument, the defendant claims that you do not have jurisdiction and asks you to step down. Can you rule on your jurisdiction? If the answer is ‘Yes’, would your decision be subject to judicial review? In case it is, may you continue the arbitral proceedings? May you render an award?**
- 4. At what moment during the proceeding must the defense of lack of jurisdiction of the tribunal be raised contending invalidity of the main contract? Can such defense be raised by the party who participated in the appointment of the arbitrators? Must the arbitrator rule on it as a preliminary question or in the final award?**

6. GUIDELINES TO DRAFT AN ARBITRATION AGREEMENT

Objectives

On the completion of this section, you will be able to:

- **Assess when it is advisable to agree on arbitration proceedings to resolve future disputes and when we should wait until disputes actually arise;**
- **Identify the key words to use when drafting an arbitration clause;**
- **Assess when it is convenient to agree either on *ad hoc* or institutional arbitration;**
- **Identify and recognize the relevant elements in selecting the arbitral institution;**
- **Analyze the different mechanisms for the appointment of arbitrators;**
- **Explain why it is important to agree on the place of arbitration;**
- **Answer or address the following questions:**
- **May the parties agree on the application of a procedural law other than that of the place of arbitration?**
- **Why is it important to agree on the language applicable to the arbitration proceedings?**
- **Describe the most usual ways of determining the applicable substantive law in the absence of any contractual provisions;**
- **Analyze when and how arbitration *ex aequo et bono* may be agreed upon;**
- **Determine if and when the parties may waive recourses against the award.**

In this section, we shall provide some guidelines on the questions to take into account when drafting an arbitration agreement.

6.1 When to resort to arbitration

Although the ideal situation may be to agree on arbitration when there is a concrete controversy between the parties, that situation is far from common. Usually, once the conflict has broken out, the parties do not agree on whether or not to resort to arbitration or on the procedure to be followed. The only way of securing arbitration is to make the necessary provisions before conflicts arise. In other words, if arbitration is not agreed upon *a priori* to settle future differences, the parties will probably not be able to profit from the possibility of arbitrating their dispute once it arises.

6.2 General considerations: written form of the arbitration clause and words to use

In order to agree on arbitration in advance to settle controversies that have not arisen yet, it is necessary to carefully analyze the terms that must appear in the arbitration agreement.

The first necessary, although obvious, clarification to make is that the parties must unequivocally express their intention to resort to arbitration. The agreement must contain a mandatory, rather than permissive, undertaking to arbitrate. Instead of using verbs such as “may” or “might” the parties should use more compulsory ones: “shall” or “must”. Ambiguous or equivocal expressions must be avoided. In a case in which the parties had agreed that “In case of necessity, the ICC Paris shall be called upon”, for example, the International Court of Arbitration of the International Chamber of Commerce held that the clause was not an arbitration clause.²⁸

The arbitration agreement must be written in such a way as not to make it necessary to complete it or complement it when the conflict arises. The arbitration clause must be clear, complete and autonomous. However, this does not mean that it must be in complex terms or too long. It is best to use standard words that do not lead to confusion as to the parties’ intention. Ambiguity is the worst enemy of an arbitration clause, not only because it may entail the ineffectiveness of the agreement, but also because it will cause unwanted complications in the proceedings and may give the opposing party a powerful weapon to challenge its enforcement in court, thus neutralizing the advantages of arbitration.²⁹

6.3 How to define the subject-matter to be submitted to arbitration

A significant aspect to consider is the determination of arbitrable questions. It is advisable to avoid language that may restrict the scope of the agreement. If the clause is ambiguous and allows several interpretations, the party interested in resisting arbitration may contend the non-arbitrability of a specific controversy. This will eventually lead to an action before a court, that will cost both time and money, and, possibly, to a court decision excluding certain questions from the arbitration.

Clauses submitting to arbitration disputes relating to “the performance, breach, termination, validity, formation, interpretation or enforcement of the contract” must be avoided. They involve the risk that the conflict might not be literally included in that listing, and a court might consider such enumeration to be of a restrictive nature, since for many courts arbitration clauses must be subject

²⁸ TAKLA, Youssef: “Non-ICC Arbitration clauses and clauses derogating from the ICC Rules”, *The ICC International Court of Arbitration Bulletin*, Vol. 7 N° 2, December 1996.

²⁹ BOND, Stephen R., “Cómo redactar una cláusula compromisoria”, in *El arbitraje comercial internacional, Special supplement of the ICC International Court of Arbitration Bulletin*, 1995.

to a restrictive interpretation as they entail a waiver of the constitutional right to resort to the courts.

To indicate the subject matter submitted to arbitration, it is also advisable to avoid words that may have a narrow or more specific meaning, such as “claims.” It is recommendable to use the terms “differences” or “disputes”, because they mean more than the existence of a claim.

Expressions such as “in connection with” or “in relation to”, are given a broad meaning and have been held to include claims for rectification of a contract, as well as issues of mistake and misrepresentation. Similarly, such phrases as “arising out of the contract” have a wide meaning and have been said to have wider meaning than “arising under a contract”, as the latter have been said not to cover rectification claims.³⁰

Adjectives should also be avoided that qualify the disputes submitted to arbitration. Professor Gray tells the case of a clause that stated: “if any *question of fact* shall arise under this contract... either party hereto may demand an arbitration...”. A dispute related to this contract arose when a party sued the other for breach of contract. The defendant asked the court to refer the parties to arbitration, according to the arbitration clause. The court so ordered. The arbitrators rendered an award, ordering the defendant to pay an amount of money. The motion to vacate the award was denied. On appeal, the Second Circuit ruled that the parties clearly did not intend to submit this question to arbitration. The narrow language used to agree to arbitration did not cover the issue decided by the arbitrators, which involved questions of law as well as fact. The appellate court accordingly held that the arbitrators had exceeded their authority.³¹

Naturally, this recommendation is valid provided that the parties wish to submit to arbitration “all” disputes arising out of that legal relationship. If the parties want to submit only some of them to arbitration, they must designate them clearly to avoid misunderstanding. For example, in a supply contract, the parties may agree on one kind of arbitration to settle “all differences concerning the quality of goods.” Even though in this way the arbitrable questions would be covered, problems may all the same arise if the conflict involved questions submitted to arbitration together with others that were not. For example, if the buyer refused to pay the price, alleging that the goods delivered did not meet the quality requirements agreed on, it is doubtful that the seller could commence an arbitration under this clause to recover the purchase price.

It may be concluded, then, that if the parties want to submit to arbitration all disputes relating to a contract, the use of a comprehensive clause is recommendable. The UNCITRAL Model Arbitration Clause states: “Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in

³⁰ SUTTON, David St. John, KENDALL, John and GILL, Judith: *Russel on arbitration, op. cit.*

³¹ GRAY, Whitmore, “Drafting the dispute resolution clause”, in *Commercial Arbitration for the 1990's*, American Bar Association, 1991, p. 142. The reference is to “*J.P. Greathouse Steel Erectors, Inc. v. Blount Brothers Construction Co.*”, 374 F.2d 324 (D.C. Cir. 1967).

accordance with the UNCITRAL Arbitration Rules as at present in force”. This phrase has been regarded as broad and it comprises all kind of disputes.

6.4 Specific questions to take into account

Apart from the general questions mentioned above, there are some specific ones to be considered when drafting an arbitration agreement.

Once they have decided to settle their disputes by arbitration, it is not advisable for the parties merely to agree that “All differences arising out of or in connection with this contract shall be settled by arbitration”. Such an agreement would be perfectly valid in most countries, in that it complies with the minimum requirements established by most laws. However, it would not make a good arbitration agreement, because it would leave out many aspects, which could eventually end up calling for judicial intervention to fill the gap left by the parties.

6.4.1 *Institutional or ad hoc arbitration?*

When the parties decide to submit their disputes to arbitration, they may choose between two types of proceedings: *ad hoc* arbitration or institutional arbitration (also known as “administered arbitration”).

In *ad hoc* arbitration, it is the parties themselves who, in the absence of the assistance of an arbitration institution, must choose the arbitrators or set up the mechanisms for their appointment. They should further agree on the place and language of arbitration, the applicable procedural rules, the arbitrators’ fees, etc. The most effective way to provide for these matters is to use the UNCITRAL Model Arbitration Clause, which calls for arbitration under the UNCITRAL Arbitration Rules.

In institutional arbitration, there is an organization linking the arbitrators and the parties. Its role is, in general, to organize the arbitration proceedings. It provides services that are often very much appreciated by the parties, simplifying the tasks and helping them avoid problems. These organizations usually provide regulations that establish the arbitration proceedings; the procedures for the appointment, challenge and substitution of arbitrators; ethical rules that specify duties and responsibilities of arbitrators; arbitrators’ fee scales, in order for the cost of arbitration to be predictable; clerical services, such as providing the place for the hearings, carry out the administrative work demanded by arbitration, receive the formal written allegations by the parties, serve notices, etc.

The decision to opt for one or another modality will depend on each particular situation. *Ad hoc* arbitration is most appropriate when there is an existing conflict. If chosen to settle future disputes, it may be difficult to commence the arbitration if one of the parties refuses to cooperate. The difficulties of *ad hoc* arbitration may, nevertheless, be substantially lessened by agreeing on the UNCITRAL Arbitration Rules and nominating an appointing authority.

6.4.2 *Selection of institutional arbitration*

If the decision is for institutional arbitration, the following step is to determine the most advisable institution to conduct the arbitration. What are the criteria to choose an arbitration institution? What are the aspects to consider?

Many institutions provide arbitration services. Each of them has special characteristics, which make them suitable for some cases and unsuitable for others. There are general arbitral institutions that offer their services in the general field of commercial issues; others that provide different arbitration models for different kinds of question (with rules and panels of arbitrators for each); others that only offer arbitration services concerning some specific matters.

Apart from the prestige and trustworthiness of the organization, there are other elements to analyze before making the decision, namely: its set of rules, the list of arbitrators (or the method of their appointment) and costs.

Before all this, the parties should define the nature of the disputes that may arise out of the contract in question. Knowing what kind of controversies may arise, the parties should naturally rule out the institutions that do not provide arbitration services for that kind of disputes. If the potential questions are too specific or involve technical or complex questions, it is also advisable to discard those institutions that are not experienced enough handling this type of controversy or that do not have appropriate rules and lists of arbitrators.

It is essential to study the rules of the prospective arbitral institutions. The purpose of the analysis is to determine, in the first place, if the procedure is suitable for the kind of conflicts that are likely to be arbitrated. As noted above, there are institutions that have a set of rules designed for a special category of issues and its provisions are suitable for such particular situation. If the conflicts that may arise out of the contract do not have those characteristics, such rules will probably be unsuitable.

In any case, the parties should analyze the powers granted by the rules to the institution in the administration of the arbitration and to the arbitrators in the conduct of the proceedings; the rules of procedure (notice system, procedural terms, rules on evidence) and admissible means of recourse against awards.

An aspect to consider is how arbitrators are appointed under the rules of the institutions. Do the parties have the right to choose arbitrators or is there a standing tribunal? Is there a list of arbitrators and is it mandatory that all the arbitrators, a sole arbitrator or the chairman be chosen from that list? Are there different lists according to the specific fields? Does the institution have discretionary power to choose arbitrators? In the event of a standing tribunal or a list of arbitrators, the analysis should be focused on the competence and experience of arbitrators in the type of questions likely to be arbitrated. If there is no list, the parties should analyze the competence of the organ of the institution in charge of appointing the arbitrators.

Last, but not least, comes the cost study. Arbitral institutions have scales that make it possible to foresee the cost of handling possible conflicts according to their amount. It is advisable to check the scale for the type of conflict that may arise between the parties.

As was said in 5.2.6.2, the clause must be clear and understandable. In order to avoid interpretation problems when submitting a question to arbitration by a certain institution, it is preferable to use the model clause proposed by that institution. At most, if its set of rules contains provisions that the parties want to change, the parties may agree on some of them, provided they are authorized to do so by the rules. If there is any doubt, it is advisable to ask the relevant institution whether the intended derogation of the rules is authorized.

The institution must be unequivocally mentioned in the clause. Unnecessary though it may seem, this recommendation is worth giving due consideration. There are frequently clauses in which disputes are submitted to an institution that does not exist as it is named. Since there are many with similar names, the parties must be careful and state the official name of the institution. We have seen clauses submitting disputes to the “Chamber of Commerce of Buenos Aires”, an institution that does not exist. When one of the parties requested arbitration by the Argentine Chamber of Commerce (based in Buenos Aires), a controversy arose concerning the submission to arbitration itself. In another case, it had been agreed to submit a question to an institution that did not have an arbitral regime in force. Courts ruled that in such case, the arbitration must be understood as not agreed upon and the conflict must be settled by a court. There are other examples of “pathological” clauses where the claimant requested arbitration by the International Chamber of Commerce but the arbitration clause provided for arbitration by the International Chamber of Commerce of Geneva, the Paris Chamber of Commerce, the Arbitration Court in Zurich, Paris Chamber of Arbitration, or the Arbitration Commission of the Paris Chamber of Commerce and Industry, none of which exist.³²

Ambiguous clauses like the ones mentioned are likely to raise doubts as to what institution the parties intended to submit their dispute. The first consequence of that ambiguity is that, at the time of the request for arbitration, there will almost certainly be a controversy between the parties that may end up in court. As a consequence, the institution might refuse to administer the arbitration alleging that its designation is not clearly established or some judge might find that, because the parties’ intention to submit to arbitration itself is not clearly stated, the dispute must be settled by a court.³³

³² BENGLIA, Jean: “Inaccurate reference to the ICC”, *The ICC International Court of Arbitration Bulletin*, Vol. 7 N° 2, December 1996.

³³ A case in Argentina could illustrate this concept. The parties had agreed to arbitrate their disputes under the Arbitration Center of the Buenos Aires Bar Association. When a dispute arose, this Center was inoperative and the institution refused to arbitrate. The court ruled that, given that the parties had chosen an -at the moment- inaccessible arbitration tribunal, the arbitration agreement was not enforceable at all and the dispute had to be decided in court (Buenos Aires Civil Court of Appeal, August 27, 1999, “Fernández Gallardo v. Morales”, published in *Rev. Jurisprudencia Argentina*, 16/8/00).

6.4.3 Appointment of arbitrators

In *ad hoc* arbitration, it is essential to provide for the procedure by which the arbitrators are to be appointed. In this case, there is usually a clause whereby each party must appoint an arbitrator and these two arbitrators must designate the third one.

In any case, it is important to provide supplementary mechanisms for the event that one party does not appoint its arbitrator or the two arbitrators cannot reach agreement on the third arbitrator. The parties may designate an appointing authority with powers to designate the missing arbitrator. It is best to designate an arbitral institution to perform this function. Arbitral institutions are often entrusted with the designation of arbitrators in *ad hoc* arbitrations even if the parties have not agreed to have the arbitration administered by it. The advantage of this procedure is that these institutions are accustomed to performing this task, have experience in the designation of arbitrators and even have lists of arbitrators from which to choose the more competent ones.

The UNCITRAL Arbitration Rules specifically provides the mechanisms for designating arbitrators. Article 6 rules the case of the sole arbitrator; Article 7 sets forth the designation mechanism when the parties have agreed on the intervention of three arbitrators; and Article 8 regulates the procedure to request the appointing authority to appoint the arbitrators.

The UNCITRAL Arbitration Rules reasonably solve the question of the appointment of arbitrators by the parties under articles 6(1) and 7(1). However, it is convenient to provide in the contract for an appointing authority accessible to the parties. There was a case in which the parties to a contract signed in Buenos Aires (Argentina) between an Argentine company and a Brazilian company agreed to submit to arbitration in Buenos Aires, in Spanish, under the UNCITRAL Rules and the Argentine law. However, they did not designate an appointing authority to appoint the arbitrators. No difficulty arose, since the parties appointed the arbitrators by mutual consent. Had it not been so, the omission would have led to a request to the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority, and then to a request to the appointing authority to appoint the arbitrators. This procedure would have entailed costs and delays detrimental to the arbitration, but the arbitration could at least have gone forward.

In institutional arbitrations, the mechanism for appointing the arbitrators can all the same be agreed upon. The provisions contained in the rules for solving these questions are generally of a supplemental nature and are applied provided there has been no agreement by the parties to the contrary. The task of those drafting the arbitration agreement submitting to institutional arbitration is to check what are the provisions set forth in the rule and how possible it is to provide otherwise by express agreement.

6.4.4 *Number and qualifications of arbitrators*

It is advisable for the parties to include in the arbitration agreement provisions concerning the number of arbitrators and, if possible, the qualifications or requirements to be met by them. In *ad hoc* arbitration, these specifications will avoid long discussions and possible legal actions. In the case of institutional arbitration, although the institution's rules contain solutions for the case of silence by the parties, such solutions will never be as good as those agreed upon by the parties.

As regards the number of arbitrators, each institution, on the basis of its experience and the nature of the conflicts it normally administers, determines a priori whether it is preferable to have a sole arbitrator or an arbitral tribunal. Such a tribunal is almost always comprised of three arbitrators, although the parties are usually allowed to change this solution by express agreement. Assuming that the consensus between them does not always exist in the face of a real conflict, it is convenient to previously agree on it ensuring that the parties' common will is respected.

The UNCITRAL Arbitration Rules establish that

“If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed” (Article 5).

It is only natural that, when agreeing on arbitration to settle future conflicts, the parties prefer not to name the arbitrators in the arbitration clause, since at that moment it is unknown whether conflicts will arise. The parties may nevertheless agree on the arbitrators' required qualifications. They may agree that arbitrators must be of a certain profession, nationality, specialized in specific areas, that is to say, on any condition that the parties may consider relevant for choosing the arbitrators.

Indication of the conditions to be met by the arbitrators is as important in *ad hoc* arbitration as it is in institutional arbitration. Faced with a conflict, the parties may find it difficult to agree on the appointment of the arbitrators. The appointment will then be made by a third party—a private appointing authority or a court—in charge of designating the arbitrators. Confronted with that contingency—the most probable one—the detailed provisions made by the parties in the arbitration clause concerning arbitrators' qualifications will restrict the margin of discretion of the third party. Whoever appoints the arbitrators must respect what has been agreed upon by the parties. The more closely things are defined, the more probability there will be that arbitrators so appointed will be similar to the ones the parties would have chosen.

6.4.5 Rules of procedure

In *ad hoc* arbitrations, the parties must create their procedures. These can be accomplished either by: laying down specific rules for that procedure or referring to a set of already existing rules. Even if the parties do not submit to arbitration administered by an institution, they may still incorporate its regulatory provisions by reference, which shall be followed by both the parties and the arbitrators.

An example of a set of rules specially intended to be used by the parties in *ad hoc* arbitrations is the UNCITRAL Arbitration Rules.³⁴ These rules contain a complete set of provisions concerning different questions related to the organization of arbitration proceedings, such as notice, calculation of periods of time (article 2); number of arbitrators (article 5); appointment of arbitrators (articles 6 to 8); challenge and replacement of arbitrators (articles 9 to 13); general provisions for arbitral proceedings (article 15); place of arbitration (article 16); language (article 17); evidence and hearings (articles 24 and 25); interim measures of protection (article 26); decisions (article 31); form and effect of the award (article 32); applicable law or amiable compositeur (article 33); interpretation and correction of the award (articles 35 and 36); costs (articles 38 to 40).

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.³⁵ 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.

In institutional 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.

³⁴ As it is said in the resolution of the General Assembly which approved them, “the establishment of rules for *ad hoc* arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations.”

³⁵ GRAY, Whitmore, *op. cit.*

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.”.*

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.”*

6.4.6 Confidentiality

One of the advantages of arbitration over court litigation is the possibility of keeping confidential the existence of the controversy and the way in which it is resolved. Some domestic laws or institutional rules contain provisions in this connection. However, statutory or regulatory rules are generic and may not fulfill specific needs of the parties.

For this reason, the parties must expressly agree on any special restriction to be imposed regarding the confidentiality of information relating to the case. This may comprise specific limitations on documents, written allegations or statements of third parties prepared for the arbitration, or about the award.

The UNCITRAL Notes on Organizing Arbitral Proceedings explain:

- “31. It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.
32. An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means (e.g. because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole (e.g. in the context of disclosures of information in the public domain, or if required by law or a regulatory body).”

6.4.7 The seat or place of arbitration

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 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.³⁶ Friedland and Hornick explain its importance: “Parties rarely make an explicit selection as to the law governing their arbitration

³⁶ 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.

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".³⁷

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.³⁸ 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 Pera 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."³⁹

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.

³⁷ 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.*

³⁸ 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)".

³⁹ 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.*

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 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.⁴⁰

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).

6.4.8 *The procedural law*

As we have seen, it is widely held that the parties may agree to apply a procedural law other than the law of the seat of arbitration. If, for strategic or practical reasons, the parties prefer a specific seat for the arbitration, they are not obliged to submit to the procedural law of that country.⁴¹ But an express agreement will be necessary for that purpose, since in case of silence the procedural law will be that of the seat of arbitration.

It is necessary, however, to bear in mind that under the Model Law, the place of arbitration is an exclusive factor for determining the applicable procedural law. The historical background indicates that the purpose of that law was to discourage the parties from agreeing on a procedural law other than the one applicable in the place of arbitration, although there is no prohibition expressly stated in the text of the rule.

⁴⁰ *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.*

⁴¹ *It might be easier to agree on the procedural law applicable to the arbitral proceedings than to agree on the place of arbitration. LE PERA, Sergio: “Where to vacate and how to resist enforcement of foreign arbitral awards: ISEC vs. Bidas S.A.”, op. cit.*

The factors leading to that decision appear in the Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration:

*“The strict territorial criterion, governing the bulk of the provisions of the Model Law, was adopted for the sake of certainty and in view of the following facts. The place of arbitration is used as the exclusive criterion by the great majority of national laws and, where national laws allow parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties in practice rarely make use of that facility. 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”.*⁴²

Among the practical criteria that prevailed in that decision is the importance of avoiding possible jurisdictional conflicts between courts of the country of the seat of arbitration and those of the country to whose procedural law the parties have submitted, especially when public policy rules of the applicable procedural law are involved.⁴³

6.4.9 *Determination of the language*

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.

⁴² <http://www.uncitral.org>

⁴³ BROCHES, Aron, *Commentary on the UNCITRAL Model Law*, op. cit.

The UNCITRAL Arbitration Rules (article 17) set forth that:

- “1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.
2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.”

6.4.10 Determination of the applicable substantive law or equity arbitration

One of the most significant questions to be decided by the parties when drafting the arbitration agreement is the scope of the powers conferred upon arbitrators concerning the settlement of the conflict. A first decision must involve the arbitrators’ nature, that is, whether they are arbitrators of law or *amiable compositeurs*.

Arbitrators of law decide controverted issues in accordance with the applicable legislation. The solution contained in the award is based on a rule of law. Instead, *amiable compositeurs* issue their judgment *ex aequo et bono*. They are not obliged to rule in accordance with legal principles and are enabled to found their award on equity criteria as opposed to strictly formulated rules of law.

Even though *amiable composition* was historically the natural condition for arbitration, the trend has lately been to favor arbitration of law. Nowadays most legislations and rules establish that arbitration will be *ex aequo et bono* only if the parties have expressly so agreed. In the case of silence, the arbitration shall be an arbitration of law. That is, for example, expressly provided in the UNCITRAL Arbitration Rules (article 33.2) and the UNCITRAL Model Law (article 28.3).

In the case of arbitration of law, it is important that the parties determine the applicable law.

Strictly speaking, it is preferable to use “rules of law,” as does the Model Law, rather than “law.” “Law” may be interpreted as referring to the law in a certain country. “Rules of law”, conversely, is a considerably broader expression as it even allows the application of rules derived from international conventions and uniform laws – even if they are not in force –, parts of different legal

systems or provisions of laws that are no longer in force as well as restatements or compilations, such as the UNIDROIT Principles of International Commercial Contracts. The Principles may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law. As the Principles represent a system of rules of contract law that are common to existing national legal systems or particularly adapted to the special requirements of international commercial transactions, there might be good reasons for the parties to choose them expressly as the rules applicable to their contract, in the place of one or another specific domestic law.

By “applicable law” we mean the substantive law and not the conflict of law rules. The concepts that used to restrict the parties’ free will to directly choose the applicable law have fallen into disuse. It is generally agreed that the parties are entitled to choose the rules of law applicable to the substance of the dispute, thus avoiding reference to the rules of conflict that indirectly determine the applicable law.

Under the UNCITRAL Arbitration Rules, the express designation of the law applicable to the arbitration agreement is all the more significant in view of the suppletive rule to be applied in the case of silence by the parties. Both the Model Law (article 28.2) and the Rules (article 33.1) prescribe that failing such designation by the parties, the arbitral tribunal shall apply the law determined *by the conflict of laws rules* that it considers applicable. This leads to an indetermination of the applicable substantive law, taking account of the difficulties usually arising when applying conflict of laws rules.

Some rules (ICC Rules, article 17.1) enable the arbitration tribunal to determine the law applicable to the substance of the conflict: “The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate”.⁴⁴ This provision was part of the amendment that came into force in 1998.⁴⁵

At any rate, irrespective of the substantive law that the parties –or the arbitrators, as the case may be– may have determined as applicable in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction (article 28.4, Model Law).

⁴⁴ *In the current rules, any reference to the rule of conflict of laws has been removed, to take into account the increasing tendency of arbitrators to resort to the procedure known as direct applicability method;*

DERAINS, Yves: “The revision of the ICC Rules of Arbitration. Method and objectives”, The ICC International Court of Arbitration Bulletin, Vol. 8 N° 2, December 1997.

The 1998 ICC Rules adopt the newest and most appropriate solution; the arbitrators may work through conflict rules, apply the closest connection test or to avoid any of these tools and to apply the voie directe to select the rules of law applicable to the substance of the conflict.

BLESSING, Marc: “The ICC Arbitral Procedure under the 1998 ICC Rules. What has changed?”, The ICC International Court of Arbitration Bulletin, Vol. 8 N° 2, December 1997.

⁴⁵ <http://www.iccwbo.org>

6.4.11 Recourse against award

In general terms, there two types of recourse against arbitral awards: request for appeal and request for setting aside.

The purpose of a request for appeal is that a higher organ entirely reviews the decision of the arbitrators who made the award. This type of recourse allows for revision of the substance of the award, its merits, evaluation of evidence, and the law as applied and interpreted by the arbitrators, as the case may be.

The purpose of the request for setting aside is for a court to declare the invalidity of the award contending that it does not meet the validity requirements set by the law. During the instance of annulment, the judge only controls the fulfillment of legal requirements without evaluating the rightfulness, the substance or merits of the award. The judge must only rule on the existence or non-existence of grounds that could adversely affect the validity of the award. The recourse is admissible only in the cases or situations set forth by the law.

The modern trend is to waive the request for appeal and there are only a few institutional rules and national laws that have appeal procedures. Even in those cases, the parties may agree on waiving their right to use the recourse. The most common rules point out that the award is unappealable, but the parties are allowed to agree on the appeal. There are some legal systems under which appeal is not allowed, even if it is agreed upon by the parties.⁴⁶

On the contrary, the right to set aside is generally not subject to the parties' will. Since it entails judicial control over the activity of private jurisdiction carried out by arbitrators, the right to request the courts to set aside the award is considered to be a matter of public policy. The law in only a very few countries allows the parties to waive this recourse, and when they do, the waiver is subject to certain conditions. For example, the Belgian Judicial Code (1998) states: "The parties may, by an explicit declaration in the arbitration agreement or by a later agreement, exclude any application for the setting aside of an arbitral award, in case none of them is a physical person of Belgian nationality or a physical person having his normal residence in Belgium or a legal person having its main seat or a branch office in Belgium" (article 1717.4). Similar provisions can be found in article 192 of the Swiss law (Federal Law of International Private Law of 1987) and article 126 of the Peruvian arbitration law (Law N° 26,572 of 1996).

In conclusion, when drafting the arbitration agreement, two things should be given due consideration regarding the procedural law applicable to the recourse against the award: on the one hand, which question are subject to modification and, on the other, what the suppletive rules are.

⁴⁶ The Model Law is an example of this. Article 34.1: "Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article." As it is said in the Explanatory Notes, in that provision, "recourse" means resort to a court, i.e. an organ of the judicial system of a State. A party is not precluded from resorting to an arbitral tribunal of second instance if such a possibility has been agreed upon by the parties.

As regards the motion for appeal, there may be several cases:

- The procedural law states that the award is appealable. In this case, if the parties do not want to raise the recourse, they should expressly waive it.
- The procedural law states that the award is unappealable, but allows for agreement to the contrary. In this case, if the parties want an instance of broad revision, they must expressly agree on it.
- The procedural law states that the award can never be appealed before courts, regardless of what the parties agree. In this case, they are not allowed to incorporate the recourse, not even by express agreement. The parties may, nevertheless, agree on a recourse before an arbitral tribunal of second instance, if one exists.

In relation to the request for setting aside, there are only two possible cases:

- The law does not provide the possibility of waiving the recourse. In this case, any agreement to the contrary by the parties will be invalid.
- The law allows the parties to waive the recourse or to restrict the grounds for raising it. In this case, they should check whether total or partial waiver of the recourse is provided for by the law.

6.5 Summary

There are many questions to take into consideration at the time of entering into an arbitration agreement.

One of them is whether it is advisable to agree on arbitration to settle future controversies or do so only in the face of real and existing conflicts. In practice, only in a few cases do the parties manage to agree on submitting to arbitration when confronted with actual conflicts. In order to ensure the possibility to resort to arbitration, the parties must agree to do so in the original contract.

When drafting the agreement, especially if it is an arbitration clause (as defined in 5.2.1.), the parties must take the need for clarity into account. The agreement must provide certainly and without doubt for arbitration. It is advisable to avoid the use of ambiguous or confusing terms that may later give rise to disagreement. Especially when defining the scope of conflicts submitted to arbitration, it is necessary to use broad formulas that cannot be interpreted as restrictive.

A first decision to make concerns the kind of arbitration to agree upon. This may be either *ad hoc* or institutional. The advantages or disadvantages of each cannot be determined a priori, although it should be admitted that institutional arbitration is more predictable and requires less cooperation from the opposing party.

In the case of institutional arbitration, the parties must carefully choose the institution to which they will submit their disputes. Given the great number and variety of arbitral institutions, it is necessary to analyze the provisions contained in their rules, the manner in which arbitrators are selected and costs. In order to avoid confusion in the identification of the institution or misinterpretations concerning the scope of the agreement, it is recommendable to adopt the model clauses commonly used by the institution.

In *ad hoc* arbitration, it is essential that the arbitration agreement contain the manner in which arbitrators are to be appointed. One possible—and advisable—way is to designate in the agreement an appointing authority to prevent the arbitration from being delayed or frustrated by the lack of cooperation of one of the parties to designate the arbitrators. In institutional arbitration, even though the rules contain provisions on this issue, the parties are generally authorized to agree on a different manner of appointing arbitrators.

It is also important to expressly agree on the number of arbitrators who will participate in the arbitral tribunal. In institutional arbitrations, this is normally provided in the rules, although with a suppletive nature. The parties may also agree on special requirements to appoint arbitrators, such as profession, nationality, etc. This provision helps to assure the appointment of arbitrators with the qualifications desired by the parties.

In choosing institutional arbitration, the parties also submit to the rules of the institution. However, they may want to incorporate some specific procedural rules that are not contained in the rules, or modify some of the regulatory ones. Before doing so, they should consult with the institution. In *ad hoc* arbitration, where the parties must agree on the rules of procedure, the UNCITRAL Arbitration Rules are a good option.

If the parties are particularly interested in confidentiality, they should include a provision on the matter. Even in institutional arbitration, regulatory provisions are often generic and may therefore fail to meet the parties' needs.

Determining the place of arbitration is one of the most important questions to consider regarding the arbitration agreement. The most significant aspect is that the place of arbitration usually also determines the procedural law applicable to the arbitration and the extent of the court's jurisdiction. Apart from this, there are considerations of a strategic (neutrality and effectiveness of the award) and practical (comfort and costs) nature that make it convenient to expressly agree on such questions. Hence, even in institutional arbitrations it is advisable that the seat of arbitration be chosen by the parties themselves.

The parties are usually entitled to agree on the application of a procedural law other than the one of the seat of arbitration. However, this is not to be recommended. In the absence of agreement, the procedural law will be the one of the seat of arbitration.

The question of language in arbitration is more important than it seems at first glance. The selection of the language also points to a certain cultural profile of arbitrators. In institutional arbitration, a lack of agreement between the parties as to the language is made up for by the institution. In *ad hoc* arbitration, this question is resolved by the arbitral tribunal.

Another essential question to be considered by the parties concerns the rules applicable to the substance of the dispute. The parties may decide that the arbitrator will rule *ex aequo et bono* or that he will rule in accordance with rules of law. If they want arbitrators to be *amiable compositeurs*, they must, according to the most widespread principle, expressly agree so, since in the case of silence the arbitration will be an arbitration of law. Once this type of arbitration is agreed upon, the determination of the rules of law applicable to the substance of the dispute is important because it provides certainty and predictability to the solution to the conflict.

Some laws provide for a motion for appeal against awards. When available, this recourse, which allows for broad review of the award, the parties may waive it or agree on it under certain conditions. On the contrary, the right to request that the award be set aside, whereby only the validity of the award is revised, is almost never subject to the parties' will. Exceptionally, some domestic laws allow the parties to waive this recourse only under certain conditions (usually for international arbitrations that do not involve nationals).

6.6 Test your understanding

1. **What would be the effects of a clause providing that “should any dispute arise between the parties, the latter may settle them by arbitration”?**
2. **If you want to write a broad arbitration clause: Is it advisable to list all possible disputes to arbitrate? Should you refer to “claims” or to “differences”?**
3. **Suppose you are the lawyer of Computer Lab Co. Your client is clinching a deal for supplying software to Best Ideas, Inc. Both companies are old rivals, to such an extent that you are surprised that a contract was signed. You are convinced that Best Ideas, Inc. will not fulfill the contract and that it will resort to any available defense when the time comes. Your client asks you to include an arbitration clause into the contract. Would you suggest an *ad hoc* or an institutional arbitration?**
4. **What powers are normally delegated to the arbitral institution when the parties submit to an administered arbitration? Can they restrict them? May they modify the provisions contained in the rules?**
5. **What mechanisms for the appointment of arbitrators can the parties agree upon in a clause that provides for submission to *ad hoc* arbitration? May the parties in an institutional arbitration agree on a mechanism to appoint the arbitrators other than the one set out**

- in the rules? Can the parties establish special qualifications for the arbitrators to be appointed?
6. What is the rule provided by the UNCITRAL Arbitration Rules for appointing arbitrators? What powers do the parties have according to these Rules?
 7. How do the parties determine the procedural rules in an *ad hoc* arbitration? Can they agree on the application of an institutional set of rules if they have not submitted to the administration of the entity in question? What are the advantages of the UNCITRAL Arbitration Rules?
 8. What legal consequences normally arise from the seat of the arbitration? How is the seat of the arbitration determined if the parties have made no provisions for the issue? What criteria must be taken into consideration when choosing the seat of the arbitration? Is it advisable to agree on a country or a city?
 9. May the parties choose the procedural law applicable to the arbitration? Can such law be other than the one of the seat of the arbitration? What does the Model Law say in this respect?
 10. How is the language of the arbitration determined in institutional arbitration in the absence of agreement by the parties? What happens in *ad hoc* arbitration?
 11. Suppose you are the lawyer of Pasta Asciutta SpA, a pasta manufacturing company. You should include an arbitration clause in the contract that your client is signing with Il Mulino SpA for flour supply. The parties believe that the only likely conflict to arise concerns the quality of the flour that Il Mulino SpA must deliver to your client. Would you recommend an arbitration of law or an *ex aequo et bono* arbitration?
 12. Suppose you are in charge of administering arbitration proceedings in an arbitral institution that has adopted the UNCITRAL Arbitration Rules. A request for arbitration is made on account of a clause that reads: "Any dispute arising out of or relating to this contract shall be settled by arbitration in accordance with the XX Arbitration Rules". The plaintiff asks for a *ex aequo et bono*. The defendant opposes the idea and requests an arbitration of law. How do you solve the question? How can you account for your choice?
 13. What is the rule provided in the Model Law for determining the applicable law in the case of silence by the parties? May arbitrators directly apply the rules of law applicable to the substance of the conflict? Or shall they apply the substantive law determined by the conflict of laws rules?
 14. Suppose you are one of the parties to an arbitration agreement governed by the Model Law. Are you allowed to incorporate into the agreement a provision to make the award appealable?
 15. Is the request for setting aside a waivable right? Can the parties validly agree to exclude the nullification motion?

7. CASE STUDIES

After having studied this module, you should be able to handle the following assignments and answer the following questions.

7.1 Cases to be studied in groups

1. You are a member of an arbitral tribunal that has to decide an arbitral complaint for breach of contract filed by Connecting Airlines Co. against Catering, B.V. The procedural law applicable to the arbitration is the text of the Model Law. On answering the arbitral complaint, Catering B.V. raises the invalidity of the main contract as a defense and, on the basis of this, the invalidity of the clause contained in the contract. It informs and proves that, before commencing the arbitration proceedings, Catering B.V. filed a complaint against Connecting Airlines Co. before a court of law to request the invalidity of the contract. The judge has not solved the question yet. You believe *prima facie* that the contract is valid and that the grounds for invalidity contended are not reasonable.
 - Do you continue the arbitration proceedings or do you suspend them?
 - How do you account for your decision?
 - Can the court oblige you to suspend the arbitration proceedings?
2. You work at the Legal Department of Acme, Inc. In the contract for the supply of raw material signed by your client with Supply Co., the parties thereto included a clause in which they would submit to arbitration all questions relating to the contract. Your client is sued by Supply Co. before the court of Feudalia (a country that has adopted the text of the Model Law to govern arbitration) claiming that Acme Inc. did not pay for the goods received.
 - What strategy would you advise your client for answering the legal complaint?
 - What defenses can you raise to prevent the court proceedings from continuing?
3. You are a member of the court of Feudalia, a country that has adopted the Model Law. A company called Pasta Asciutta SpA files before your court a request for setting aside an arbitral award that compelled the company to pay the opposing party, Il Mulino SpA, for damages derived from the breach of an agreement for the sale of flour. Pasta Asciutta SpA contends, as a ground for the invalidity of the award, that there was no written agreement as required by the law. In effect, the contract does not contain any arbitration clause. You analyze the arbitral proceedings and realize that on requesting arbitration, Il Mulino SpA

said that there had been an oral agreement between the parties to submit to arbitration all the question relating to that contract. On answering the request for arbitration, Pasta Asciutta SpA just defended itself and denied having failed to fulfill its obligations.

- Would you set aside the award?
 - How do you account for your decision?
4. You are a member of the Supreme Court of Justice of Feudalia, a country that has ratified the New York Convention. Pending resolution before your court is a request for recognition and enforcement of an arbitral award made in Alquimia, a State that has also ratified the New York Convention. The defendant resists arbitration arguing that the laws of Feudalia require that the arbitration agreement be signed before a notary public.
- Can you refuse enforcement of the award on that ground?
 - What laws must you apply to determine the validity of the arbitration agreement?
5. You work at the Legal Department of the Venezuelan subsidiary of a Canadian company that is negotiating an important international contract with a company from Singapore. During the drafting process, the lawyer for the opposing party proposes the inclusion of the following clause:

“In case of necessity, the parties may agree on submitting to arbitration claims arisen from the present contract related to its interpretation. In such case, except otherwise agreed, Arbitration Rules of the Chamber of Commerce should apply”.

- Would you advise your client to agree to it?
- What corrections or modification would you make to it, if any?
- Write a new version of the clause to propose to the lawyer for the other party.

7.2 Mastery test- Yes or No test

After answering the questions with a “yes” or “no” or selecting an option in the multiple choice form, you will give a brief explanation.

	YES	NO
<ul style="list-style-type: none"> An agreement to submit to arbitration disputes that may arise is called: <ol style="list-style-type: none"> Submission agreement Arbitration agreement Arbitration clause 		
<ul style="list-style-type: none"> When the parties agree on arbitration as a clause in a contract, the parties reserve the right to file an action before a court until a submission agreement is signed. 		
<ul style="list-style-type: none"> The parties may agree on a specific law as applicable to the arbitration agreement. 		
<ul style="list-style-type: none"> The New York Convention contains no suppletive rules for determining the applicable law to the arbitration agreement in the absence of an agreement between the parties. 		
<ul style="list-style-type: none"> The Model Law does not specify the capacity of the parties for the validity of the arbitration agreement. 		
<ul style="list-style-type: none"> It is a validity requirement of the arbitration agreement that it contained in the same document as the main contract. 		
<ul style="list-style-type: none"> There is no domestic legislation admitting the validity of an arbitration agreement that does not contain the signatures of the parties. 		
<ul style="list-style-type: none"> The parties may generically agree to submit to arbitration “any dispute arising out of any legal relationship”. 		
<ul style="list-style-type: none"> The death of one of the parties is generally recognized as a ground for termination of the arbitration agreement. 		
<ul style="list-style-type: none"> The invalidity of the main contract does not necessarily affect the validity of the arbitration agreement contained in that contract. 		
<ul style="list-style-type: none"> A party who appointed an arbitrator is precluded from raising a plea that the arbitral tribunal does not have jurisdiction. 		
<ul style="list-style-type: none"> The arbitrator’s ruling on his own jurisdiction: <ol style="list-style-type: none"> Is always appealable before a court Can never be appealed Depends on what the parties have agreed upon 		
<ul style="list-style-type: none"> When writing an arbitration clause, it is advisable to be meticulous and list all the matters to be submitted to arbitration. 		
<ul style="list-style-type: none"> <i>Ad hoc</i> arbitration is recommendable for settling already existing conflicts. 		
<ul style="list-style-type: none"> Under the UNCITRAL Arbitration Rules, the appointing authority to appoint arbitrators is the Secretary-General of the United Nations. 		

	YES	NO
<ul style="list-style-type: none"> • If the parties have not previously agreed on the number of arbitrators, the UNCITRAL Arbitration Rules provide that three arbitrators shall be appointed. 		
<ul style="list-style-type: none"> • The parties may agree to apply the rules of an arbitral institution even if they have not submitted to the administration of such institution. 		
<ul style="list-style-type: none"> • The election of the seat of the arbitration indirectly determines: <ul style="list-style-type: none"> (a) The substantive law applicable to the arbitration (b) The procedural law applicable to the arbitration 		
<ul style="list-style-type: none"> • Once a place has been agreed upon as the seat of the arbitration, all procedural acts must be carried out there. 		
<ul style="list-style-type: none"> • In the absence of agreement by the parties concerning the seat of the arbitration, the arbitrators are empowered to determine it. 		
<ul style="list-style-type: none"> • In the absence of an express agreement of the parties, the arbitration shall be: <ul style="list-style-type: none"> (a) <i>Of laws</i> (b) <i>Ex aequo et bono</i> (c) Determined by the arbitrators 		
<ul style="list-style-type: none"> • In the absence of agreement by the parties, the applicable substantive law must be determined by the court of the place of the arbitration. 		
<ul style="list-style-type: none"> • In arbitration of law the arbitrators cannot apply commercial usages and customs. 		
<ul style="list-style-type: none"> • The parties are free to agree on a motion for appeal against the award. 		

8. FURTHER READING

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