DRAFTING AN ARBITRATION CLAUSE

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Abstract

Entrance to an adequate arbitration is not as simply as including an arbitration clause in a contract. When parties wave its right to such an essential right as ordinary courts proceedings, they have to be extremely diligent on how they do it, and in respect to who they do it. This article provides a notion of how to avoid unwanted consequences when introducing an arbitration agreement, and how to duly anticipate contingencies in its wording.

"Being the consent of the parties the main door to enter arbitration, it shall not be disregarded, neither forced".

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1. Introducing arbitration.

International commercial arbitration is an alternative method of resolving disputes arising out of commercial transactions between private parties across national borders that allows the parties to avoid litigation in national courts **[Georgetown University Law Library[1]]**.

As said by Prof. Moses, arbitration is "*a private system of adjudication*". Parties who arbitrate have decided to resolve their disputes outside any judicial system, being that in most instances arbitration involves a final and binding decision, producing an award that is enforceable in a national court **[Moses, p. 1[2]]**.

Now, parties decide whether the arbitration will be conducted by an international arbitration institution [*ex. g.: ICC, LCIA, ICDR*], or will be ad hoc, which means no institution is involved **[Rodriguez Roblero, p. 79[3]]**.

1 Georgetown University Law Library. Available online at: http://guides.ll.georgetown.edu/InternationalCommercialArbitration

2 MOSES, Margaret. The Principles and Practice of International Commercial Arbitration, second edition. P. 1.

3 RODRÍGUEZ ROBLERO, María Inmaculada. "*Impugnación de acuerdos sociales y Arbitraje*". Memoria para optar al grado de Doctor. Available online at: http://eprints.ucm.es/11611/1/T32148.pdf

Furthermore, the rules that will apply are the rules of the arbitration institution or the rules chosen by the parties.

In sum, arbitration gives the parties substantial autonomy and control over the process that will be used to resolve their disputes.

It can be affirmed that this is a really important issue in international commercial arbitration, since the parties do not want to subject their dispute to the jurisdiction of the other party´s court system. Arbitration avoids the fear each party has to the other party´s "home court advantage".

2. The regulatory framework

The regulatory framework of arbitration is to be defined as an inverted pyramid, in which the point is facing down –containing the arbitration clause-, and affecting only the parties of the agreement **[Moses, p. 6[4]]**.

Above that point/arbitration agreement, are the International Treaties, International Arbitration Practice, National Laws, and Arbitration Rules.

It can be said hence, that above the arbitration agreement, the framework expands in terms of scope and applicability beyond the immediate parties.

3. Some basics about the Arbitration Agreement.

The Arbitration Clause is commonly known as a "creature of contract" **[Steelworkers of America v. American Manufacturing Co.[5]; Henderson, p. 894[6]; Born, 504[7]]**. The arbitration agreement gives the arbitrators the power to decide the dispute and defines the scope of that power. As said by many scholars, in essence, the parties create their own private system of justice **[Drahozal, p. 578[8]; Murray, p. 133[9]; Hazel Genn, p. 9, 10[10][11]]**.

Since the arbitration agreement constitutes the wave of an important right –the "judiciary justice"- and creates other rights, and because the arbitration clause affects how the entire arbitration process will proceed, careful drafting is required **[Pereira Campos, p. 86[12]]**.

4 MOSES, Margaret. The Principles and Practice of International Commercial Arbitration, second edition. P. 6

5 U.S. Supreme Court, Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). Decided June 20, 1960. Page 363 U. S. 570. Available online at: https://supreme.justia.com/cases/federal/us/363/564/case.html

6 HENDERSON, Alastair. "*Lex Arbitri, Procedural Law and the Seat of Arbitration: Unravelling the laws of arbitration process*". Singapore Academy of Law Journal, 2014. Available online at: http://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/335/Citation/JournalsOnlinePDF

7 BORN, Gary. "International Commercial Arbitration: International and USA Spects commentary and Materials". Kluwer Law International, Apr 26, 2001, p. 504.

8 DRAHOZAL R., Christopher. "*Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System*". 9 Kan. J.L. & Pub. Pol'y 578 (1999-2000). P. 578.

9 MURRAY L., Peter. "*Privatization of Civil Justice*". 15 Willamette J. Int'l L. & Dis. Res. (2007).

10 HAZEL GENN, Damel. "*Why the Privatization of Civil Justice is a rule of Law issue*". 36th F A Mann Lecture, Lincoln's Inn. 19 November 2012. Pp. 9-10. Available online at: https://www.laws.ucl.ac.uk/wp-content/uploads/2014/08/36th-F-A-Mann-Lecture-19.11.12-Professor-Hazel-Genn.pdf

11 Prof. Hazel points out that "*ICC Annual reports shows a gradual upward trend in arbitrations*".

12 PEREIRA CAMPOS, Santiago. Autonomía de la Cláusula Arbitral y competencia del Tribunal Arbitral para resolver sobre su competencia en el arbitraje interno uruguayo. Revista de Derecho de la Universidad de Montevideo. Available onli-

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Now, the arbitration agreement is frequently contained in a clause or clauses that are embedded in the parties´ commercial contract. Hence, it is entered before any dispute has arisen between the parties.

Notwithstanding, if the parties did not include an arbitration clause in their commercial contract and dispute arises, they can nonetheless enter into an agreement to arbitrate, known as arbitration "*Submission Agreement*" **[Moses, p. 18; Khodeir/Ghoneim, ¶ 2[13]]**.

Despite the fact that the arbitration agreement is generally contained in the main commercial contract between the parties, most laws consider the arbitration clause as a separate agreement **[Llopis-Llombart, Pág. 5[14]; Rankin v. Allstate ins Co., 336[15]; UNCITRAL Model Law, Art. 16; English Arbitration Act ¶ 30; LCIA Rules, Art. 23]**. Because the arbitration clause is considered as a separate agreement, it is not affected by claims of invalidity of the main contract, and still confers jurisdiction on the arbitrators to decide the dispute **[Prima Paint Corp v. Flood & Conklin Mfg. Co., 1967[16]; Buckeye Chek Cashing, Inc v. John Cardegna et al, 2006[17]]**.

Regarding the Validity of the arbitration agreement, it must be said that it is a critical issue.

As already said, being that the arbitration clause is a creature of contract, it is no other than a creature of consent, hence it should be given freely. Parties will not be compelled to arbitrate if they have not voluntarily contracted to use this mechanism to resolve their disputes **[Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth; Litton Fin. Printing Div. v. NLRB]**.

As said by Prof. Daly[18], "*while contracts generally do not have to be in writing to be enforceable, arbitration clauses must be in writing to be valid*" **[Daly, p. 15[19]; New York Convention, Art. 2; UNCITRAL Model Law, Art. 7; English Arbitration Act, ¶ 5]**.

In order to be valid, enforceable, and effective, an arbitration clause needs to achieve at least three elements:

- designate arbitration as a mandatory means of dispute resolution,
- define the scope of covered disputes,
- insure that the law applicable to the arbitration procedure is compatible with the mandatory provisions referred by the law of the seat.

¿Which kind of arbitration clause is to be chosen?

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ne at: http://revistaderecho.um.edu.uy/wp-content/uploads/2012/12/Pereira-Campos-Autonomia-de-la-Clausula-Arbitral-y-competencia-del-Tribunal-Arbitral-para-resolver-sobre-su-competencia-en-el-arbitraje-interno-uruguayo.pdf

13 KHODEIR, Omar / GHONEIM, Ahmad. "Know your type three types of arbitration agreements in a nutshell". June, 2017.

14 LLOPIS-LLOMBART, Marco. Asimetría, separabilidad, sinalagma. P. 5.

15 USA Court of Appeal, First Circuit, 14/07/2003 in re Rankin v. Allstate ins Co., 336.

16 USA Supreme Court, Prima Paint Copr. V. Flood & Conklin Mfg. Co., 1967.

17 USA Supreme Court, Buckeye Chek Cashing, Inc. v. John Cardegna et al., 2006.

18 Prof. Joseph Daly is a labor arbitrator for the U.S. Federal Mediation and Conciliation Service, and the Minnesota Bureau of Mediation Services. He also arbitrates for a number of other states, including Hawaii, Wisconsin, and Michigan, and the City of Los Angeles, as well as the Virgin Islands. Daly is also an international arbitrator for the American Arbitration Association. He previews U.S. Supreme Court cases in school law for the ABA.

19 DALY, Joseph L. "Resolving International Business Disputes by Arbitration".

As identified by arbitrator Bishop[20], arbitration clauses may be classified into three categories: basic clauses, general clauses and complex clauses.

Basic clauses may be defined as those that include only the basic provisions -those that are essential or particularly important to a viable arbitration agreement-.

One could say that General clauses represent the most common range of arbitral provisions for substantial transactions. They are more involved than basic clauses, including the provisions outlined above and certain optional provisions that are useful, relatively low risk and not uncommon **[Bishop, p. 24[21]]**.

Complex clauses are those that are more involved, those that include unusual provisions -in addition to the basics- **[Bishop, p. 25]**.

As said by Prof. Daly, if parties want to retain more control over the arbitration proceeding, they should draft a more detailed arbitration clause. Notwithstanding, detailed is not always a synonym of "*well drafted*".

What would be a detailed arbitration clause? *"A more detailed arbitration clause will address: the method of selection and number of arbitrators; arbitrator qualifications; language used in the arbitration; governing law to be applied during the arbitration; conditions precedent to arbitration; preliminary relief; document discovery; duration of arbitration proceedings; remedies; reasoned opinion accompanying the award; assessment of attorney's fees; confidentiality; and appeal"* **[Daly, p. 18[22]]**.

4. Pathological arbitration clauses.

Since when negotiating and drafting a contract, parties too often do not focus on drafting the arbitration clause, it can be rendered as a "pathological clause" **[Moses, p. 43; Welser/Molitoris, p. 17[23]]**. A too narrowly drafted arbitration clause as well as a too widely drafted one, can determine the so called "*midnight clause*".

For example, as pointed out by Prof. Daly, arbitration clauses may become "pathological" when the clause is designed in order to give one side a disproportionate advantage.

Many kinds of defects can affect a clause, rendering it as a "pathological" one.

A provision of the arbitration clause may be so defective, that it invalidates the entire arbitration agreement.

Not few arbitration agreements had been rendered pathological for being –for example- ambiguous, equivocal, containing mistaken information, using the wrong name for an arbitral institution (or its rules), or for choosing a specific arbitrator that may be deceased by the time an arbitration commences, etc.

20 BISHOP, Doak. "A Practical Guide for Drafting International Arbitration Clauses". King & Spalding. Served as arbitrator (including chairman of panels and sole arbitrator) in approximately 80 arbitrations, including ICSID, ICC, LCIA, UNCITRAL, ICDR, AAA, IACAC, CPR and ad hoc arbitrations.

21 BISHOP, Doak. A Practical Guide For Drafting International Arbitration Clauses. King & Spalding. P. 24

22 DALY, Joseph L. Resolving International Business Disputes by Arbitration.

23 WELSER, Irene / MOLITORIS, Susanne. "The Scope of Arbitration Clauses – Or "All Disputes Arising out of or in Connection with this Contract ...". Available online at: http://www.chsh.com/fileadmin/docs/publications/Welser/Welser-Molitoris_AYIA_2012.pdf

Not less important is the fact that, in some circumstances, the designed arbitral institution may disappear. Hence, in order to avoid pathological clauses in case the parties intend to pursue arbitration, they should agree on a broad arbitral clause.

Ex. g.:

"*All disputes arising out of or in connection with this Agreement shall be settled amicably and in good faith between the parties. The arbitration shall be conducted under the* (ex. g) *Rules of Arbitration of the International Chamber of Commerce (the "*Rules*") and in line with international arbitration practice.*

*The Arbitral Tribunal shall consist of three arbitrators, appointed in accordance with the Rules. The Parties may select arbitrators who are not on the List of Arbitrators maintained by International Chamber of Commerce (the "*ICC*"). The President of the Arbitral Tribunal shall be appointed by the President of ICC.*

The seat of arbitration shall be [City, Country].

The arbitration proceedings shall be conducted in English.[24]

In the event the ICC, for any circumstance cease to exist, the arbitration shall be conducted in accordance with the Rules of […], and the guidelines previously established in regard to the number of arbitrators, place and nature of the arbitration, which is in law and not by equity. There shall be three arbitrators. The parties agree that one arbitrator shall be appointed by each party, and the third presiding arbitrator shall be appointed by agreement of the two party-appointed arbitrators[25]*. Arbitration proceedings will be conducted in accordance to the ICC Rules, which is considered as incorporated in this contract, as well as further provisions in regard to the award, terms and other provisions*".

There are, thus, certain principles that should be followed in order to avoid pathological clauses **[Bishop, p. 26]**.

The **first principle** requires avoidance of provisions that offend mandatory rules of the applicable substantive or procedural law.

The **second principle**, is to avoid alterations of arbitral rules fundamental to the operation of the administering institution.

And the **third principle requires** respect for the drafting rules designed **to prevent pathological mistakes, which may be summarized as**:

- *the intent to require binding arbitration should be clearly and unequivocally stated;*
- *the drafter should verify the existence and proper name of the institution designated to*

24 This first part of the arbitration agreement is partially based on the model provided by The Problem of the Twenty Fourth Annual Willem C. Vis International Commercial Arbitration Moot, April 7-13, 2017. Page 6. Available online at: https://vismoot.pace.edu/media/site/24th-vis-moot/the-problem/24thVisMootProblem_withPO2.pdf

25 Sentence of appointment is based on "*Practical Law Publishing Limited and Practical Law Company, Inc*" proposal, p. 51. Available online at: https://files.skadden.com/sites%2Fdefault%2Ffiles%2Fpublications%2FPublications2153_0.pdf

administer the arbitration;

- *the parties should avoid naming a particular person as arbitrator in their agreement;*
- *the parties should avoid too much specificity when imposing qualifications for the arbitrators;*
- *the parties should insure that any institution named to act as appointing authority will agree to fulfill its mandate;*
- *the parties should insure that the procedure adopted is clear, workable, and not confused or conflicting;*
- *if deadlines are imposed for action by the institution or arbitrators, generally, either they should be made precatory or extensions should be permitted in the sole discretion of the institution, the arbitrators or a court;*
- *if a condition precedent to arbitration is adopted, either a deadline for the occurrence of the condition or the means of satisfying it should be clearly stated.*

As pointed out in the 2016 Latin-American International Commercial Arbitration Moot Problem[26], the unwanted extension of the arbitral clause to non-signatories is a must-deal-with issue.

5. Drafting the arbitration agreement.

Even if not pathological, the clause may not provide a process that is efficient or beneficial to the parties. That is why a well drafted arbitration clause is so important. To ensure proper functioning of the arbitration, the agreement should be drafted with a great care. A well drafted arbitration clause, directly reverberates on how successfully, fairly and efficiently the arbitration proceeding will be.

Many scholars hold that a short and simple arbitration clause is sufficient, and that there is no need for a complex clause **[Lew/Mistelis/Kroll, p. 166[27]]**. In light of that, many arbitrators consider that the simple model clause provided by the arbitral institution chosen by the parties (if so), is sufficient.

But if the parties chose an ad hoc arbitration, logically they will need to spell out more specifics in their arbitration clause.

Some worldwide known arbitration clauses´ wording, goes from "*all disputes arising out of or in connection with the present contrac*t"[28], to "*all disputes arising out of this contract or related to its violation, termination or nullity*"[29], or even "*any dispute arising out of or in*

26 The Moot is co-organized by University of Buenos Aires and Jurisprudence University of Rosario, Bogotá. Available online at: http://www.derecho.uba.ar/internacionales/competencia_arbitraje_ediciones_anteriores.php

27 LEW, Julian / MISTELIS, Loukas / KROLL, Stefan. "Comparative International Commercial Arbitration". 2003. P. 166 ¶ 8 – 5.

28 ICC standard clause, www.iccwbo.org/court/arbitration/id4114/index.html (last visited May 21, 2012).

29 VIAC standard clause, www.viac.eu/en/recommended-arbitration-clause.html (last visited May 21, 2012)

connection with this contract, including any question regarding its existence, validity or termination"[30].

Now, -as Welser and Molitoris point out [**Welser/Molitoris, p. 20**[31]]- common law Courts have traditionally distinguished between narrowly and widely drafted arbitration agreements. While the later may prevent the fragmentation of disputes between different forums and avoid additional complications arising when the underlying contract itself turns out to be invalid, it is to be taken into account that On an international level, courts tend to apply a broad interpretation to the scope of arbitration agreements **[Kroller, p. 260**[32]**]**. So, it could lead to include unwanted non-signatories, as well as unwanted issues that may be accidentally related to the contract.

U.S Courts still held the same view **[Cape Flattery Ltd v. Titan Maritime LLC**[33]**]**. In their judgment, widely drafted clauses encompass not only all disputes that may arise out of the contract, but also those connected with it. On the opposite, narrowly drafted clauses only include disputes on strict contractual issues **[Welser/Molitoris, p. 20**[34]**]**.

<u>There are certain issues that must be regulated by the arbitration clause, such as:</u>

- Choice of Arbitrators; - Seat of the Arbitration (the law of the seat establishes the "nationality" of the award); - Language of the Arbitration;
- Substantive Law; - Objective arbitrability (that determines the subject matters which can be referred to arbitration. An award may be set aside due to non-arbitrability of the subject-matter of the dispute). – Subjective arbitrability (it is important to clearly identify the parties).

As additional provisions, the parties should address:

- IBA Rules on Taking Evidence (Document Disclosure);
- Interim Relief (subject to the extent permitted by the lex arbitri, the parties should consider to provide the arbitral tribunal the power to issue preliminary relief, while preserving their ability to seek interim relief from the courts **[Haber/Bédard, p. 51**[35]**]**); - Security for Costs (applicable only to those parties whose prevailing rule

30 LCIA standard clause, www.lcia.org/Dispute_Resolution_Services/, LCIA_Recommended_Clauses.aspx (last visited May 21, 2012).

31 WELSER, Irene, MOLITORIS, Susanne. "The Scope of Arbitration Clauses – Or "All Disputes Arising out of or in Connection with this Contract …". Available online at: http://www.chsh.com/fileadmin/docs/publications/Welser/Welser-Molitoris_AYIA_2012.pdf

32 KROLLER, Christian. "Die Schiedsvereinbarung ["The Arbitration Agreement"], in Lieb- scher/Oberhammer/Rechberger (eds.), Schiedsverfahrensrecht I (2012) 91-337.

para. 3/260.

33 Cape Flattery Ltd v.Titan Maritime, LLC (U.S. Court of Appeals, 9thCircuit 2011).

Available online at: http://cases.justia.com/federal/appellate-courts/ca9/09-15682/09-15682-2011-07-26.pdf?ts=1411063880

34 WELSER, Irene / MOLITORIS, Susanne. "The Scope of Arbitration Clauses – Or "All Disputes Arising out of or in Connection with this Contract …". Available online at: http://www.chsh.com/fileadmin/docs/publications/Welser/Welser-Molitoris_AYIA_2012.pdf

35 HABER K., Lea / BÉDARD, Julie. "*Standard Arbitration Clauses for the AAA, ICDR and ICC*". Practical Law The Journal | July/August 2010. Available online at: https://files.skadden.com/sites%2Fdefault%2Ffiles%2Fpublications%-

is "looser pays");

- Legal Fees and Costs (and "*recoverability*" of legal fees);
- Confidentiality (which may encompass: the existence of the arbitration itself; any documents prepared or created for the arbitration; any evidence submitted by the parties (except for documents that are publicly available); and any correspondence from the arbitral organization or the tribunal (including procedural orders, interim and final awards, etc.) **[Pieper, p. 14[36]]**;
- The parties intent of a "multi-party agreement", or including a clause of "Non-Third Parties" (in order to avoid non signatories to compel arbitration).

If wanted, the parties could agree on an "*Expedited Arbitration*" or fast-track arbitration. In order to do so, they should provide for specific deadlines for filings and tribunal rulings. Nevertheless, to preserve the jurisdiction of the tribunal, this deadlines should be subject to discretionary extensions **[Haber/Bédard, p. 51[37]]**. This is not a recommended process when confronting a complex arbitration.

It must be pointed out that Document Disclosure is a really important and critical issue. As a general practice, document disclosure in internal arbitration is much more limited compared to U.S. style Discovery.

In international arbitration, the terms "discovery" and "disclosure" both refer to tribunal-ordered document production for its use in substantiating the Parties' claims in the arbitral proceedings **[Born, p.2320[38]; Savage/McIlwarth, ¶ 5-187[39]; Marghitola, p. 1[40]]**.

As discovery is very limited in international arbitration **[United Nuclear v. General Atomic; Born 1[41], p. 484; Briner, p. 160[42]]**, the term is not well seen. Hence, it is considered to be a misnomer of disclosure **[Born, p. 2321]**.

Hence, this kind of misunderstandings must be avoided by a detailed arbitration clause.

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36 PIEPER, Thomas N. "Drafting Arbitration Clauses". New York City – April 1, 2014

Available online at: http://www.americanbar.org/content/dam/aba/events/international_law/2014/04/aba-nysba-international-boot-camp/CrossBorder11.authcheckdam.pdf

37 HABER K., Lea / BÉDARD, Julie. "*Standard Arbitration Clauses for the AAA, ICDR and ICC*". Practical Law The Journal | July/August 2010. Available online at: https://files.skadden.com/sites%2Fdefault%2Ffiles%2Fpublications%2FPublications2153_0.pdf

38 BORN, Gary, "International Commercial Arbitration", Kluwer International Law, Second Edition.

39 MCILWRATH, M. / SAVAGE, J., "International Arbitration and Mediation: A Practical Guide". Kluwer International Law, 2010.

40 MARGHITOLA, Reto. "Document Production in International Arbitration". International Arbitration Law Library, Vol. 33, Kluwer Law International, 2015.

41 BORN, Gary, International Commercial Arbitration: Law and Practice, Kluwer International Law, 2001.

42 BRINER, Robert, "Domestic Arbitration: Practice in Continental Europe and its lessons for Arbitration in England in Arbitration International", Oxford University Press and LCIA, 1997.

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Another important issue is the Law governing the Arbitral Proceedings (*lex arbitri*).

The lex arbitri is almost always the law of the place of arbitration. Even if it is mostly a procedural law, it also has some substantive elements. Why is an important –and also critical- issue? Because –as pointed out by Prof. Margaret Moses **[Moses, p. 68]**- the line between the substantive and the procedure is not always clear, and is not always viewed in the same way in different countries.

This is to be complemented with the Rules governing the Arbitral Proceedings. Since very few of the procedural requirements of the lex arbitri are mandatory, the parties may choose arbitration rules that will prevail, such as the ***International Bar Association´s Rules on the Taking of Evidence*** in International Arbitration. These rules will be the most important guide for conducting the proceedings.

Another issue that is extremely important, is to decide whether the arbitration clause will allow non signatories to participate in the proceedings or not.

Firstly, it must be taken into account that there are mainly six theories of extension of the arbitration clause to non-signatories: incorporation by reference, assumption, agency, veil-piercing/alter ego, estoppel, and third-party beneficiary **[Reiner, p. 83**[43]**; Born, p. 1197; Moses, p. 38]**, and additional theories such as implied consent, assignment, novation, guarantee clauses, succession by operation of law, subrogation and the group of companies doctrine **[Hanotiau, pp. 49-99**[44]**; Hosking, p. 469**[45]**]**.

Now, in order to avoid an unwanted extension [*Ex. g.: a conflict arises within an M&A, and the target Company wants to compel arbitration –as in "**Hummel España S.A en liquidación v. Shareholders**"*[46]-], the drafters should be really restrictive on the terms used. For example, the drafters should not address the parties as "the involved", but as the "signatories". Furthermore, it should be included a "Non-Third Parties" clause, in order to avoid any doubt in that matter. With a clause of the kind, signatories would avoid a third party beneficiary –even though some Courts considered that if there is a non-signatory third party who has a benefit under the contract, a "non-third parties" clause is not sufficient to avoid the extension of the arbitral agreement-.

In light of the aforementioned, it is strongly advisable to be really careful while addressing the parties [*"Parties", as a defined term*] on the arbitral clause.

And last but not least, the parties should address the Law governing the Arbitration Agreement.

The arbitration proceedings may be regulated by two different "*bodies of law*".

43 REINER, Andreas. "The form of Agent´s power to sign an arbitration agreement and Art. II of the New York Convention", ICCA Congress series no. 9 (Paris/1999). Pp. 83-84.

44 HANOTIAU, Bernard. "Complex Arbitrations", 2005. Pp. 49-99.

45 HOSKING, James M. "The third party non-signatory´s ability to compel International Commercial Arbitration: doing justice without destroying consent". 2004. Pp. 496, 483-484.

46 STS de 20 de Marzo de 2012. Available online at: http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=35970&links=&optimize=20080904&publicinterface=true

In first place, i) the Lex Arbitri, which regulates the relationship between the arbitration and "ordinary Courts". The Lex Arbitri addresses issues such as Interim Measures, Enforcement of the award (*imperium*), Validity (and Annulment) of the award, Validity of the arbitral clause. [*Ex. g.: UNCITRAL Model Law*]

It is to be noted that since the Lex Arbitri is not mandatory, the parties may agree to derogate its provisions.

In second place, ii) as a subsidiary regime the parties may agree on the Rules (ex. g.: UNCITRAL Rules). The Rules address elements of the arbitration proceeding itself: when is the arbitration initiated, the composition of the arbitral tribunal, notifications, evidence, among others. Moreover, the extension of the arbitral clause to non-signatories, gets encompassed by the Rules. Nevertheless, in such a hypothesis it is to be noted that in some cases since the extension of the arbitral clause may be based on the "third party beneficiary" theory, it could be a matter of interpretation of the "benefit" under the Lex Causae, and not the Rules.

It must be noted that when agreeing on Rules, these have primacy over the Lex Arbitri on the issues dealt by it.

To select the Rules of an institution, is not the same to select that institution as in charge of the arbitration. For example, one could choose the UNCITRAL Rules the regulate the arbitration, and at the same time it could be an Ad Hoc arbitration.

If wanted, the drafter must address both issues on the arbitration clause.

It is important to note that if the parties intend to adopt the Rules of the selected Institution –such as the ICC Rules- but to alter them, they must include a provision stating that if the Institution –in this example, the ICC- refuses to administer the arbitration proceedings, then the alteration shall be disregarded **[Bishop, p. 18]**.

Of major importance, is to ensure that the law applicable to the arbitration proceedings, and the lex arbitri are compatible with each other.

Since the arbitration agreement is a creature of consent, parties are allowed to agree on different procedural laws that will govern the arbitration proceedings. Now, these Rules will provide the parties with the procedural framework to conduct the arbitration. The Parties may also resort to national or state laws, either to i) govern the arbitral procedure or ii) to supplement the rules of the selected arbitral institution.

As we know, the lex arbitri –which is the procedural law of the seat-, refers to mandatory provisions imposed by each country on arbitrators in their own territory. These provisions refer to kompetenz-kompetenz (tribunal´s power to decide on its own jurisdiction), objective and subjective arbitrability, interim measures, among others. The lex arbitri is related to issues of public policy. Generally, the parties are not allowed to derogate from these laws.

Hence, since the lex arbitri is fundamental over the rules of procedure chosen by the parties, and may render the award as null when the rules violate the lex arbitri, the parties have to take special care in making the rules compatible with the lex arbitri.

As we already said, the Lex Arbitri deals with the formal validity of the arbitration agreement **[France v. Egyptian Local Authority[47]]**. But the law governing the arbitration agreements' substantive validity represents a bigger issue regarding conflicts of laws **[Blessing, p. 169-179[48]]**. And the questions to be answered about the validity arise at the beginning of the proceedings (in those cases where a party resists to arbitrate), and at the time the enforcement of the award is challenged.

Since the question of what law applies to the arbitration agreement can be complicated –a question that gets much more complicated when the parties did not choose a seat of arbitration or a governing law- is truly important that the drafters of the arbitration agreement address this issue with care.

6. Conclusion.

Parties to an arbitration agreement have substantial autonomy to determine the parameters of the legal framework in which their disputes will be resolved.

In international agreements, when drafting arbitration clauses the attorneys need to be smart by creating a legal framework that permits the procedures they desire, that minimizes the need for disputes about the framework itself, that does not violate mandatory rules, and that not create the kind of ambiguities and uncertainties that can invalidate the arbitration agreement **[Moses, p. 58]**.

When the arbitration clause is clearly valid and sets forth a process that will work smoothly and efficiently, parties should have less incentive to resort to delaying tactics involving the courts, and more incentive to avoid both litigation and arbitration by simply settling their dispute informally.

According to scholars **[Bishop, p. 23]**, there are four essential functions of an arbitration clause:

1. to produce mandatory consequences for the parties,
2. to exclude the intervention of State courts in the resolution of disputes (at least prior to the rendering of an award),
3. to empower the arbitrators to resolve the parties' disputes, and
4. to adopt a procedure for resolving the disputes.

In conclusion, these are the main criteria that the drafter must follow in order to provide

47 ICC Award in Case No. 6162, Consultant (France) v. Egyptian Local Authority (1992).

48 BLESSING, Marc. "The Law Applicable to the Arbitration Clause", ICCA Congress series. No. 9. Paris, 1999.

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