THE RELEVANCE OF INTERNATIONAL COMMERCIAL ARBITRATION AS AN ALTERNATIVE METHOD OF DISPUTE RESOLUTION: a study on the structure of international arbitral tribunals and business demands

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1. INTRODUCTION

In the contemporary world, in which the economy is constantly accelerating, stimulating not only one nation‟s trade practices, but of the world as a whole, Private International Law has become one of the branches of law that most increase in importance and meaning. As a direct consequence of that fact, there is an interest of the people who operate in this area to find and resort to alternative or unconventionals “legal pathways” that may align with the business expansions that we are today testifying. Modern international commercial relations demand a quick and efficient way to solve mitigations, notably in cases where the positive law is incapable of provide an indisputable answer. Given this reality, arbitration emerges as a solution.

Arbitration is, in the scope of international commercial relations, an irreplaceable vehicle for conflict resolutions, satisfactorily exercising a judicial function in complex transactions in international trade. Born from the need of parties domiciled in different states to achieve an immediate, yet safe, denouement in a controversy arising from businesses or contracts of supra or ultra-national sphere, it is, today, essential for the dynamism of the International Private Law thanks to to their characteristics of confidentiality, speed and flexibility.

The option of allowing an arbitrator, chosen by the parts and whose verdict they accept the commitment to observe, to end a conflict has proved to be a preferential practice among traders or industrialists due to, as mentioned it, being a modality of quick and effective response, what reduce costs derived from lengthy legal proceedings, typical when more than one country are involved. We can say arbitration takes on a special importance, replacing the State's responsibility to provide legal security and social peace in particularly cases.

In other words, the solution negotiated by arbitration, by "de facto judges" chosen by the parties and with the technical knowledge for a predetermined case, aims to occupy a space ordinary reserved to the States‟ jurisdiction in favor of security and maximum commercial or industrial justice. While there is no doubt that the decision of the legal system of a sovereign nation has more certainty and institutional importance, the celerity of the business world is many times incompatible with the deterrence associated with it. In choosing commercial arbitration, the parties waive this delayed judicial certainty in favor of the operative, quicker and fair certainty of a negotiation, whose possible gains compensate a lack of assurance.

Thus, arbitration with its own rules is an alternative equivalent to judicial deliberation and, as such, once the arbitration award has been issued, the controversy is usually extinguished. For this reason, national legal systems have generally accepted the development of arbitration bodies as a means of settling disputes with the same power and normative force as the provisions of ordinary courts, that can only comply to it): the international arbitral courts.

Now, someone might say that the existence of arbitration and international mechanisms dedicated to perform this form of conflict resolution may represent a derogation of the force of the States. Nonetheless, it is quite the opposite: by protecting and enhancing the solution chosen by their citizens and their companies they are, deliberately, promoting peace and legal security, two of the most important values of a nation‟s Law. But, more important, by accepting the validity of these institutions that does not mean that the States will also accept whatever decision achieved through arbitration; an arbitral court only operates with the consent of the countries that indirectly give it the power to extinguish controversies. If for whatever reason these nations decide to withdraw this power (what happens when, for instance, the arbitration ruling conflicts with their own internal legal systems), they can and probably will not absorb it decision.

In addition, international commercial arbitration must obey international rules stipulated in treaties, such as the New York Convention, and standardizations promoted by the United Nations through their Commission on International Trade Law. By formulating and agreeing with these commandments, the signatory States give legitimacy to arbitrations that obey them and also exercise their sovereign power dictating what they consider valid in these acts of judgment.

Nowadays, this notion that there is not a conflict between international arbitration and a nation sovereignty, but that they should complement each other to assure to the global community access to an efficient justice that can promote directly and indirectly the development of a wealth society is fundamental to imbue individuals with the “trust” to resort to the International Chamber of Commerce, the American Arbitration Association or any other international arbitral organization capable of offer the quick and solid solutions that the modern global trade relations demands. The flexibility, inherent to these courts and based on the possibility of the parties agreeing on certain prerogatives, making their proceedings less formalistic, but no less effective or devoided of credibility, it is essential in the present day economy. Therefore, these organizations should not be avoided because of some sort of jingoism or positivist rigor that may be attached to the idea that only a territorial legal system has the strength to solve permanently a dispute, but stimulated in favor of a better and more integrated international order. That is the lesson of Susan Franck:

> Arbitration does not occur in a vacuum, and the existence ofinvestment treaty arbitration does not eliminate the need to encourage the development of a court system where rights are adjudicated in an impartial, fair and predictable manner. Investment treaty arbitration

> and national courts have a symbiotic relationship. Fostering the development of the rule of law in national courts nor only develops local judicial institutions, but it also promotes confidence in the overall process of resolving investments disputes.[1]

Recognizing the importance of arbitration, however, the need to comprehend the structures that allow it to be effectively realized arises. How the international courts dedicated to arbitration are organized, what is the range of a decision in an international commercial arbitration; these are all questions that need to be answer to make this method of conflict resolution the most transparent to all interested parties. After all, people will only resort to judicial solutions that they feel safe with, especially when dealing with international trade practices.

The objective of this essay is exactly that: by examining the main aspects of arbitration in the international and commercial field and examples of international arbitratal courts and the proceedings that they adopt, we will try to explain how efficient this method of dispute settlement is and what possible obstacles it might face when operating in the scope of Private International Law. At the end, hopefully we will have evidenced how arbitration has brought considerable diversity to preexisting jurisdictional forms, which systematically represents evolution from the more obvious manners of jurisdiction provision, incompatible with the dynamism of the modern world.

2. ARBITRATION IN INTERNATIONAL COMMERCIAL LAW

2.1. Definition and Relevance

The constantly increasing globalization and the tendency of countries to form trading blocs helped to solidify the idea that economy, nowadays, cannot limit itself to a nation or territory‟s borders. As a result of this new global commercial order, the need for legal measures to ensure a quick, economic, confidential and technical answer for conflict of interests born from these new international relationships arise. Notably in order to ensure equitable treatment between parties uncertainty about the impartiality of a local court[2] in disputes between nationals and foreigners involved in an transnational controversy, the modern system of arbitration that we have today has developed.

Arbitration is, thus, “a judicial, but non-judicial way of peaceful settlement of international disputes” [3]. The parties, free willing, must chose an arbitrator, describe the dispute and delimitate the applicable law. This arbitrator, who possess the confidence of the parties, adjudicates a decision that binds them. This ruling tends to be fast, fair, will be known only by the ones involved in the question and is cheaper than the one derived from a typical long judicial litigation, all interests of a modern commercial trader.

The conditions for its existence basically are: the arbitration commitment[4] or the arbitration

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[1]FRANCK, Susan. D. *Foreign Direct Investments, Investment Treaty Arbitration and the Rule of Law.* Pac: McGeorge Global Bus. & Dev, L. J. 337, 2007. p. 368.

[2]Allowing, even, choice of forum or the law to be applied to a specific case.

[3]REZEK, José Francisco. *Direito Internacional Público*, 2ª ed., São Paulo: Saraiva, 2004. p. 352.

[4]The arbitration is established with the determination of the dispute to be settled in sight.

clause[5], the arbitration organ and the arbitration procedure[6]. The parties agree to submit, previously when establishing the transaction or after a possible contention emerges, the conflict to an individual or organization that, corroborated by rules also accepted by the parties, will utter a sentence that they must abide. The adjudication of an arbitration is final and unappealable (since is not inserted in a traditional judicial structure), therefore, definitive and obligatory[7].

The international experience has shown that more than ever this alternative method to settle a dispute is being used by actors of the global order, precisely because of these numerous advantages above mentioned. And, so, several entities work for its implementation. Among other, we can mention the American Arbitration Association, based in New York, The International Chamber of Commerce in Paris, and the London Court of International Arbitration. Even in Latin America, where along history the global community experimented difficulties to implement an effective arbitration system, nowadays we can see efforts to overcome the locals‟ formal and cultural barriers.

Also, interested in regulate this new practice, innumerous international legislations on arbitration were instituted by the States, with the first being the Geneva Protocol in 1923, the New York Convention in 1958, the Panama Convention in 1975 and the Model Law on International Commercial Arbitration of the UN in 1985.

As an example of the relevance of arbitration as an alternative solution to commercial conflicts, we have what occurs in NAFTA, where the solution of controversies is a responsibility of the Free Trade Commission: when prevention, consultation or mediation is not successful to avoid a dispute, the parties are submitted to arbitration and the decision within achieved is final.

The World Trade Organization (WTO) is another expressive institution that deserves attention for its methods regarding arbitration. It has a system of solution of contentions that begins with preliminary consultations and, then, the establishment of an arbitration panel who will rule on the case. It is possible to an unsatisfied party to appeal to the Appellate Body. If there is no spontaneous
fulfillment of the arbitration adjudication, the WTO can impose compensatory measures to the defeated.

It is important to note that, although a valid and useful procedure adopted by some of the major global organizations, arbitration cannot substitute for every type of court proceeding. It is a prerogative of a sovereign nation, by their legal systems, to limit the scope of subjects that may be submitted to arbitration. Even though the boundaries of arbitrability are progressively expanding, the legal landscape in this regard is not completely harmonized yet: while some subject matters are almost universally considered arbitrable (such as monetary claims deriving from a commercial relationship) and others are clearly not arbitrable (such as criminal cases), different jurisdictions take different approaches, especially as far as „grey areas‟ of uncertainty are concerned. As examples of these, we may mention employment and family-law disputes. Some countries

[5]The parties in advance accept the arbitration as the method to solve possible controversy.

[6]Freely chosen by the parties or the one adopted by the elected arbitration organ.

[7]The exception being when the arbitration organ has its own appealing system, such as in the case of the OMC.

historically have refuse to allow even the arbitration of antitrust claims.[8]

2.2. Procedure

In order to be able to ascertain in what consist the procedure in an arbitration, it is necessary to take into account the concept of procedure itself. This can be conceptualized as being a set of rules, systematically listed, stipulating the predetermination of acts to be practiced within a certain process.[9]

Based on this concept, at first, the judicial and arbitral procedures seem to be equivalent. Notwithstanding, a deeper analysis will reveal that some acts are exclusive of the judicial route, while others are inherent to arbitrations. Here, we will explore both the process and the jurisdiction of the latter.

The arbitration begins when the disputing parties choose an arbitrator that will analyze the concrete case (or, as mentioned before, choose to use the previously agreed clause that refers to an arbitrator to mitigate a controversy). It is his responsibility to confirm the validity of the arbitration agreement and, after, initiate the proceedings of litigation that, at the risk of offending basal procedural rules, must respect some global accepted principals: the adversarial principle, the equality of the parties and the independence and impartiality of the judge.

As long as these norms are observed, the procedural rite adopted to conclude the arbitration can be much less formalistic than the one normally associated with a common judicial claim. Devoid of traditional legal "rigidity", the parties have the possibility to express more freely their opinion, within the limits that the chosen arbitral institute stipulates, to the arbitrator. About this procedure, the brazilian professor Sebastião José Roque:

> The ad hoc judgment is exercised by a court established by the arbitration agreement to examine a particularly question. The parties establish whether only one arbitrator or one collegiate will function and who will be the arbitrators, where and when will the trial occur and what are the applicable law and procedural steps to be adopted. It is up to them to adopt other measures that they seem fit. After the judgment, the arbitration will be extinguished. If the same parties have another divergence, they may institute another arbitration, with a brand new procedure."[10]

2.2.1. Domestic Arbitration x International Arbitration

It is, however, important when dealing with this theme to differentiate some of the particularities between domestic and international arbitration procedures.

The arbitrator faced with a domestic arbitration dispute, for instance, will generally be in the same position as a judge, as the arbitrator is bound to apply the domestic laws of the country in question, its public policy and mandatory rules. It usually consist of claims brought by private

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[8] BORN, Gary B. International Commercial Arbitration, 2ª ed., Kluwer Law International, 2001, p. 246-247.

[9] CAMARA, Alexandre de Freitas. *Lições de Direito Processual Civil*, 12ª ed, Rio de Janeiro: Lumen Iuris, 2012, p. 83.

[10] ROQUE, Sebastião José. *Arbitragem: a solução viável*. 3ª ed. São Paulo: Ícone, 1997. p. 72.

individuals and the amount in dispute will be small in most cases (although that is not a mandatory rule).[11]

Though there is not an internationally accepted definition of the term "international", when used to characterize an arbitration it implies a conflict settlement procedure that transcends national boundaries. This definition has important consequences: where international arbitration is used, its only connection with a country will be regarding the arbitration taking place within the territory of that country; as consequence, in most cases, the parties involved in international arbitration will be more than just mere individuals; they will be supra-nationals corporations or States entities.

Generally speaking, two criteria are used to define an international arbitration: the first concerns the nature of the dispute, as thereof involves the interests of international trade or the dispute has an international character. The second criterion concerns the parties themselves, their nationality or habitual place of residence, or the seat of a corporate body‟s "central control or management" because that (the place of arbitration) will be the factor that gives the arbitration an international character or connection.[12]

Nonetheless, different entities and institutions have adopted their own criteria for determining if a dispute has this "international character". The International Chamber of Commerce[13], for example, places great importance on the nature of the dispute as to cover "disputes that contained a foreign element" and "business disputes of an international character"[14]. By referring to a "foreign element", the organ gives a wide interpretation to the term "international"; the parties, for instance, may not have separate nationalities to resort to the court (the agreement, however, must show an transnational element). The United Nations Commission on International Trade Law (UNCITRAL) Model Law, in its turn, determines that arbitration will be regarded as international if the parties have different nationalities or if the dispute has an international element[15] (the parties‟ agreement on a foreign seat of arbitration being able sometimes to reflect this international element).

Regarding the legislation to guide an arbitration, sometimes the same may be applicable to both domestic and international transactions. There are cases, however, that some set of rules only applies to international transactions as the result of certain countries adopting a separate regime for international procedures (due to a specific State‟s position on some legal instruments) and distinguishing between domestic and international arbitration within their legislation.[16] This will

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[11]BLACKABY, Nigel and PARTASIDES Constantine. *Redfern and Hunter on International Arbitration*. 5ª ed. London: Oxford University Press, 2004. p. 12.

[12]VENTER, Debra. *UNICITRAL: International Commercial Arbitration*. Saarbrucken: LAP Lampert, 2012. p. 26.

[13] The International Chamber of Commerce‟s International Court of Arbitration supervises the proceedings and administration of arbitral tribunals conducting arbitration under the ICC Arbitration Rules. We will talk more about this organism posteriorly in this essay.

[14] BLACKABY, Nigel and PARTASIDES Constantine. *Redfern and Hunter on International Arbitration*. 5ª ed. London: Oxford University Press, 2004. p. 14.

[15]UNICITRAL Model Law, Article 1, (3).

[16] VENTER, Debra. *UNICITRAL: International Commercial Arbitration. Saarbrucken*: LAP: Lampert, 2012. p. 27.

mostly be evidenced in international commercial law matters.

2.2.2. International Commercial Arbitration

Within the sphere of international arbitration, the commercial branch of the subject deserves a particular attention. After all, due to their individual natures, different rules of law and legislation are applied if we are dealing with noncommercial or commercial questions.

Particularly, we believe that the term "commercial" should not be given a limited interpretation; it should govern all relationships with a commercial nature or character, as expressed in UNCITRAL Model Law:

> The term "commercial" should be given a wide interpretation as to cover matters arising from all relationships of a commercial nature, whether contractual or not.[17]

Regardless, this definition is not unanimously accepted by all nations and international organisms, so the term "commercial" must be taken in consideration with the national law relevant to the specific contract in mind.

Independently of the concept adopted, howsoever, arbitration is, in our opinion, the most favorable method whereby commercial disputes are resolved: as a result of the final and binding nature of the arbitrator‟s decision, disputes will not be dragged out by placing the matter on appeal. In addition, the flexibility of arbitration gives it a very attractive lure for parties wishing to mold theproceedings to their liking.[18]

For that advantages, international commercial arbitration has being a fast growing dispute resolution method used when the parties are from different nationalities. This increase in relevance even has made several countries to amend their arbitration legislation to include it in their law, making it more attractive from trading practices standpoint.[19]

This ongoing progressive interest in international commercial arbitration showed by these adaptations is an indication that countries are willingness to respect arbitration as an alternative to court-based litigation. And, for this, we can say that, today, international commercial arbitration has a "hybrid nature": it evolves from a private agreement between the parties and, though it happens through privately chosen proceedings, ends in a public nature – the award made will have legal force, will be binding and will have effect in the courts of most nations.

2.3. International Commercial Arbitration Ruling and Its Effects in The States

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[17] UNICITRAL Model Law, Article 1, (1), footnote 2.

[18] BERGER, Klaus Peter. *The Settlement Privilege – A General Principleof International ADRLaw*" in: Arbitration International, The Journal of the London Court of International Arbitration, Vol. 24, Nr. 2, London, 2008. p. 254.

[19] By including international commercial arbitration within their arbitration legislation, countries are increasingly competing with another countries striving to offer the best one and, by doing so, securing future business for them. Better and more effective arbitration legislation equals more arbitration business for the country. (CROOK, John R. *Applicable Law in International Commercial Arbitration: The Iran-US-Claims Tribunal Experience*. 83 AJIL, 1989, p. 278.

But how this effects will be assimilated by the nations that accept the arbitrator decision in an international commercial dispute? Well, to promote a proper analysis, a priori it is useful to distinguish among the three kinds of effect that a general international ruling might have.

First, a ruling might have enforcement effect: a domestic court might compel a party to abide by the ruling in a domestic litigation (if an arbitration panel awards damages in a breach of contract, a domestic court might enforce this decision by forcing the losing party to pay, for example). Second, a ruling might have a precedential effect: not only the ruling will bind the involved parties in the controversy, but also different parties involved in similar situations. And, finally, aruling might have persuasive effect: a domestic court might decide that, although not necessarily binding, the international solution is based on convincing arguments that the court should adopt as its own.[20]

When dealing with international commercial arbitration – from now on, referredas ICA – only the first of these three effects is significant. That is logical. ICA panels are usually ephemeral and their decisions confidential, leaving little record of their work, so it will be impossible to use them as precedential material.[21] Similarly, this confidentially and the ad hoc character of much ICA makes difficult for a judge to betake their ruling as reasoning for its own decision.

Most states nowadays, however, do grant ICA awards a powerful enforcement effect. This began with the New York Convention, the most important treaty about the matter, with roughly 140 Member-States, which contains a strong proenforcement presumption, presumption that, as mentioned before, was slowly incorporated by the signatories‟ legal systems. In understanding this proenforcement idea, it is useful to look at two main points in the arbitration process: a domestic court‟s decision whether to enforce an arbitration agreement, and its decision to enforce an award rendered in a different country.

At both points, a domestic court must decide to whether or not to defer to the ICA regime. And in both situations, contemporary principles routinely require courts to defer. In deciding whether to enforce an arbitration agreement, a domestic court has two options. The court can either enforce the agreement and send the parties to an international arbitral panel or scrap the agreement and force the parties to litigate in the domestic forum.[22] The New York Convention, in its Article II, 3,[23] favors the first option (excepting cases in which the subject object of litigation cannot be settle through arbitration according to the domestic law). Most countries do not object this rule.

The decision whether to enforce an award presents a similar choice. The domestic court can

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[20] MOVSESIAN, Mark. *International Commercial Arbitration and International Courts.* Faculty Publications: 2008. Paper 98. p. 426. Can be found in http://scholarship.law.stjohns.edu/faculty_publications/98.

[21] Even major and permanent international arbitration institutes can‟t be used as a reliable source of material since they normally receive thousands of fillings a year, making impossible to coordinate all of their data in a way useful for domestic courts.

[22] MOVSESIAN, Mark. *International Commercial Arbitration and International Courts.* Faculty Publications: 2008. Paper 98. p. 426. Can be found in http://scholarship.law.stjohns.edu/faculty_publications/98.

[23] "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."

defer to the international panel and require the parties to comply with the award or ignore the panel's ruling and require the parties to litigate again in the domestic forum. And, likewise, the international principles favors the first solution. The New York Convention, this time under its Article 5, forbids the domestic court of a signatory to ignore the international ruling, except in specific cases mostly related to procedural mistakes or incompatibility of the adjudication with the public policy of the State in question. It is impossible to a domestic court to refuse to enforce an award simply because it believes the arbitral panel decided the case incorrectly.

This tendency to valorize the ICA is, in this modern era, present in the national arbitration laws of most developed countries. There are reasons why. First, this position does not raise concerns about legitimacy in these sovereignties. In liberal democracies, legitimacy turns on the process by which law is made, which means that, to be legitimate, law must be made by actors who are publicly accountable, directly or indirectly.[24] This is the case in ICA contexts. Especially because the ruling has very little domestic impact, nations have relatively little interest in policing such disputes. Therefore, the freedom that it is allowed to the parties to choose the procedure and the arbitrator that will adjudicate is by them respected, as long does not offend any cardinal rule of their legal systems.

Second, by making the arbitration regime more effective, the pro-enforcement presumption creates significant economic benefits for States. It is simples: ICA facilitates international commerce by reducing intangible barriers to cross- border trade. Although contract law does not differ that much from nation to nation, there remains a risk that local courts will treat outsiders unfairly. By providing a neutral forum for resolving disputes, ICA helps minimize this danger.[25]

And, finally, the national companies involved in international transactions support a legal system that is pro-enforcement. They do it for two main reasons: a-), since foreign countries will probably not enforce awards against their own citizens unless other countries reciprocate, they have an incentive to make sure that their governments do not oppose enforcement; b-) a pro-enforcement regime helps to reassure foreign parties that they will be able to collect against the companies in the event of a dispute, making more attractive business partners.[26]

In sum, the determinant characteristic of an ICA‟s adjudication is its enforcement effect. And it is this obligation of a State to respect the decision rendered by arbitrator or an organ of arbitration in an international dispute that makes the institute so advantageous, both to the parties involved as well as to the nations who comply; the former because they can benefit from a fast, fair, effective and cheap procedure to solve a controversy, the latter because the international ruling has limited impact on domestic law and, at the same time, with the increasing modern globalization, benefits the nation‟s economy considerably.

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[24]BRADLEY, Curtis A. *International Delegation, the Structural Constitution, and Self Execution*, Stanford: L. REV, 2003. p. 1557-1558.

[25]YA-WEI Li. *Note, Dispute Resolution Clauses in International Contracts: An Empirical Study*, Cornell: INT'L L.J, 2006. p 789.

[26]MOVSESIAN, Mark. *International Commercial Arbitration and International Courts.* Faculty Publications: 2008. Paper 98. p. 437. Can be found in http://scholarship.law.stjohns.edu/faculty_publications/98.

3. INTERNATIONAL COMMERCIAL ARBITRAL INSTITUTES

With a better understanding of the concept of arbitration – with an emphasis in its international and commercial strand – its purposes, procedures and advantages, we can turn our study to some of the courts dedicated to implement it.

Since it is impossible to consider all international arbitral institutes, we will, first, expatiate about the United Nations Commission on International Trade Law (UNCITRAL) and its Model Law on International Commercial Arbitration, the foundation to most ICAs systems that exist today. Then, we can focus on three of the most important ones: the London Court of International Arbitration, the International Chamber of Commerce and the American Arbitration Association. They have the most relevance for the modern economy and globalization and, as predecessors to the more recent courts, fostered some of the major rules that end up being adopted by them and by other ad hoc ICAs.

3.1. United Nations Commision on International Trade Law – UNICITRAL

Established in 1966 by the General Assembly of the United Nations, UNICITRAL was born when the international order recognized that there was a lack of similarity between the national laws of different countries governing international trade law and that this disparities created obstacles to international commerce.[27] It was realized that there was a need for a global set of standards and improved legal framework to further the progressive harmonization, modernizations and unification of the existing national regulations that governed international trade up until then. UNICITRAL was a way to fix that and, maybe more important, substantiate a more active presence of the UN in the international trade sphere.

Seen today as the core legal body of that institution, UNICITRAL consists of a diverse composition of sixty Member-States elected by the General Assembly and has the primary objective of harmonize and unify international commercial trade through formulating rules and texts that equate citizens, corporations and even nations that are usually disparate in this sphere.

One of its most important accomplishments is the 1985‟s UNICITRAL Model Law on International Commercial Arbitration. Since a relevant number of countries at the time did not have in their domestic legislation standards to implement or ratify settlements obtained through ICAs, the institute offered a template that, by being adopted and incorporated in their legal systems by the States, could fill this void.

This Model Law was widely accepted and end up forming the basis for modern ICAs. It was a procedural in nature, as provided various procedures and articles to be observed, and very comprehensive, since followed normal phases and principles already common in the global community. And even though amendments to the text by the States were not encouraged (since that would difficult its main goal of international unification), it did inspire various countries to modify their arbitration legislation towards a more universal accept procedure.[28]

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[27] VENTER, Debra. UNICITRAL: International Commercial Arbitration. Saarbrucken: LAP: Lampert, 2012. p. 33.

[28] VENTER, Debra. UNICITRAL: International Commercial Arbitration. Saarbrucken: LAP: Lampert, 2012. p. 40.

The main characteristics of the Model Law was associated with the freedom and autonomy that it grants to the party interested in resort to international arbitration. For example, the Model Law allow the parties to choose the rules of law that will be applicable regarding the substance or merit of a dispute, not binding them to a specific national legal system. In fact, its text limits the involvement of national courts in the arbitration proceedings, handing them the task of only implement the adjudication in their jurisdiction.[29] Parties are given a maximum degree of freedom when making use of the Model Law: they can conduct the arbitration in accordance with their own needs and expectations, being restricted solely when circumstances deem it necessary to ensure a fair dispute.

It is important to remember that, even though the Model Law became maybe the most important piece of legislation regarding ICA, being adopted not only by several countries, but also by even international arbitral tribunal, the UNICITRAL itself never took on the responsibility to execute it. It does not act as an arbitral organ, an administrator of arbitrations proceedings or even assist in the interpretation of laws about the matter; it is not within the mandate of its Comission to get involved in any dispute.

That being said, it did draft the Model Law in a way to potentialize the global use thereof, making it easier for countries and international organizations to understand and apply its rules and principles own their own. Was written using phrases and legal jargons of common knowledge, without any State or specific legal system in mind, making it a real universal piece of legislation. For that reason is so efficient not only to regulate and orient ICAs, but also as a good framework for domestic arbitration, as it embodies all the necessary and relevant provisions required to ensure that an arbitration proceedings run effectively.[30]

3.2. The London Court of International Arbitration - LCIA

One of the longest established of the major international commercial arbitral institutions in the world (what it would become today was founded in 1883), the LCIA, even though is named after a specific city, is truly a global organization, being responsible perhaps to some of the most important economic wise arbitrations ever accomplished. Its own set of rules and procedures are so wellknown and respected that are frequently adopted in ad hoc arbitrations even where the institution itself is not involved.

Formed as a not-for-profit company limited by guarantee, the LCIA operates under a three-tier structure, comprising the Company, the Arbitration Court and the Secretariat. The Court is made up of up to thirty-five members, selected to provide and maintain a balance of leading practitioners in commercial arbitration, from the major trading areas of the world, and it is the final authority for the proper application of the LCIA Rules.

The current set of arbitration norms used by the LCIA became effective in 2014 and are detailed, though complex. For instance, the Article 1 of the Rules establishes a long series of

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[29] McNERNY, Mary E. and ESPLUGUES, Carlos A. I*nternational Commercial Arbitration: The UNCITRAL Model Law*, 9 B.C. Int'l & Comp. L. Rev. 47, 1986. p. 47-48. Found in http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1395&context=iclr.

[30]VENTER, Debra. UNICITRAL: International Commercial Arbitration. Saarbrucken: LAP: Lampert, 2012. p. 44.

documents needed for someone request its operation[31], creating requirements that sometimes makes almost impossible even to large corporations to fulfill. The Article 7 indicates that, by choosing the LCIA Court, the parties will not have full control over appointment of arbitrators.[32] The Article 22 presents a series of provisions relating to the additional powers of the Tribunal have that in some occasions may surpass the ones previously agreed by the parties.[33] Even its jurisdiction‟s rules are overpowering when compared to a typical ICA:

> 23.1 The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement.
> 23.2 For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail (of itself) the non-existence, invalidity or ineffectiveness of the arbitration clause.

3.2. The International Chamber of Commerce – ICC

Based in Paris, France, The International Chamber of Commerce (ICC) is arguably the largest, most representative business organization in the world. It has three main activities: rule setting, dispute resolution, and policy advocacy.[34] And to achieve this goals, one of its main organs is the Court of Arbitration.

Established in 1923, the ICC‟S International Court of Arbitration, according to itswebsite, "pioneered international commercial arbitration as it is known today. The Court took the lead in securing the worldwide acceptance of arbitration as the most effective way of resolving international commercial disputes. Since its creation, the Court has administered well over 13,000 international arbitration cases involving parties and arbitrators from more than 100 countries and territories. Demand for its services grows in line with the expansion of international trade and the rapid globalization of the world economy."[35] It is an administrative body who, assisted by the Secretariat of the Court, is responsible to guide and watch over ICAs resolutions submitted to it,

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[31] Among them, the full name and all the contact details of the parties of the arbitration (Article 1.1, “I”), a statement briefly summarising the nature and circumstances of the dispute, its estimated monetary amount or value, the transaction(s) at issue and the claim advanced by the Claimant against any other party to the arbitration (“iii”), and a statement of any procedural

[32] “If the parties have agreed howsoever that any arbitrator is to be appointed by one or more of them or by any third person (other than the LCIA Court), that agreement shall be treated under the Arbitration Agreement as an agreement to nominate an arbitrator for all purposes. Such nominee may only be appointed by the LCIA Court as arbitrator subject to that nominee‟s compliance with Articles 5.3 to 5.5; and LCIA Court shall refuse to appoint any nominee if it determines that the nominee is not so compliant or is otherwise unsuitable.”

[33] As example we present the text of the Article 22, “c”: “The Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views: (c) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law applicable to the arbitration, the merits of the parties' dispute and the Arbitration Agreement.”

[34] CONNERTY, Anthony. *A Manual of International Dispute Resolution*. London: Commonwealth Secretariat, 2006. p. 240.

[35] Found in https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration.

but, as mentioned in the Article 1 of its Rules, that do not resolve disputes itself.[36]

This is an important distinction as this particularity makes the ICC‟s Court of Arbitration more of a guardian than a typical ruler, despite its name. Specifically, its functions include: a-) fixing the place of arbitration; b-) assessing whether there is a prima facie ICC Arbitration agreement; c-) taking certain necessary decisions in complex multi-party or multi-contract arbitrations; d-) confirming, appointing and replacing arbitrators; e-) deciding on any challenges filed against arbitrators; f-) monitoring the arbitral process; g-) scrutinizing and approving all arbitral awards; h-) setting, managing and, if necessary, adjusting costs of the arbitration; i-) overseeing emergency arbitrator proceedings.

Although efficient in fulfill this objectives, the ICC‟s system is not free from criticism, the main one referring the content of the Article 34 of its Rules:

> Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

This unique feature of ICC arbitration demands that all its awards, before becoming effective, must be submit to the Court for a final scrutiny. The organ cannot change the decision substantially, but, if realize that something shall be modified, can return it to the original arbitrators to promote alterations, a procedure prolong the arbitration longer than usually desired by the parties.[37]

However, it is reasonable to argue that exactly the scrutiny provisions are what ensure the so intended high standard of ICC awards. To those corporations involved in transnational disputes who seek it, the ICC's stamp of approval on an international arbitral award is beyond any doubt a matter of importance and value, no matter how long it take it to obtain it.

3.2.3. The American Arbitration Association – AAA

The American Arbitration Association is another institution with a respectful tradition in the field. Founded in 1926, is the leading arbitral organization in the United States and, as such, deals with an expressive volume of cases compatible with the major economy of modern world. It is a not-for-profit organization dedicated to not only arbitration, but to several alternative dispute resolutions, providing services to individuals and organizations who wish to resolve conflicts out of court.

In the 1990s the AAA promulgated its International Arbitration Rules, which are largely based on an administered version of the UNCITRAL Arbitration Rules, and established its international division: the International Centre for Dispute Resolution (ICDR). With offices in New

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[36] Article 1, (1): The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC (the "Rules"). The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules.

[37] MOSES, Margareth. *The principles and practice of International Commercial Arbitration*. 2ª ed, London: Cambridge, 2012. p. 255.

York, Miami, Houston, Dublin, Mexico City (through a cooperative agreement with the Commission of the Mexico City National Chamber of Commerce) and Singapore (due to a joint venture with the Singapore International Arbitration Centre), the ICDR‟s international system, as stated in his own website, "is premised on its ability to move the matter forward, facilitate communications, ensure that qualified arbitrators and mediators are appointed, control costs, understand cultural sensitivities, resolve procedural impasses and properly interpret and apply its International Arbitration and Mediation Rules".[38]

Because its regulation, as stated above, is heavily inspired in the UNCITRAL Arbitration Rules, the procedure adopted by the AAA is more "generic" than its equivalent in the LCIA and in ICC. For instance, the awards have the same characteristics as most of ICAs: are made by a majority of arbitrators, are final and binding the parties undertake to carry it out without delay, and may be made public only with the consent of the parties or as required by the law.[39]When describing how the arbitration should be conducted, the legislation is concise, being limited to only present general rules.[40]

This option for a more accessible dispute settlement procedure makes it possible for a greater number of individuals to reach to the AAA as alternative to judicial litigation to solve their contentions. However, for lacking the same rigor (or, one might say, the same austerity) associated with some of the other grand international arbitral organisms, this organ not always can provide the safe and quick resolution expected by the parties.[41]

4. CONCLUSION

As modern economy and the phenomenon of globalization expands, it is only logical to presume that litigations, disputes and controversies in the international commercial field will increase and become more complex at the same rate.

Tribunals and domestic courts simply are not prepare to offer quick, technically proper and efficient answers to all of them. It is, therefore, necessary to one interested in follow this changes and developments to abandon the "attachment" to solutions only provided by national laws and resort to alternative methods of conflict resolutions.

Reckon in the institute of international commercial arbitrations as one of these unconventional pathways may present one the best options to the actors of this new global order.

As an efficient extrajudicial manner to offer a fair conclusion to transnationals disputes, arbitration represents a progressive view that jurisdiction should not be limited to prosecution and

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[38] Found in https://www.icdr.org/about_icdr.

[39] Articles 29 and 30.

[40] Example: while the LCIA‟s Arbitration Rules, in its Article 14.1, establishes that "the parties and the Arbitral Tribunal are encouraged to make contact (…) as soon as practicable but no later than 21 days from receipt of the Registrar‟s written notification of the formation of the Arbitral Tribunal", the ICDR‟s Arbitration Rules only mention, in its Article 20 (2), that "(…) the tribunal may, promptly after being constituted, conduct a preparatory conference with the parties for the purpose of organizing, scheduling, and agreeing to procedures", without setting fixed deadlines to manage the parties and the procedure.

[41] The average time frame from commencement of an arbitration to the issue of an award in na ICDR-administered arbitration is superior to a year (CONNERTY, Anthony. A Manual of International Dispute Resolution. London: Commonwealth Secretariat, 2006. p. 251).

adjudication of issues in a traditional “coercive” and “positivist” path, but rather by the willingness of the parties involved, the ones truly interested in the outcome. That way, not only they are able to extinguish a controversy in a quicker, more effective and even cheaper way (all adjectives much appreciate by traders), but also release some of the burden felt by domestic courts, each day more overloaded with excessive work.

As here exposed, to appreciate this method does not mean that the parties or the States that validate its adjudications are agreeing with a “free of formalities” territory; with sets rules provided, if not by domestic legislations, by the UNICITRAL Model Law for International Arbitration and by the codes or regulations of international arbitral courts, arbitrations must obey some standards, destined mostly to guarantee equality and the due process for all the parties involved. Though through this method the freedom of the individuals to establish how, when, where and by who a dispute shall be solved, ICAs only could achieve the respectability and the solidity that has today because its foundation assures that the final result will be fair.

At the same time, by no means this represents an attack or a crack in the sovereignty of nations. In fact, only the manifestation of this sovereignty by the acquiescence with conventions and treaties that aim to harmonize and unify domestic and internationals rules about the theme gave to arbitrations in the commercial field the effectiveness necessary to be this truly necessary instrument to the global society. In return, the States interested in promote it – through enforcement of international adjudications and the modernization of its own dispute settlement systems to include arbitral decisions – have being realizing the economic and financial benefits attached to it with little to no impact in their laws.

The truth is that, in an economic field where “borders” is a concept that mean everyday less, it is necessary the establishment of international apparatus that can provide what domestic legislation cannot, especially in the area of dispute settlement. As we saw, institutes like the London Court to International Arbitration, the International Chamber of Commerce and the American Arbitration Association has supplied the actors of the new global order with the mechanisms to keep trade relationships in constant growth, without the need to be put on halt until the judge or the court of a country can manifest its opinion about some controversy that may arise from this commercial relation.

Arbitration, in sum, is not only an advantage; it is a necessity to the modern and fast-paced economy. And as more countries realize that, directly and indirectly encouraging its practices, greater is the chance for the Private International Law become current and dynamic as expected in this era.

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