INTERNATIONAL COMMERCIAL ARBITRATION: Some practical matters based on Australian and Colombian law[1]

ARBITRAJE COMERCIAL INTERNACIONAL: Algunas cuestiones practicas basadas en el Derecho australiano y colombiano

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Abstract

This article aims to explore some of the main aspects and practical problems to have in mind when readers are getting familiar with international commercial arbitration. The text does not pretend to be a profound analysis of the international commercial arbitration institutions, but to review some of the main topics to take into account to begin studying this settlement dispute system.

Key words: International commercial arbitration, procurement, litigation, laws to be applied, Law governing Arbitration agreement, Scope of the arbitration agreement, stay of proceedings, Validity of the arbitration clause, Unenforceability.

Resumen

Este artículo tiene como objetivo explorar algunos de los principales aspectos y problemas prácticos a tener en cuenta cuando los lectores se están familiarizando con el arbitraje comercial internacional. El texto no pretende ser un análisis profundo de las instituciones de arbitraje

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comercial internacional, sino una revisión de los principales temas a tener en cuenta para comenzar a estudiar este método de resolución de conflictos.

Palabras claves: Arbitraje comercial internacional, contratación, litigio, leyes aplicables, Ley que rige el convenio arbitral, Alcance del convenio arbitral, suspensión del procedimiento, Validez de la cláusula compromisoria, Inoponibilidad.

Introduction

Under a commercial context, which is characterized by complex international transactions, it is necessary to have a system for dispute resolutions that understands the commercial particularities of the international commerce, being Arbitration the most important one.

As the parties in arbitration are from different countries, has different cultures and come from different ideas and principles of law, it is necessary a very flexible system that meet the business requirements. That is why businessmen prefer someone that knows the business environment as arbitrator to their cause, because they can understand the context and particularities of international transactions,

Therefore, businessmen generally prefer arbitration to litigation whereas lawyers do not. The reasons are easy to see. Businessmen instinctively prefer arbitration because it is private and generally more informal, and because it is, or at any appears to be, a friendlier means of resolving disputes than by litigation*.* (Kerr, 1980)

In this context, International Commercial Arbitrations face some important risks that the international model law understands and try to resolve. Those principal risks are: i) Risk of familiarity or knowledge of the legal system; ii) Transportation risk; iii) Desire of the parties to apply their own rules (generally a third country is chosen); iv) Different legal systems and rules (i.e., Common Law and Civil Law); v) The diminished importance of the arbitration clause.

In order to solve those risks, The UNICITRAL model law, the International Commercial Arbitration Act of Australia and the 1563 of 2012 Colombian International arbitration law, have similar regulations, all based on the model law as the main international arbitration instrument.

Hence, this article will briefly review the principal answers that those rules propose to resolve the mentioned risks, departing from the arbitration and litigation differences, reviewing topics as laws to be applied to arbitration, the Scope of the arbitration agreement and stay of proceedings, Validity of the arbitration clause and stay of proceedings, third party's involvement in arbitration, challenge of the arbitrators, security for Cost, "deadlocks", privacy importance in arbitration, and unenforceability based in serious errors of fact and mistakes in the interpretation of the contract.

1. Differences between International commercial arbitration and litigation

Even the International commercial arbitration has become more regulated and those regulations are based, sometimes, in the inner litigation rules and proceeding of the countries (for example in Colombia an Australia), it has not lost their independence, nature and freedom of agreement, in which the parties are ultimately the owners of the arbitration process. Moreover, arbitration, as a settlement dispute system, needs to depart from some established rules and accommodate them to the international business environment and also to the internal rules of law.

One of the main advantages of arbitration and a difference with litigation is that it is a private process. The parties are safe that their information is not going to be published or disclosure to third parties, unless there are a statutory compulsory disclosure obligation (International Arbitration). This privacy prevents attacks from the competence and from the society (Hunter, 1991) and gives the parties more confidence, flexibility in negotiations and barging power under arbitration. In contrast, a procedure in Courts, being public, constrains and limits the parties.

Other of the informal and flexible characteristic of arbitration is the possibility to choose their Arbitrators: in the Articles 10 and 11 of the Model Law (UNCITRAL, 2006, 7 july) the freedom of choice is granted, opposed to litigation. This possibility allows the parties to have whatever tribunal they prefer with the characteristics and qualifications that best fit with the subject matter of the dispute.

Because of the above, parties can choose non-lawyers as arbitrators, something impossible in litigation. In some cases, a specific qualification different from law is required to understand and solve complex issues related with economic transactions and engineering issues that lawyers are not always familiar with (Hunter, 1991) This multi-qualified tribunal gives the parties the trust that the matter is going to be completely understood by the tribunal.

Another characteristic of arbitration that gives flexibility, based on the freedom of contract, is that parties can decide the applicable laws in Arbitration. There are three coexisting rules in the arbitral procedure, the law that governs the contract, the law that governs the arbitration agreement and the law of the process.

Under the UNICITRAL Model Law (UNCITRAL, 2006, 7 july)parties have freedom to agree all of those rules accordingly with articles 19, 20 and 28. These provisions give the parties flexibility to organize the arbitration in the way that best fits with their particular needs.

Even more, the parties are allowed to choose non-specific system of law but general principles of law, equity, fair principles, or even international *Lex Merchant,* to be applied to their case. Also, article 28 (3) of the Model Law (UNCITRAL, 2006, 7 july) gives the parties the opportunity to authorize the tribunal to decide as “amiable compositeur”.

In contrast "A trial before a national Court must be conducted in accordance with the rules of that Court." (Hunter, 1991) Rules in Court are usually more formal, demanding, rigid and have complex particularities as, for example, the disclosure regulations in different countries. (Newman, 1992) Therefore, businessmen feel more comfortable with a procedure they chose and with a tribunal that understands the commercial context and knows the businessmen needs.

Related with the procedural rules, the only limitation for the parties is that the proceedings shall treat equally both parties (UNCITRAL, 2006, 7 july). This rule, rather than being an inflexible law, is an expression of the basic principles of natural justice to grant a fair trial to the parties.

Court Jurisdiction is usually established by rigid statutes under an Estate policy. Accordingly, in litigation, parties are not allow excluding issues from the jurisdiction of the Court and has to accept whatever the national law states. In contrast in arbitrations the jurisdiction of the tribunal depends on the scope of the arbitration agreement (UNCITRAL, 2006, 7 july).

For that reason, the parties are entitled to decide which kind of matters can be subject to arbitration and which others can be set aside. Even it is a great decision power, this possibility is limited by the Estates in matters that involved public interest and labor issues. Still is another expression of the flexibility that the arbitration has.

Articles 16 of the Model Law and 79 of the Colombian international arbitration law (UNCITRAL, 2006, 7 july) contains another expression of the flexibility of arbitration. The faculty given to the Arbitrators to determine their own jurisdiction under the competence – competence principle, provides the tribunal with a wide scope of interpretation of the arbitration agreement as seen in cases like Angelica (The angelic Grace, 1994) and Comandate (Comandate Marine Corp v Panaustralia Shipping pty LTd, 2006)

In this context, according with the parties' agreement, almost everything related with the contract, including pre-contractual issues, can be subject to Arbitration. Dissimilarity, as said before, in litigation, Courts jurisdiction are bind by the statutes and cannot rule on its own jurisdiction.

According with the Model Law (UNCITRAL, 2006, 7 july) Courts should not intervene in arbitration, but should help the tribunal. The principle of minimum intervention of the Courts appears in the Article 5 of that law: "In matters governed by this law [Model Law], no Court shall intervene except where so provided in this law." (UNCITRAL, 2006, 7 july)

However, Courts are useful to break the "deadlocks" that can occur during the procedure and they have a paramount role in the enforceability of the tribunals' awards, helping the arbitration procedure since respecting the will of the parties who chose arbitration for good or bad (Comandate Marine Corp v Panaustralia Shipping pty LTd, 2006).

Some examples of the role of the Court helping arbitration are those in article 6 of the Model Law. The limited cases for Court intervention in this article are relating with the arbitrator's

appointment, challenge of an arbitrator, arbitrator's impossibility to act and enforceability of the award. These measures are not designed to stop the arbitration but to make it more fluent.

Other examples are in the articles 9 and 27 where the Court, helping arbitration, can grant interim measures and assist in the collection of proof. Those measures are important to grant the applicability of the award and the correct performance of the arbitration procedure.

So, the Model Law of UNICITRAL finds the Court's role as to help but not to race against arbitration. Therefore, Courts shall grant stay of proceedings when the parties have an arbitration agreement. The stay of proceeding is mandatory according with s 7 (2) of the ICCA (International Arbitration) article 8 of the Model Law (UNCITRAL, 2006, 7 july) and article II (3) of the New York Convention. (United Nations, 1958) Consequently, the grounds for set aside tribunal awards are restricted to those stated in the s 8 of the ICCA and the Article V of the New York Convention granting to the parties that the award is a final decision in most of the cases.

In conclusion, the international arbitration law is not a replica of litigation. It has a completely different nature, based on the parties' agreement and only feeds its procedure with litigation procedure when it is required. The proceedings are still informal and the parties have huge flexibility to decide how to manage their arbitration, something that does not exist in litigation. Finally, Courts intervention is designed to help arbitration but never to block it or compete with it.

2. Laws to be applied to arbitration

In Arbitration it is important to define, first, if it is an international or national arbitration and, second, to define the different applicable laws.

The UNICITRAL Model Law, in its article 1, establish that arbitration is international if the parties have "their places of business in different states" (UNCITRAL, 2006, 7 july) for example if one of the parties has its business in Australia and the other in Italy, it is going to be an international arbitration.

When the arbitration is international, it is also paramount to find if both countries are part of the New York convention on the Recognition and Enforcement of Foreign Arbitration Awards, and if they are, both countries will be consider as convention countries according with the Model law, the ICCA (3) par 5 and 6, (UNCITRAL, 2006, 7 july) and, therefore the case is going to be resolve under the international Commercial Arbitration legislation.

Second, to find the applicable laws it is important to note that in Arbitration there are at least three coexisting applicable laws: As exposed in the Tunisienne case there is the law governing the contract, the law governing the arbitration clause as an independent agreement and the law that governs the Arbitral procedure (Compagne Tunisienne v Compagne DÁrmement Maritime, 1970).

a. Law governing the contract (lex causae)

Relating with the *lex causae* (law of the cause or law applicable to the contract), Arbitration shall honor the freedom of contract since the jurisdiction of the tribunal and the applicable laws depends on the parties' will.

In this way the Model Law in its article 28 (1) establish *"The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute"* (UNCITRAL, 2006, 7 july) However, in some cases, the parties agreement of substance law cannot be found in the contract.

When parties did not make a pact about the law applicable to the dispute (substantial law) by general principle of international law, the substantive law applicable to the dispute is the one with which the contract has a greater relationship (closeness and connection according to the contract obligations).

Still, parties can make an implicit chose of substantial law. In Australia, in the Akai case the Court rule that the substantive law could be found express or implied in the contract (Akai Pty Limited V The People's Insurance Company Limited, 1996). This statement was reiterated on the Tunisienne case where the Court, quoting *Dicey & Morris, The conflict of laws,* 8th ed., accepted that when the parties had not make an express choose of law, their intention should be inferred from the words of the contract.

Although, in common law, when parties did not expressly choose the substantive law, according with the Akai case, but choose a place to arbitrate, that means an imply pick of the law of that place as the *Lex causae.* For example, if the parties agreed Melbourne as the place for arbitration, they implicitly decided the law of Australia as the law of the substance.

Finally, if the parties did not expressly or implicitly decide about the *lex causae*, the Arbitration tribunal decides on the applicable law taking into account the general principle, the competence – competence principle, and also being able to apply principles of nova *Lex Merchant* (common law systems are not very pro *Lex Merchant*), even though is different from the legislation where the tribunal is located.

b. Law governing Arbitration agreement

The law governing the Arbitration agreement, are those set of rules which applies specifically to the arbitration agreement as a separate contract and defines its scope, validity, existence and all the matters concerning with arbitration clause. The Law Governing Arbitration agreement is also determined by the pact of the parties.

When the parties have not expressly choose this law, according with the Deutsche Schachtbau case and the Article V (1) (a) of the New York Convention, the law governing the arbitration agreement will be the law where the arbitration take place (*lex fori principle).* For example, if the parties

choose Melbourne as the seat of the arbitration, the law governing the Arbitration Agreement is the law of Australia (International Arbitration).

c. Law governing the arbitral procedure

The relevant provision of the Model Law to define the rules of procedure is the article 19. As the freedom of contract is paramount in Arbitration, the Model Law sets that the parties can choose the rules of procedure that they preferred, on condition that those rules accomplish with the article 18 of the Model Law making reference to the equalitarian treatment – same defense opportunities (UNCITRAL, 2006, 7 july).

When the parties have not decided about the procedure law, the arbitration tribunal can decide for them. This statement coexists with the Common Law seat theory (the same as in Colombia) in which the procedure law will be the one where the Arbitrations are seated, or the same, the procedure law of the country where the tribunal took place (*lex fori*).

Underneath the dictums of the James Miller case and the Naviera Amazónica Peruana S.A case, it is no commercial sensible or possible to ask to the tribunal to apply a procedure law that they are not familiar with. Therefore, even when the parties have agreed on specific procedural rules, if the tribunal cannot actually apply them because they do not know them, the tribunal can choose other rules.

However, the above represent a confrontation between common law and some civil law systems. Even though in common law systems tribunal can overrule the procedural choose of the parties base on the Naviera Amazónica Peruana S.A case, in Civil law systems, as Colombia, if there is an express chose of procedural law by the parties, the tribunal cannot rule against it. This argument could be a reason to unforce the award in those civil law countries.

3. Scope of the arbitration agreement and stay of proceedings

Scope of the arbitration agreement are related with those matters that the tribunal can decide. The parties usually pact in their contracts clauses as the following: "Any dispute arising under this agreement" (Recyclers of Australia Pty Ltd v Hettinga Equipment Inc, 2000) . This writing was analyzed by the Federal Court of Australia in the Paper case and concluded that the interpretation of this clause is narrow an arbitration clause which is limited to disputes or controversies ´arising here under´, in general, restricts arbitration to disputes and controversies relating to the interpretation of the contract and matters of performance which do not include fraud or other torts committed in the inducement of the agreement. (Recyclers of Australia Pty Ltd v Hettinga Equipment Inc, 2000)

This means that only those things related directly with the contract can go into Arbitration, when parties write arbitration clauses with the words *"arising under or here under"*. Consequently, the breach of contract, performance, validity, existence, capacity and other matter clearly related with the contract, are in the scope of the arbitration agreement and subject to the tribunal to solve.

In the Comandate case, related with *"the notion of 'capable of being settled by arbitration'*, it was held that

First, the common element to the notion of non-arbitrability was that there was a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national Court system inappropriate. Secondly, the identification and control of these subjects was the legitimate domain of national legislatures and Courts (Comandate Marine Corp v Panaustralia Shipping pty LTd, 2006)

When parties claim that something related with the controversy its linked with the public interest (defined by the Estates) and not only related with the contract and it really is, that matter will not be a problem capable of being submited to arbitration.

In conclusion, accordingly with the Article II (3) of the New York Convention and the s (7) (2) of the ICCA (United Nations, 1958) which are both mandatory provisions, when a party request a stay of proceedings to take the controversy to an international tribunal based on subject related with the contract that does not involve public interest, inner Courts Should grant it.

4. Validity of the arbitration clause and stay of proceedings

The validity of the arbitration clause is paramount because national Courts can deny a claim for stay of proceedings, refuse to send the matter to arbitration or ever refuse to enforce the award under the NY convention when the arbitration agreement is *"null and void".* (International Arbitration)

The first question related to the validity of the arbitration agreement is whether the arbitration agreement can be in an exchange of communications by email or always has to be signed directly by the parties, because of the mandatory requirement to be in writing.

This issue was solved by the Model Law in its article 7 (4) in which the requirement that the arbitration agreement must be in writing is met by electronic communications exchange as i.e., e-mail (UNCITRAL, 2006, 7 july). Also the ICCA s 3 par 3, s 8 and s 9 recognize that the arbitration agreement can be in an exchange of mails, as the same as in law 1563 of 2012 article 69 b) of Colombia.

The second issue related with the validity of the arbitration agreement is the interpretation by Courts of what "null and void" means. Under the Article V (1) (a) of the New York Convention there must be a restrictive interpretation of this concept. Therefore, it is highly unlikely that inner Courts take into account the reasons for declaring the arbitration agreement "null and void" unless they are clear and justifiable.

As seen in Comandate case quoting A J van den Berg, 1981, at 154–61

> The words ['null and void'] may be interpreted as referring to those cases where the arbitration agreement is affected by some invalidity right from the beginning. It would

> then cover matters such as the lack of consent due to misrepresentation, duress, fraud or undue influence. (…) It may be added that the words 'null and void' etc. would also apply the question of capacity of a party to agree to arbitration, which question is to be decided under his personal law or another law which a Court may hold applicable to this issue according to its conflict rules. (Comandate Marine Corp v Panaustralia Shipping pty LTd, 2006)

In this context a claim of "included by mistake" won't be a reason to declare the agreement "null and void". Therefore, as said in Comandate "It is the practice of some Courts to permit this question to go to the arbitrator, particularly if the issue is not clear or manifest" (Comandate Marine Corp v Panaustralia Shipping pty LTd, 2006) Because of that, it must be clear or manifest that the arbitration agreement is "null and void" for the stay of proceeding to apply or to deny the awards' enforcement.

Also in relation with two different processes which goes at the same time, one analyzing the nullity of the clause (in the inner court) and the other started in the arbitration tribunal, fragmentation should be avoided. It is more commercial sensible and preferable to have only one place for decision.

Finally, under the Article 16 (1) of the Model Law the arbitration Tribunal *"may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."* Hence the tribunal have jurisdiction over the validity of the arbitration agreement and only when the public interest is present Courts should refuse to granst the stay of proceeding.

5. Third party's involvement in arbitration

Another question arises, what will happen when a party that did not signed the arbitration clause, could be affected by the award? Under s (7) (4) of the ICCA (International Arbitration)is only a party the one who has made the agreement or those who claim through or under a party who signed.

Therefore, according to Cosco case, for third parties to claim, it is necessary a close proximity between that third party and the party who signed the arbitration agreement, and most important, that the third could be considered as a successor in title of one of the parties who signed the agreement (BHPB Freight v Cosco , 2008).

6. Security for Cost

The security for cost is a measure to protect the winner, in the case that the other party has no funds to pay the award. This is a very useful measure because protect the payment of the award and safeguard the party in cases of insolvency or bankruptcy of the other party. For that reason, is desirable to request it as a preventing measure.

This protection was not included in the Model Law because it does not exist in the Civil Law countries. However, under the Common Law, it is a protection that it is in the scope of the article 9 of the Model Law and can it be requested as an interim measure (UNCITRAL, 2006, 7 july).

7. Challenge of the arbitrators

The article 12 (2) of the Model Law has restrictive reasons to challenge an arbitrator. It establishes that if the Arbitrator has the qualification, the only grounds for challenge are justifiable doubts of an arbitrator´s impartiality or independence. (UNCITRAL, 2006, 7 july)

The scope of justifiable doubts has been developed by the common law Courts. In the case Common Wealth Coatings Corp was established that a substantial financial relationship with one of the parties could raise justifiable doubts (Commonwealth Coating corps v Continental Casuality Co, 1968). In the same way, in the Transmarine case, the Court said that it is possible to challenge an arbitrator when he has a close relationship with the subject-matter of the arbitration (Transmarine Seaways corp. of Monrovia v Marc Rich & Co, 1979).

In both cases the grounds for challenge must be very serious to succeed and required a real danger of bias, therefore not only a payment or a simple relationship with the subject-matter of the arbitration will be enough.

In the same way, only one action or mistake of the arbitrator is not enough to declare or argue a bias. In the Gas and fuel case the Court found bias because of the sum of various factors which reasonable demonstrate de bias, not only one element (Gas & Fuel Corp Victoria v Wood Hall & Leonard, 1978).

For example, if an arbitrator is a shareholder in one of the party’s companies or has gave legal advices to one of them, that will not be a sufficient reason to raise justifiable doubts unless he a) has received any substantial payment more than the reasonable payment received by any other shareholder or b) a very close connection that can be demonstrated since of the legal advice. In this case the time and the amount of payments should be analyzed, but also the closeness of the relationship.

Another important matter to take into account is the equalitarian treatment as a reason for arbitrator’s challenge. Under the article 18 of the Model Law it is a duty of the arbitrators to give both parties the same opportunities of defense, especially an opportunity to present their case (UNCITRAL, 2006, 7 july).

If arbitrators do not guarantee equalitarian treatment can be subject of a challenge under article 12 of the Model Law. One of the most common violation for the equalitarian principle is when the tribunal severally reduces the time for one of the parties to present their case (or bring documents), putting them under an unequal position, aiming that the party are not going to be able to present their case correctly.

Also, an award done under these circumstances will not be enforceable under Article 34 (2) (a) (ii) of the same Law, the Article V (1) (b) of the New York convention or, in Colombia under the 1563 of 2012 law, because that award is against the fundamental right of defense (because the party was unable to present their case).

8. The "deadlock"

One of the most common deadlocks take place when the parties agreed that each one will choose an arbitrator and the elected ones 'will elect the third arbitrator. UNICITRAL Model Law, In the Article 11 (3) (a) established that "if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the Court or other authority (…)." (UNCITRAL, 2006, 7 july)

It is important to note that in the Noble China case was held that an appointed Arbitrator is not a party´s lawyer so they have the same impartiality standards that all the other Arbitrators have (Noble China Inc. V Cheong , 1998).

Accordingly, the general answer to the resolve deadlocks and other issues is to ask the Courts where the arbitration tribunal is taking place to resolve them. International arbitration always need the support of the inner Courts, so a judicial pro arbitration culture is always needed for this dispute resolution method to be effective.

Other deadlock happens when one of the parties does not want to provide some documents or information that the tribunal need. In this case:

a) the tribunal can generate an adverse inference against that party,

b) the party who is interested in the information can make a claim to the Tribunal to produce an interim award under the Article 17 (2) (b) of the Model Law, or to ask the inner Court under article 9 of the Model Law to generate interim measures to obtain that information, measures enforced by local courts.

c) in the common law systems, parties can obtain a subpoena under the s 23 (3) (b) and the s 23 D (1) of the ICCA or the other international arbitration acts, that obligates the party to provide the information. In civil law countries, parties can ask for caution measures.

9. Privacy importance in arbitration

The Arbitration process is confidential and that is one of its main advantages. This allows the parties to maintain their private information secure and does not be subjects to undue pressures. When a case has not any public interest involved, media representatives should not attend to the arbitration tribunal.

Therefore, media representatives are not consider as part of the arbitration procedure according with s 7 (d) and s 7 (4) of the ICCA (International Arbitration). As a result, the tribunal can prohibit to the media representatives attending to the arbitral hearings. Also, parties can ask for an injunction to the Tribunal or to the Court against the media representatives.

Moreover, under the s 23 C (1) of the ICCA, parties cannot disclosure confidential information to thirds that are not involved in the Arbitration, unless both parties agreed taking into account the circumstances described in sections 23 D, 23E, 23F and 23 G of the ICCA.

Therefore, if one of the parties is revealing confidential information, the other can make a claim to the Tribunal to produce an interim award under the Article 17 of the Model Law, or ask the Courts under the Article 9 of the Model Law for an injunction or a caution measure (In Colombia for example) against the other, in order to stop them giving interviews to the media.

10. Unenforceability based in serious errors of fact and mistakes in the interpretation of the contract

As said before, reasons for set aside an award are very restrictive (unenforceability). Under section 8 (3A) of the ICCA Courts would only refuse to set aside an award under the circumstances contain in the sub sections (5) and (7) of the same section 8, in Colombia only under article 112 of the 1563 of 2012 law.

Nor in the subsection (5) neither in the subsection (7) or the 1563 of 2012 law, errors of facts or mistakes in the interpretation of the party´s contract are grounds to refuse the enforcement of the award.

In the same way, the Article V of the New York convention, which is also restrictive, has no ground to set aside an award based on errors of fact and/or mistakes in the interpretation of the contract.

Additionally, in the Uganda v telecom case was held that the parties cannot use the defense of public policy to argue mistakes of law (Uganda Telcom Ltd v Airtel Uganda Ltd , 2011), and in the Quintette case the Court said that the claim that the tribunal exceeded its jurisdiction, is neither a way to argue mistakes of facts or law (Quintette Coal Limited v Nippon Steel Corporation and others, 1991)

> *"Mistakes in law or fact (…) of a party´s argument by the arbitrator, although not amounting to ´misconduct´, may in certain circumstances arouse in the mind of a fair observer a reasonable suspicion that they flowed from a failure to consider the relevant contentions and submissions with a fair and unprejudiced mind.* (Gas & Fuel Corp Victoria v Wood Hall & Leonard, 1978)

Consequently, as said before, the unenforceability is very restricted in the law so the errors in facts or law cannot be a reason for it, unless bias is demonstrated.

Conclusions

International commercial arbitration is actually the most important dispute settlement tool in international transactions. However, it presents has some risks for the parties, related with the differences of law systems and customs that each merchant has according to their countries way to do business, which could confront the international principles or ways.

Consequently, it is important to differentiate arbitration from litigation, for the parties to understand which of the both are better to their national or international business problems resolutions. If their choice is arbitration, they should have in mind that this method basic principle is the freedom of will and pact, and that it has all the international strength.

Because of the above, parties must agree about which are going to be the laws to be applied to arbitration: There are always at least to be chosen, a) law for the controversy (lex causae), b) the law governing the arbitration clause and c) the procedural rules to be applied. That decision made by the parties, will determine the Scope of the arbitration agreement and the possibility to stop a cause in one of the parties' countries to take it into arbitration using the "stay of proceedings".

Also, topics as validity of the arbitration clause, specific performance, fulfillment of the obligations among others, will be decided by the tribunal accordingly with the choice of the parties. If they have not expressly or implicitly decide something related with arbitration, the tribunal, under the competence – competence principle, can interpret the contract and its clauses, to define those thing that the parties did not do.

Finally, UNICITRAL Model law, analyze and purpose answers to the most common problems in arbitration as the third party's involvement in arbitration, challenge of the arbitrators, security for Cost, "deadlocks", privacy importance in arbitration, and unenforceability based in serious errors of fact and mistakes in the interpretation of the contract.

These rules showed to be so important and useful, so most of the countries has take them as national law, as for example Australia and Colombia, giving international merchants ways to resolve their controversies that applies in different countries.

Finally, it is always important to understand that arbitration needs inner courts to be effective. As tribunal has not enforced powers, interim measures, preventing measures, security of cost and the award enforcement, will always depend on the inners courts force and the countries arbitration acceptance. Therefore, the acceptance by Estates of the New York Convention will be paramount to make this international tools effective but also the collaboration of the inner judges to it.

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