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FUNDAMENTALS OF INTERNATIONAL ARBITRATION

Commencing the procedure

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1. **WHY ARBITRATION?**

It could seem that this question has an obvious answer. But, unfortunately there are still many countries where the advantages and constitutionality of international commercial or investment arbitration are still questioned and resisted.

What leads both parties in a contract to include an arbitration clause is a matter that should be left to the parties autonomy. There are many reasons to prefer arbitration. The most commonly given are the advantages that arbitration proceedings have or should have vis a vis the state courts, such as flexibility of procedural rules, time efficiency, language, confidentiality, the possibility of choosing the arbitrator, avoiding procedural traps among others, although the most appreciated characteristic among clients is cost efficiency.

However, international arbitration is also driven by the plausible reason, that being both parties of different countries of origin, each one may resent the courts from the country of the opposing party, and the bizarre details that one may be confronted with, stemming from the complexities of local procedural rules. This is specifically true when the party to a conflict named as defendant is the Government itself, or a state owned company.

Arbitration may be ad hoc, or institutional or administered, and an arbitrator may act iuris, or as amiable compositeur or ex aequo et bono. In general terms ad hoc arbitrations should be avoided, since any of the well known international institutions give their clients certain guaranties as to the constitution of the tribunal, the possibility

of carrying out the proceedings even if one party defaults, and to secure the enforcement of the final award. All such issues may give rise to complex difficulties in the ad hoc system.

Investment arbitration is a category in itself to which we shall refer in a minute.

In a recent case (Bear Service vs. Cervecería Modelo, LL 1/07/05), dealing with a claim for losses arising out of the termination of a sale of goods contract that included an ICC arbitration clause, the Commercial Court of Appeals in Buenos Aires reversed the Lower Court judgment that had dismissed the defense of lack of jurisdiction based on the existence of an arbitration clause, opposed by the defendant. The Argentine Supreme Court affirmed the decision of the Court of Appeals and declared that the ICC International Court was the competent court to decide the indemnification claim. The claimant had argued that the agreement to arbitrate ceased with the extinction of the contract, and further, that the arbitration clause included in a printed form was not binding. Furthermore the Argentine Supreme Court, in line with its precedents, excluded the arbitration proceedings from accumulating with the claimant's insolvency proceedings.

The fact that an arbitration which commenced before a bankruptcy is declared may be exempted from being joined with the insolvency proceedings, which are bound to carry on for several years, is a material advantage not frequently mentioned.

Control from the judiciary over the arbitrators has occurred lately in cases where the state is the defendant. Those cases, comprising not only of foreign investment protection treaty claims, but also adjustments for cost increases during the building of large public works are now becoming rather popular. We have seen several cases recently in Argentina, domestic and international, all having the state or state owned companies as defendants, were the courts have reviewed final awards or have issued interim measures staying the arbitration procedure. Such control or interference with the arbitrators may reduce the apparent benefits of arbitration proceedings, but still even if such control is exercised, arbitration seems better than being directly subject to the dogmatic nationalism of certain judges.

In many countries it is still to be decided which is the best opportunity to exercise the control by the judiciary over the arbitrator's decisions, and which is to be the scope and measure of this control.

After the New York Convention of 1958 a foreign award should be recognized and enforced as an award made by the local courts. This makes the national states willing to exercise control over arbitration which they are obliged to enforce.

Is arbitration cheaper? The answer to this question should be referred to the costs involved in normal litigation in the relevant place of arbitration. If you take ordinary costs awarded in judicial cases, in many countries the difference is material. In Argentina, judges will impose all the costs on the loser, with very few exceptions, and legal fees and court taxes may add up to 25% of the aggregate amounts of the award.

Some commentators have made the exercise of comparing costs from different institutions. Since the parameters used by each institution to determine the costs are different, such comparison between institutions is not easy to make. Typically the AAA International Centre for Dispute Resolution establishes compensation for the arbitrators at an hourly rate, while ICC fixes a scale based on the amount of the claim and counterclaim. In any case, it seems clear that costs, although material in certain cases, are always kept below the average legal cost of most countries. The general rule regarding allocation of costs is different in commercial arbitration, where arbitrators are, in my opinion, more inclined to split the amounts, and let each party bear its own costs. Still a claimant may be ordered to pay all legal costs if its claim is dismissed in whole, and this risk should discourage parties from incurring in over-optimistic exaggerations when drafting their claims.

Arbitration is, of course, generally shorter than any normal litigation before state tribunals, although it is not as quick as the competing international centers wish to advertise. In general, this is a major advantage in favor of arbitration. The whole span of the procedure is shorter, not only because awards with few exceptions are complied voluntarily, but also because the time needed to arrive to a final decision on the merits is, as a general rule, much shorter than the time needed to reach a final res iudicata decision with the courts.

I find that commercial courts in most of the countries I have asked use time as an unlimited resource in order to reach justice. That is not the case of arbitration. If one realizes that it is quite frequent that certain ongoing litigation may materially affect the possibility of a company to distribute profits, or complicate a share purchase agreement, and this situation if maintained for several years may create further complications and costs, the advantages of arbitration are made clear.

Banks participating in international loans usually use contract forms that include the jurisdiction of New York tribunals, and choose New York law as the law of the contract. This sounds attractive, since probably the debtor of a developing country will not have sufficient financial means to litigate against a bank in New York, and the award condemning the debtor to pay will be very quickly reached. From then on the advantages of having a judicial award are not that clear, since under the New York Convention, arbitral awards are more easily enforced outside the country where the arbitration took place than foreign judicial awards, and we may expect that the enforcement of a foreign judicial award in the debtor's country will be subject to many more difficulties than an arbitration award.

Investment Arbitration under ICSID Rules is currently under attack from Argentina's government. It is also looked at with increased suspicion by a number of specialists, and as a result the ICSID Rules are the subject of several amendment proposals. The arguments tend to focus on the real independence and fairness of an institution organized within the World Bank and hypothetically subject to the action and pressures of countries that are both important members of the bank and the home country of foreign investors.

The absence of a real court for appealing the ICSID awards is also looked at as a negative trait, not remedied by the possibility of claiming the nullity of the award before a panel entirely appointed by ICSID.

Amendments currently under study relate to the following matters[1]

Preliminary procedures (provisional measures, claim manifestly without merit) - *publication of awards – third party access – disclosure requirements for the arbitrators – mechanism for appeal of awards*

As a whole I find that investment arbitration is starting to be defined as a particular category of cases with general common features distinct from the rest of normal commercial arbitration.

Above all, it is questioned if governmental decisions taken by a sovereign country affecting the economic system as a whole, such as devaluation or the general banning of indexation mechanisms which are frequent when a country is confronted by severe economic and political crisis, can be subject to scrutiny by an international panel, available only to foreign citizens, who may eventually fix an indemnification based on such general standards as “unfair treatment”, or similarly under general ‘umbrella clauses’, which may be included in Binational Investment Treaties, or so called BITs, combined with the most favorable nation treatment principle.

It is very clear to me that if ICSID provides foreign investors with a kind of insurance policy which is not available to nationals of the host country, covering devaluation or other financial crisis, when that works as sufficient economic incentive, it will not be long until nationals who wish to invest will come back into the host country pretending to be foreigners.

As a matter of fact, this case has already occurred in Tokios Tokeles v. Ucranian Republic. A company established in Letonia, with 99 % of its shareholders from Ucrania files a claim against Ucranian Republic under the Letonian - Ucranian BIT, as a if the company was a foreign investor in Ucrania. The Panel in this case accepted jurisdiction using only the standard of the place where the company was established,a sunique standard to determine the nationality of the investor according to this treaty.

Further advantages of arbitration relate directly to the possibility of enforcement of the award and shall be dealt with by my colleague Pierre during the second part of this panel.

[1] Working Paper of ICSID Secretariat, May 12, 2005

Now, is there any alternative to arbitration available?

Of course mediation is gaining momentum. Mediation is conceived as a stage prior to arbitration but we have seen arbitration coexisting with mediation, and even the arbitrator, if the parties so wish, may transform himself or herself into a mediator while staying the arbitration proceedings. Perhaps this pattern, or some variations of it, could be advisable to handle large numbers of investment disputes against one host country when arising as a consequence of the same economic crisis, or if originated by the same general measures of the government.

Another alternative would be a permanent board for international commercial matters with panel members that would receive fixed monthly compensation. In fact the main arbitral tribunal in Buenos Aires, which has been in place for nearly a century with enormous success is a permanent board of three arbitrators administered by the Buenos Aires Stock Market Permanent Arbitral Tribunal. Excluding the fees of the arbitrators from the costs constitutes a material advantage for this system even if the relevant administrative costs include an amount for arbitrators compensation.

So my answer to the first question, why arbitration?, is that because companies all around the world increasingly cross the borders of their home countries to buy, sell or invest abroad, they will also request that their conflicts are taken away from the national courts, and they commonly prefer to rely on arbitration rather than submitting to the courts and local procedural rules of the host countries. Such procedure is made possible because the legal systems around the world will consider an award exactly as a final judgment from a state court.

2. THE ARBITRATION CLAUSE

The arbitration agreement is drafted as a separate agreement or within a contract, as an arbitration clause inserted generally near the end of the document, and side by side with the section choosing the law applicable.

It is frequent that nobody puts special attention to this clause when negotiating an agreement. It is a matter generally left to the legal counsel of the parties, to be arranged late in the evening after everything else has been settled. Again jurisdiction is a subject

which is not expected to raise any particular issue, and which is generally not considered a deal breaker.

However, experienced practitioners know that this view will change dramatically if a conflict arises or is expected. Then the arbitration experts may have their day. The dots and comas, and each word of the arbitration clause will be subject to all possible constructions, and of course, counsels participating in the drafting will be questioned in detail.

The arbitration clause has very peculiar traits, which I would summarize as follows

Arbitration clauses generally tend to expand into the future outliving the contract, to reverse into the past reaching back to include certain acts performed prior to the closing, to broaden its effects by enclosing related persons other than those that were the parties to the agreement, to spread into successive agreements or sub contracts, and finally to permeate into other matters and claims not arising from the agreement but from statutes.

We shall mention again some of these traits along our presentation. Without pretending to cover all aspects of this very particular clause, the following are some significant aspects of the arbitration agreement.

1. Double agreement: it is an agreement between the parties, and also between the parties and the arbitrator or the chosen institution.
2. The panel or the single arbitrator produces a written award that contains several orders that the losing party must comply within the time limits set therein. If the losing party fails to comply with the orders, the successful party may request a state judge sitting in any country of the world except North Korea and a few others, to enforce them, as if it was an actual judicial judgment. Therefore, the arbitration agreement is not exactly a service contract or a joint mandate from the parties. The arbitrators appointed by the parties do not represent, or act on their behalf, neither arbitrators are services-providers. The arbitrators, very simply said, are the judges of the parties.
3. Even if arbitrators lack imperium, that is, the ability to achieve enforcement through specific and mandatory performance, in most countries it is mandatory for the competent judge to enforce the arbitral award. Therefore, imperium is achieved

through the intervention of a competent state court. If the right to appeal has been waived, directly or indirectly, there is no room for the judge to try to amend the arbitral award, even if he or she finds a mistake in the law applied or in the reasoning of the arbitrators. The state judge must enforce the award as it has been drafted by the arbitrators.

4. The arbitration clause outlives the contract of which it forms part, since it is accepted that arbitrators have jurisdiction to decide on a claim for damages arising out of unlawful termination of the contract. In the recent decision of the Argentine Supreme Court mentioned before, it was decided that the arbitral tribunal had jurisdiction to decide on a claim for damages arisen after the relevant agreement was terminated.
5. The arbitration clause confers the arbitrators jurisdiction to interpret the scope of the arbitration agreement, and as an extension of this capacity, it is generally accepted that arbitrators are entitled to decide any challenge against their own jurisdiction, at least as a first judgment subject to review in limited cases.

Reputed institutions normally include a standard clause in their booklets containing their rules. If it is the ICC, the booklet includes the following standard clause

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Inserting this text in a contract doesn't seem to be a difficult task and the possibility of incurring on an error while copying these few words seems highly unlikely. Lawyers are usually the ones in charge of the cut and paste task. Unfortunately, our first reaction is to improve the standard clause, which seems too short and simple, even when it is evident to anybody who is not a lawyer that it is quite near perfection

I am not saying parties should always refrain from adding extra words to the standard clause, but rather that new words should only be added under very specific circumstances and when it is absolutely necessary, and after making sure they are not a mistake.

On several occasions I have seen creative variations of the standard text, some quite amusing, that may have served as justification for some counsel's billable hours, but ended up creating material obstacles to starting the proceedings. In this matter I would strongly recommend leaving your creativity for another opportunity, or for other sections of the relevant contract.

Several times I have been presented with a clause that said something like "all disputes concerning the validity and interpretation of the contract shall be resolved by a neutral panel in an ad hoc arbitration. The Arbitration procedure will be governed by the ICC Conciliation and Arbitration Rules.

One can imagine that said clause was an agreement reached by both counsels to try to by-pass the advance for administrative costs requested by the ICC, while at the same time benefiting from well tested rules. But there is no way to adapt ICC Rules to an ad hoc arbitration, and in any case Conciliation Rules are now a separate set of rules. This genetic engineering of well established rules should be avoided.

Another example of creative imagination is the renaming of the concerned institution such as creating the London International Chamber of Commerce, or the Court of Arbitration of the Buenos Aires International Chamber of Commerce.

In Latin American countries there is also a trend to impose on the ICC tribunal the Procedural Code of the place of arbitration, supplementary to the ICC Rules of Arbitration, in order to fill in occasional blanks. This decision should be subject to careful scrutiny since it could encumber or even jeopardize the arbitration.

Just as an example of the risks involved, we may mention that the Uruguayan Procedural Code requires that the arbitration agreement or "compromiso" be executed in the form of a deed drawn up by a notary public under penalty of being considered non existent.

Many countries expressly establish that the arbitration agreement must be executed in writing. However, if a party files an arbitration claim and the defendant answers that claim without challenging the existence of an arbitration agreement, the arbitration shall be deemed valid even if no previous consent was expressed in a written document. A recent award of the Federal Supreme Court of Brazil, enforcing the new Arbitration Act, found that exequatur would proceed in these circumstances.

In Argentina, and in other Latin American countries, arbitration is conceived as a waiver to the constitutional right every citizen has to have access to justice, thought only as seeking a decision from the competent state tribunal with respect to any contended issue. The consequence derived from such principle is that the scope of the arbitration agreement is to be construed restrictively, since this is the standard applicable when determining the scope of any waiver of rights. As we all know, in the United States the standard of construal of arbitration agreements stemming out of the Federal Arbitration Act and upheld by United States Supreme Court precedents is exactly the opposite. In the Supreme Courts words,

"questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration" [2]

3. THE SEAT OF ARBITRATION

The lawyer's reasons to choose a seat for the arbitration are seldom the same as their clients. In principle, clients are attracted by Paris, or Barcelona, or even Buenos Aires but finally they accept to follow their counsel on this issue.

In choosing the correct place clients take into account a number of different factors, such as the need to pay long and expensive flights for the counsel and his team, the arbitrators and the witnesses, the hotel rates, and the food and drinks available.

Practitioners, quite on the contrary, only have in mind the interest of their respective clients in the outcome of the case.

As important as those reasons may sound, it is more important that the place of arbitration is a friendly environment for arbitration. Since the place will determine the competent jurisdiction to file the request to set aside the award, it is better that the country in which arbitration takes place is a signatory to the New York Convention. Only a small number of countries have not yet ratified this convention, so this factor should not be a problem.

What may raise a problem is the possibility that the courts of any given country may have a tradition of controlling the arbitration proceedings. This control by the judiciary

[2] Moses H. Cone Mem. Hosp.. v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983)

in some cases may not only be exercised after the award is made but even during the proceedings. Unfortunately, we have seen examples of both cases in Argentine arbitrations where the government is named defendant. Therefore, in those cases in which the claim is filed against state owned corporations or the state itself, we should first carefully analyze what the reaction or prior behavior of the courts in the host state jurisdiction might be.

You should also keep an eye on the rules in place referred to our profession, since in some jurisdictions only registered lawyers may practice, and therefore arbitrators that are not nationals of that state may be banned from acting as such if not duly registered with the local bar. In any case, I would not risk carrying out an arbitration in a foreign country without retaining a local law firm to follow the case.

The reason is that local procedural law may include rules that are considered public order rules, against which the parties may not enter into any agreement, and which the arbitration tribunal must comply with under penalty of having the entire procedure being declared void, or the award set aside.

I have been informed that the Supreme Court of the State of Florida has recently decided that we, as foreign lawyers, may act as counsel in international arbitration proceedings as of January 2006 provided certain benchmarks are met, including the following:

- Acting on behalf of a client with offices in the place of counsel's domicile.
- The appointment as counsel is reasonable considering the practice at the place at which the lawyer is registered.[3]

We are thus very grateful to the Florida Bar and the Supreme Court of the State of Florida for this tolerance. However the Court apparently said nothing about the work as arbitrator of a non registered lawyer or professor performed in that jurisdiction.

I can mention an actual case that is underway in which my client and my co counsel are from New Zealand, and our counterpart is an Argentine company incorporated in

[3] SC04-135, Amendments to the Rules regulating the Florida Bar and the Florida Rules of Judicial Administration, May 12, 2005.

Argentina represented by a Buenos Aires law firm. One member of the panel is a United States citizen not residing in Florida, the second is an argentine lawyer domiciled in Buenos Aires as we are, the chair is a Mexican arbitrator, domiciled in Mexico but who recently moved to Washington, and the seat of the arbitration is Miami. None of all these people are registered or have permanent residence in Florida that I know. To what extent the rules applicable to the members of the bar should also apply to all these foreigners, or non resident professionals?

All these factors should be considered when choosing a place for the arbitration, but the main concern should be the following two fundamental questions:

Are the local rules applicable to the procedure arbitration friendly?

Will any state court requested to exercise control over the arbitration give precedence to the arbitration agreement and to the parties autonomy?

4. THE LAW

Choosing the law applicable to the merits is a trait of international contracts, and as such, is not normally included within the arbitration clause but in a separate section. However there is a clear relation between both. Contract law, even if evolving towards a healthy similarity between the major legal systems, still maintains its special traits in each country. For instance, it should be mentioned that certain rules such as those applicable to the statute of limitations may be considered procedural law in one system and law of the contract in other, and the same goes for arbitrability. If the law of the contract is from a country different from the country of seat, a conflict may arise, since such differences make it possible to question which law is applicable to the instant case with respect to those matters.

Arbitrability

We designate with this term the condition that any discrepancy be it contractual or arising out of statute rights must have, in order to be validly solved through arbitration instead of the normal state courts.

This is a restriction arbitrators have unlike state judges.

Of course the general principle is well known, and basically in civil law systems is typically defined in one sentence.

Everything that can be settled freely by the parties autonomy may be subject to arbitration.

However it has been discussed whether rights arising out of a statute may be subject to arbitration. The United States Supreme Court in Mitsubishi vs. Soler Chrysler Plymouth (473 U.S. at 629, 1985) said

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights aforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.

In a case concerning an Argentine Company (Reef v. CGC) resolved under the AAA Rules, the panel found that

It will be noted that the scope of this clause is not limited to claims for breach of the contract. In Texas courts, and generally in Federal and state courts in the United States, this kind of clause, which is very commonly used in both domestic and international arbitration agreements, is interpreted to cover among other things claims of various kinds that arise in the context of the negotiation leading up to the execution of the contract, or that arise in the course of its performance or non performance, in addition to claims for damages for breach of contract.

For example, Texas courts have held that a broad arbitration clause similar to this one covered claims of fraud in the inducement to enter into the contract, securities fraud, common law fraud, negligent misrepresentation, and claims under the Texas Deceptive Trade Practices Act, as well as others. The United States Supreme Court has held that an almost identical clause covered a claim for fraudulent inducement to enter into a contract.

Thus, from Reef it becomes clear that the scope of the arbitration agreement even covers, as already mentioned, those claims arising out of certain acts or partial agreements prior to the execution of the contract that includes in it an arbitration clause.

In Argentina, it has been recently discussed whether arbitrators may declare the unconstitutionality of an emergency law which is considered of public order or public interest.

With few exceptions the answer of reputed scholars and the Commercial Courts has been that an arbitrator should have exactly the same jurisdiction as a state judge, except that jurisdiction of the judge is derived from the law and jurisdiction of the arbitrator is derived from a valid agreement. Therefore the construal of laws and the ability to declare their unconstitutionality is included in the scope of the arbitration agreements unless specifically excluded, since in Argentina there is no specific tribunal with exclusive venue to control the constitutionality of the laws.

Arbitration is in continuous expansion. In Argentina corporate conflicts between shareholders can be subject to arbitration, and matters of antitrust law or competition in Europe may be solved by the same way.

Maybe Pierre will wish to comment on that.

5. CHOOSING THE ARBITRATOR

This is of course a material feature in arbitration proceedings. Practitioners know that any mistake in choosing the arbitrator may end up not only in losing the case but also in losing the client.

Some arbitration institutions offer a list of arbitrators, but it is also frequent for the parties to have freedom of choice to name a candidate which shall be subject to final approval by the institution. Since a party has the right to challenge the arbitrator chosen by the other party, we can conclude that all members of the panel must be accepted by all the parties and the relevant arbitration Center.

The parties usually prefer a practitioner or arbitrator with many years of practice, who has acted as arbitrator in a large number of cases, but at the same time with no relationship past or present with the other party, its controlling shareholders and affiliates, or its counsel. The international arbitrators community is currently not very large in many countries making the search for the suitable arbitrator sometimes a very difficult task.

Arbitrators should know about the law applicable to the merits or the proper law o the contract. At this point please let me quote a most revealing comment from a distinguished arbitrator, Gabrielle Kaufman- Koller.[4] She said,

> *I have resolved disputes under German, French, English, Polish, Hungarian, Portuguese, Greek, Turkish, Lebanese, Egyptian, Tunisian, Moroccan, Sudanese, Liberian, Korean, Thai, Argentinian, Colombian, Venezuelan, Illinois, New York…and Swiss Law. Do I know these Laws? …Except for New York and Swiss Law the answer is clearly no.*

Certain familiarity with the law applicable to the merits is thus a desirable factor, but it is not decisive provided the partie's counsel excels in proving the applicable law, or Laws if different systems coexist and govern the obligations and rights of the parties.

6. DRAFTING THE CLAIM

Argentina practitioners following the procedural Code have a continental style as opposed to a United States style in drafting claims. Civil law countries expect the first presentation to include each and every claim, mention all relevant facts, and have copies of all the relevant documents attached. The lack of any of these elements would be considered to harm the right of defense of the defendant. Americans on the contrary, are fond of the gradual approach and the first brief will not be comprehensive of all what they intend to say on the matters subject to arbitration.

My first surprise in dealing with international arbitration was given by an American lawyer who naively said to me

"If you expect that the presentation we made with our claim includes all our allegations you are totally mistaken."

Some civil law lawyers expect that the consecutive order -the claimant is heard first and then the defendant answers- is kept all along the proceedings, and if they are on the defending side they tend to be horrified if they are not given the last word on any issue that may be discussed. This also applies to claim and answer to the claim.

[4] ITA Newsletter, Volume 18, Number 3, Summer 2004.

Even if the particular Rules that the parties have chosen include, as the ICC Rules do, the possibility of successive amendments and expanding of the initial claims, it is better to try to make the first brief as comprehensive as possible. Personally I find that when writing down my arguments new questions of fact arise, and many difficulties of evidence come to the surface. Frequently the client questioned on a particular circumstance will add new facts of evidence that will strengthen –or sometimes weaken- the crucial topic of the whole claim. Pressing to have all the documents for the first presentation frequently allows you to have a clear picture of what is missing and to eventually discover facts that may differ from your client's version of events. Arbitrators coming from civil law countries will not be pleased with the evolving pattern of allegations. Therefore, I find it is a good practice to be as comprehensive as possible in your first presentation.

Some colleagues are fond of using the surprise factor. I think it seldom gives you a material leverage. In commercial litigation both parties usually know perfectly well all the details of the case, and what may be claimed by both sides. As a matter of fact, frequently they know more than what they are prepared to brief to their own counsel. To be honest, if I may say, I have been surprised more times by what was disclosed to me by my clients at a later stage, good and bad, than by my opponents.

The number of documents involved tend to increase in a way that is creating certain alarm between practitioners. We are now depending on discs and computer programs to find our way and pick one paper between thousands of pages. Our concern should be to guide the arbitrators to a critical number of documents on which we may rely, and we should not expect that the Tribunal will read a whole mountain of papers, the majority of which are not decisive.

7. WHO MAY BE PARTIES?

Can only those who have signed the contract that has the arbitration agreement, including their successors and assignees be parties to an arbitration? Yes.

"a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. (United Steel Workers of America v. Warrior & Gulf Navigation Co, 363 U.S. 574,582 (1960))"

This was the general principle until recent years. However currently this restriction has been amended and expanded to include –under certain circumstances- other parties that have not signed the agreement.

The traditional 5 avenues for binding non signatories to an arbitration (as classified by the United States 2nd Circuit Court of appeals in Thompson v. American Arbitration Association (1995), are

A. Incorporation by reference
B. Assumption
C. Agency
D. Veil piercing/Alter ego
E. Estoppel

Those strict standards were broadened in Mc Bro vs Triangle Electrical Construction Company to encompass the circumstance in which "***appellants claims were intimately founded in and intertwined with the underlying contract obligations".***

Thus, extending its effects to third parties is another particular trait of the arbitration agreement.

The truth is that arbitrators all along the world had to resort to certain flexibility to accommodate the complexities of modern international business and of the existence of contract clusters rather than single agreements..

I was envolved in a case of a JV in which the JV agreement, executed by two parties, contemplated the incorporation of a company in which both parties would hold 50% of the shares and of the voting rights, without foreseeing a way to solve a deadlock situation. Litigation between both partners involving the company created as a consequence of the JV agreement started. Can the company be a party to such arbitration to address any claim originated from contracts containing no arbitration clause, executed between the same company and one of the partners? What happens if the deadlock successfully blocks the Board from taking any decision as to participating

in an arbitration between the company and one of it’s shareholders, and substantially any other material decision?

Independently from the standards used in United States precedents to accept the participation of a non signatory, it can easily be confirmed that due to the increasing complexities of international transactions, and the increasing number of deals, the cases where a person is called or requests admission into arbitration proceedings are increasing in number and variations. Therefore, a tension is created between the consensual character of arbitration, and the objective situations where consent may be derived from parameters other than the signature of a representative at the bottom of the page that includes an arbitration clause.

8. DRAFTING THE TERMS OF REFERENCE

Arbitrators may ask the parties to draft their proposal of Terms of Reference, and then communicate its own mix of both versions, or start the other way round, by submitting to both parties an elaborate version of Terms of Reference and ask them to comment within a short period.

Terms of Reference as such only exist in the ICC Rules, and no other international arbitration rules. It is therefore possible to ask if this particular step is really necessary, or if we could pass without it. I personally find that Terms of Reference are helpful in certain ways but sometimes they may give room for confusion.

The most common confusion I have encountered is the belief in that the Terms of Reference draw the limits to the jurisdiction of the Panel. This is certainly a big mistake. This relates to a possible future challenge of the award on grounds of extra petita or ultra petita.

The matters subject to arbitration are those resulting from the claim and other presentations by the parties, and those stemming from the counterclaim, in correlation with the particular arbitration clause. The arbitration Tribunal has no possibility of amending the presentations made by the parties, or limit the arbitration agreement.

The Terms of Reference should include all those claims and relief sought by both parties, and the final document should constitute a guideline for the parties and the

Tribunal, to clarify which are the specific issues the parties expect the arbitrators should solve.