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Commercial Arbitration: Its Harmonization in International Treaties, Regional Treaties and Internal Law

Elvia Arcelia Quintana Adriano*

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I. INTRODUCTION

Some say that Mercantile or Commercial Law should be studied methodologically by examining the subjects or persons who participate; the purpose or field of commerce; the relationship between resources and instruments of commerce; and, finally, the issues or conflicts inherent in the combination of the first three aspects of commerce.¹ The resolution of conflicts and problems in commerce may occur through a judicial or administrative process, regardless of whether the problems are of an intra-national or cross-border nature. This resolution may include regional or international procedures known as Insolvency Proceedings,² Commercial Arbitration.

Mexican legislation has incorporated the work of an international organization of the United Nations system, the UNCTAD/UNCITRAL,³ and this incorporation is reflected in the current insolvency procedure. In addition, the Commercial Code now includes an arbitration proceeding that reflects this international influence.

II. BACKGROUND

In abstract terms, the arbitration proceeding is a heterocompositive method: it is an alternative to litigation, yet decided by an impartial third party. In arbitration, a neutral third party delivers a solution to the parties. The arbitrator is not simply a communicator proposes one or several possible solutions; rather, the arbitrator imposes a binding.

"However, in order to make arbitration work, it is necessary that the parties had previously accepted, by common agreement, their submission to this form of solution."⁴

Title IV of the Mexican Commercial Code defines arbitration as any arbitral proceeding of a commercial nature, regardless whether or not it is brought before a permanent arbitration institution. International arbitration is the proper method when the parties, at the time of entering

². ELVIA ARCELIA QUINTANA ADRIANO, INSOLVENCY PROCEEDINGS, DOCTRINE, LAW, JURISPRUDENCE 191-213 (2d ed. 2004).
⁴. ADRIANO, COMMERCIAL LAW, supra note 1, at 509.
into an arbitration agreement, are established in different countries. International arbitration is also proper when (a) the place of arbitration, (b) the place to fulfill with a substantial portion of the obligations contained in the commercial relationship, or (c) the place in which the subject matter of litigation has a greater relationship, is located beyond the borders of the country where the parties are established.

III. WORKING HYPOTHESIS

This paper's working hypothesis follows the elements necessary for the use of arbitration to resolve a controversy: the existence of an agreement, a commitment clause in the agreement, actual arbitral commitment, and an arbitral or arbitration agreement.

The Commitment Clause is a section in the contract in which the parties provide that any legal dispute between them shall be submitted to arbitration for resolution. On the other hand, an Arbitral Commitment is an agreement of the parties after the dispute has arisen: in other words, the parties commit to arbitration after the threat of litigation is imminent. Finally, an Arbitration Agreement is the agreement of the parties that appoints an arbitrator, defines the obligations and rights of the arbitrators and parties, sets the time limits for resolution of the dispute, and specifies the fees to be paid by the parties.

IV. TYPES OF ARBITRATION

In Mexico there are several bodies of laws which govern arbitration according to its area of the law: i.e. labor, commercial and financial arbitration. There are also different approaches in commercial law. Consequently, it is important to mention that there are, for example, corporate, financial, maritime, and many other specialties each with different approaches. At the same time, each one of them provides arbitration specialized in diverse fields: i.e. patents, trademarks, copyrights.

This article will examine the legal framework of commercial arbitration. In this context, commercial arbitration is classified in the following three fields: (a) National Commercial Arbitration, (b) Regional Commercial Arbitration, and (c) International Commercial Arbitration.
V. LEGAL FRAMEWORK FOR REFERENCE IN MEXICO

Commercial Arbitration is located within the framework Mexican Commercial Law\(^5\) and, therefore, is governed by several sources of law that include:\(^6\)

- The Political Constitution of the United Mexican States
- The International Treaties subscribed to by Mexico
- The Commercial Code
- The Federal Code of Civil Procedure (supplementary applicability)
- The particular laws (special laws) related to a specific subject matter of commerce or those of a mercantile nature.

VI. NATIONAL COMMERCIAL ARBITRATION

When Mexico acceded to the Model Law of United Nations on International Commercial Conciliation prepared by the United Nations Commission on International Trade Law ("UNCITRAL") in 1985,\(^7\) the legislators incorporated it into the Commercial Code in the space left by the Law of Bankruptcy and Temporary Receivership ("LBTR"). After the LBTR was decodified, Title IV emerged, which rules commercial arbitration in a series of new statutory Chapters, codified and included from article 1415 to article 1463.\(^8\) These amendments to the Commercial Code were enacted in October 1989 as to the arbitral proceeding, and in July 1993 as to the enforcement of foreign judgments.\(^9\) The nine chapters of Title IV of the Commercial Code\(^10\) are as follows: General Provisions, Arbitration Agreement, Composition of Arbitral Tribunal, Jurisdiction of the same, Substantiation of Arbitral Proceedings, Costs, Annulment of Award, and, finally, one chapter refers to the Recognition and Enforcement of Awards.\(^11\)

\(^5\) ELVIA ARCELIA QUINTANA ADRIANO, COMMERCIAL LEGISLATION 107-200 (2005).
\(^8\) Código de Comercio de Mexico [COD.COM.] [Commercial Code], as amended, Diario Oficial de la Federación [D.O.], 17 de Abril de 2008 arts. 1415-1463 (Mex.)
\(^9\) See ADRIANO, FOREIGN TRADE, supra note 3 at 204-60
\(^10\) Id. at 143-44.
\(^11\) See Código de Comercio de Mexico, supra note 8, arts. 1415-1463.
VII. OPERATION OF THE ARBITRATION IN MEXICO

*Legal Nature.* Chapter IV of the Commercial Code in force contemplates a group of procedural norms that regulate the Commercial Arbitration; and as it is well known, in Mexico, the subject matter of commerce by constitutional provision has a federal scope.\(^{12}\) Commercial Arbitration is a judicial procedure, which is applied at national or international levels, as long as the situs of the forum is in Mexican territory, unless otherwise provided in other laws or international treaties to which Mexico is a signatory.\(^{13}\) Likewise, it is applied when any of the parties requests its operation, or it is requested by the judge to adopt conservatory and interim measures or, when it is pleaded in writing to the judge to enforce an arbitral award in conformity with provisions of Chapter IX of the Commercial Code.\(^{14}\)

Precisely stated, arbitration is any arbitral proceeding of a commercial nature, regardless of whether or not it is brought before a permanent arbitration institution. International Arbitration is that which takes place if the parties have their place of business situated in different countries at the time they enter into the arbitration agreement.\(^{15}\)

An Arbitration Agreement is defined as an agreement whereby the parties decide to submit their controversies that have arisen between them regarding a particular juridical, contractual, or non-contractual relationship. The arbitration agreement may be in the form of a commitment clause included in the contract or by separate agreement.\(^{16}\) The costs of an arbitration shall include the fees of the Arbitral Tribunal, the traveling and other expenses incurred by the arbitrators, the fees for expert advice or any other assistance required by the tribunal, traveling and other expenses incurred by the witnesses, among others, if approved by the Arbitral Tribunal.\(^{17}\) The arbitral tribunal can be a sole arbitrator or a panel of arbitrators appointed to resolve a dispute.\(^{18}\)

*The Discretion to Decide.* Whenever a provision of Title IV leaves to the discretion of the parties to freely decide a matter, such faculty shall include that of authorizing a third party, including an institution to decide on said matter. Because Title IV refers to an agreement between the parties, it is understood that such agreement includes all the provisions of the arbitration rules to which the agreement refers. If a provision refers to a claim, it shall also apply to a counterclaim, and when it refers to an

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12. *Id.* art. 1415.
13. *Id.* arts. 1415-1416.
15. *See id.* art. 1416.
16. *See Código de Comercio de Mexico, supra* note 8, art. 1416.
17. *Id.*
18. *Id.*
answer shall also apply to a reply to the answer to said counterclaim, and
the foregoing shall not affect the determination of the arbitrators as to
their jurisdiction over the claim and counterclaim.\textsuperscript{19}

\textit{Notice and computation of time periods.} A notice is any written
communication which has been delivered personally to the recipient or
when it has been left at his establishment, usual residence or postal
address. In the event none of the foregoing locations can be ascertained
after a reasonable investigation, a written communication shall be
deemed received when sent to the last establishment, usual residence or
postal address known of the recipient by certified mail or any other form
of delivery that shows the attempted delivery. A communication is
deemed received on the day it was delivered.\textsuperscript{20} Notably, these provisions
shall not apply to communications in a judicial proceeding.\textsuperscript{21}

In this context, time begins to run from the day following receipt of
a notice, advice, communication or proposal. If the last day of the time
period falls on an official holiday or a non-working day at the place of
residence or establishment of the recipient, the time period shall be
extended to the following working day.\textsuperscript{22} If during the elapsing of time
periods holidays or non-working days fall, they shall be included in the
computation.\textsuperscript{23}

\textit{Right to object.} The right to object is deemed to have waived if one
party to arbitration continues with the arbitration knowingly of the non-
fulfillment with certain provision of the Commercial Code in Title IV
that can be waived by said party, or such party knows that a requirement
under the arbitration agreement has not been fulfilled.\textsuperscript{24} The party shall
voice his objection without justified delay or, if he has a time period
which to comply and fails to do so, he shall be deemed to have waived
the right to do so.\textsuperscript{25}

\textit{Judicial intervention.} Unless otherwise provided, in all matters
governed by Title IV, there is no need for judicial intervention.\textsuperscript{26} If
judicial intervention is requested, the Federal District Court or the local
trial court at the place where the arbitration is held shall be competent.\textsuperscript{27}
If the arbitration is held outside of the national territory, the recognition
and enforcement of the award shall be under the jurisdiction of the first
instance federal judge, or under the jurisdiction of the local trial judge at

\begin{itemize}
\item \textsuperscript{19} Id. art. 1417.
\item \textsuperscript{20} Id. art. 1418.
\item \textsuperscript{21} See Código de Comercio de Mexico, supra note 8, art. 1418.
\item \textsuperscript{22} Id. art. 1419.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id. art. 1420.
\item \textsuperscript{25} Id. art. 1420.
\item \textsuperscript{26} Código de Comercio de Mexico, supra note 8, art. 1421.
\item \textsuperscript{27} Id. art. 1422.
\end{itemize}
the place of residence of the debtor, or if the debtor has no residence, at the place where the assets are located.\textsuperscript{28}

\textit{Arbitration Agreement.} The arbitration agreement shall be in writing and signed by the parties, or it may be in an exchange of letters, telexes, telegrams or faxes, or any other means of telecommunication that properly records the agreement.\textsuperscript{29} It may also be expressed on an exchange of a written complaint and a written answer from which the existence of the agreement can be signed by one party without being denied by the other.\textsuperscript{30} If a contract refers to a document that contains a commitment clause, such clause shall constitute an arbitration agreement as long as it is in writing and its reference creates the implication that such clause is an integrating part of the contract.\textsuperscript{31}

A judge hearing a matter that is subject to an arbitration agreement, shall remit the parties to arbitration at the time in which any of them files the corresponding petition, unless it is proven that said agreement is null, ineffective or impossible to enforce.\textsuperscript{32} However, the arbitration proceedings may be initiated or prosecuted and the award may be entered while the matter is pending before the judge.\textsuperscript{33} Even is there is an agreement for arbitration, the parties may request the judge to take conservatory and interim measures, prior to initiation of or during the arbitration proceedings.\textsuperscript{34}

\textit{Composition of the Arbitral Tribunal.} As a general rule, the parties may freely agree on the number of arbitrators, as well as the procedure to appoint them.\textsuperscript{35} In an arbitration proceeding with three arbitrators, each party shall appoint one arbitrator and the appointed two shall name the third one. In the absence of such an agreement, the following shall apply:

\begin{itemize}
  \item The sole arbitrator, upon request of any of the parties, shall be appointed by the judge.
  \item Three arbitrators, if any of the parties within 30 days of the request from the other party, does not appoint its corresponding arbitrator, then such arbitrator shall be appointed by the judge by request of the other party.
\end{itemize}

\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.} art. 1423.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Código de Comercio de Mexico, supra note 8, art. 1423.}
\textsuperscript{32} \textit{Id.} art. 1424.
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.} art. 1425.
\textsuperscript{35} \textit{Id.} art. 1426.
If the two appointed arbitrators in the following 30 days do not agree to name the third arbitrator, upon request the arbitrator is appointed by the judge. If other options for the procedure of appointment are not foreseen, or one of the parties does not act in accordance with the stipulated agreement, or a third party, including an institution, does not comply with the functions that have been assigned, either party may petition the judge to adopt the necessary measures.

- The decisions of the judge are not appealable.
- The arbitrator, as of the moment of its appointment must disclose all circumstances that may give rise to a justified doubt of his impartiality and independence. The parties may freely agree on the procedure to challenge arbitrators. If an arbitrator is unable physically or by legal disposition to perform his functions, or for other reasons, his appointment shall terminate if he resigns, or if the parties agree to his removal.  

*Jurisdiction or Arbitral Tribunal.* The Arbitral Tribunal has the authority to determine its own jurisdiction and rule on any defenses regarding the existence or validity of an agreement for arbitration. The decision of an Arbitral Tribunal declaring a contract null shall not cause, for that simple fact, the invalidity of the commitment clause. The defense of lack of jurisdiction of the Arbitral Tribunal must be raised before the filing of the plea. The plea is legally admitted even if the parties appointed an arbitrator or participated in the appointment of one of the arbitrators.

The defense based on the excess of authority, must be asserted as soon as the subject matter is raised that supposedly exceeds the authority during the arbitration proceeding. The Arbitral Tribunal may resolve the defense immediately or in the final award on the merits; however, the tribunal may decide immediately if it finds the delay unjustified.

If the tribunal declares itself competent, prior to the issuance of the award on the merits, either party may petition a judge to decide definitely within thirty (30) days after receiving notice of the declaration, and his decision cannot be appealed. While such petition is pending, the Arbitral Tribunal may continue with its proceedings and pronounce its award.

The Arbitral Tribunal may, upon petition of any of the parties, order precautionary measures for the protection of the subject matter of the dispute, and may exact from either of the parties sufficient security in connection with such measures.37

**Principles.** The parties in the arbitration proceeding shall enjoy:

- Fairness
- Full opportunity to assert his rights
- Freedom to agree on the procedure to be followed by the Arbitral Tribunal
- Freedom to agree as to the location of the arbitration
- The free determination of language
- The start of arbitration proceedings38

If the parties do not reach an agreement, the tribunal:

- Shall determine the location considering the circumstances of the case, including the convenience of the parties.39 The tribunal may, except if otherwise agreed to by the parties, convene at any location it deems appropriate to hold its deliberation, hear the parties, the witnesses or the experts, or to examine commodities or other assets or documents.40

- Shall determine the admissibility, relevancy and probative value.

- Shall determine the beginning of arbitration proceedings on the date the defendant receives a demand to submit the controversy to arbitration.41

- Shall determine the languages to be used in the proceedings; may order that any documentary evidence be accompanied by a translation into one of the languages agreed by the parties or determined by the tribunal.42

**Requirements of the claim and response.**43 Within the time agreed by the parties or that determined by the tribunal, the plaintiff must set forth the controverted facts on which he bases his claims and the

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37. *Id.* art. 1424.
38. *Id.* art. 1437.
39. *Id.* art. 1436.
40. *Id.* art. 1435.
41. Código de Comercio de Mexico, *supra* note 8, art. 1437.
42. *Id.* art. 1438.
43. *Id.* arts. 1439-1440.
recovery he demands. The defendant must respond to all that it is referred to in the claim, unless the parties agree otherwise on what the claim and response are to contain. The parties shall submit all the documents they consider relevant along with their pleadings, or make reference to them or the other evidence they intend to offer. Unless otherwise agreed to by the parties, they may modify or supplement their claims or responses, unless the tribunal considers such alterations inadmissible because they were presented with undue delay.

The arbitral tribunal shall decide if hearings are to be held for the submission of evidence or for oral argument, or if the proceedings shall substantiate by documents and other evidence. If the parties do not agree to the waiver of hearings, the tribunal shall hold them at the proper stage of the proceedings upon petition of one of the parties. The arbitral tribunal, or either of the parties with the approval of the former, may request the presence of the judge at the offer of evidence.

Sufficient advance notice shall be given to the parties regarding hearings and the convening of the tribunal to inspect commodities or other assets or documents. Copies of all testimony, documents, proofs, experts' reports and other information that a party presents to the arbitral tribunal shall be provided to all opposing parties.

Pronouncement of the Award and Conclusion of the Proceedings. The arbitral tribunal shall resolve the controversy in accordance with the principles of law chosen by the parties, and it shall be understood that all reference to the laws or rules of a specific country refer to its substantive law and not to its principles of conflicts of laws. The arbitral tribunal shall resolve as amiable compositeur or ex aequo et bono only if the parties expressly authorize said tribunal to resolve in accordance with the terms of the agreement and shall take into account the mercantile customs which may be applicable to the case. In arbitration proceedings where there is more than one arbitrator, all decisions shall be by a majority of votes. The chairman of the arbitral tribunal may resolve issues of procedure. If parties reach a settlement that resolves the controversy, the tribunal shall terminate its proceedings; and if both parties so request, and the tribunal does not object, it shall enter their controversy as an arbitration award subject to the terms agreed by said parties.

The award shall be in writing and shall be signed by the arbitrator or arbitrators. In arbitration proceedings with more than one arbitrator, the

44. Id. art. 1445.
45. Id.
46. Código de Comercio de Mexico, supra note 8, art. 1446.
47. Id. art. 1447.
signatures of a majority shall be sufficient, provided that it is stated the reasons for the lack of one or more signatures. The award shall set forth the date it was pronounced and the place where the arbitration was held. The award shall be deemed to have been pronounced at that location. Such an award shall have the same effects and consequences as any other award pronounced on the substance of the controversy.48

The proceedings of the arbitral tribunal terminate by a final award or by an order of the Arbitral Tribunal if the plaintiff withdraws his claim, unless the defendant objects to said withdrawal and the tribunal acknowledges his legitimate right to obtain a final determination regarding the controversy; the parties agree to terminate the proceeding; and the tribunal finds that the continuation of the proceedings will be unnecessary or impossible.49 The tribunal concludes its functions unless: the parties agree upon a different time period, within thirty (30) days after a final award is entered, or either of them may, after due notice to the opposing party, petition the tribunal to correct an error of computation, of copying, typographical or of a similar nature in the award in order that the tribunal gives an interpretation upon an issue or upon a specific part of the award.50

Additional award. Within thirty days after receipt of notice of the award, either party may petition the tribunal to pronounce an additional award, upon due notice to the opposing party, regarding claims which were presented in the proceedings but omitted from consideration in the award. If the arbitral tribunal deems it justified, it shall decree the additional award within sixty days.51

Costs. The parties may adopt, either directly or through existing arbitration regulations, rules governing costs of the arbitration. The arbitral tribunal shall assess costs of the arbitration in its award.52 The fees set by the arbitral tribunal shall be reasonable, taking into account the amount in controversy, the complexity of the issues, the time spent by arbitrators on the matter and any other circumstance that is relevant to the case. The fee of each arbitrator shall be determined separately and fixed by the arbitral tribunal.53 If petitioned by a party and the judge consents to comply with his commitment, the arbitral tribunal shall fix the fees after consulting the judge who may provide the tribunal with recommendations he considers appropriate regarding the amount of the

48. Id. art. 1448.
49. Id. art. 1449.
50. Id. art. 1450.
51. Código de Comercio de Mexico, supra note 8, art. 1451.
52. Id. art. 1452.
53. Id. art. 1454.
fees. The costs of the arbitration shall be borne by the party against whom an award is pronounced. The arbitral tribunal may make a pro rata distribution of the costs between the parties. The arbitral tribunal shall decide, considering the circumstances of the case, which party shall pay the costs of representation and legal assistance, or if the costs can be prorated among the parties as long as the tribunal determines this to be reasonable.

Whenever the arbitral tribunal decrees an order to conclude the arbitration proceedings, or pronounces an award in accordance with the terms agreed to by the parties, it shall fix the costs of the arbitration in the text of its order or award. The arbitral tribunal may not charge additional fees for the interpretation, rectification or supplementation of its award.

Once the arbitral tribunal has been constituted, it may request a deposit from each of the parties in equal amounts as advance of the fees of the tribunal, expenses for trips and other expenditures of the arbitrators, as well as the costs for experts or any other assistance required. If a party so requests, and the judge consents thereto, the arbitral tribunal shall set an amount of deposit or of the additional amounts only after consulting with the judge.

If deposits have not been made in full within thirty (30) days from notice by the tribunal to do so, it shall inform the parties of this fact so that the required payment may be made forthwith by each one of them. If payment is not made, the tribunal may order the suspension or dismissal of the arbitration proceeding.

After the award has been pronounced, the tribunal shall deliver to the parties a statement of accounts related to the deposits received and shall reimburse the portion that was not used.

Nullification of the arbitral award. Arbitration awards may only be nullified by a judge of competent jurisdiction for one of the following reasons: a) incapacity, where the party requesting the action of nullity proves that one of the parties to the arbitration agreement was subject to a legal incapacity; b) inadmissibility, where the arbitration agreement is shown to be invalid pursuant to the laws that were designated by the parties or, if no other laws were designated, the agreement is invalid.

54. *Id.*
55. *Id.* art. 1455.
56. *Código de Comercio de Mexico, supra* note 8, art. 1455.
57. *Id.*
58. *Id.*
59. *Id.* art. 1456.
60. *Id.*
61. *Código de Comercio de Mexico, supra* note 8, art. 1456.
under Mexican law; c) the party was not given proper notice on the
designation of one of the arbitrators or on the arbitration proceedings, or
was prevented by any other reason to assert his rights; d) the award refers
to a controversy which was not foreseen in the arbitration agreement, or
contains determinations that exceed the terms of the arbitration
agreement; e) the panel of the arbitral tribunal or the arbitration
procedure was not in accord with the agreement between the parties,
unless such agreement is in conflict with provisions of this Title IV of
the Commercial Code which the parties cannot waive or, in the absence
of such an agreement, the procedure was not in conformity with this
Title; or f) the judge finds that in accordance with Mexican law, the
object of the controversy is not subject to arbitration, or the award is
contrary to public policy.62

The petition to nullify an award shall be presented within a period
of three months from the date notice is given of the award.63 If a petition
for the annulment of an award has been presented to a judge, he may
suspend the nullity proceedings where appropriate and upon petition of
one of the parties, for a term determined by said judge to allow the
arbitral tribunal to continue with the arbitration proceedings, or adopt
any measures that, upon the opinion of the arbitral tribunal, eliminates
the grounds of the annulment petition.64 The annulment proceeding shall
be brought on by special motion in accordance with the provisions of
Article 360 of the Federal Code of Civil Procedure. The decision shall
not be subject to any appeal.65

Recognition and enforcement of awards. Regardless of the country
where an arbitration award is pronounced, it shall be recognized as
binding and after submitting a petition in writing to a judge, it shall be
enforced.66 The party who asserts an award or petitions for its
enforcement shall present the original of the award duly authenticated, or
a certified copy of the same and the original of the arbitration
agreement.67 The recognition or enforcement of an award may only be
denied, regardless of the country where the arbitration award is
pronounced, if:

A. The party against whom the award is asserted proves to the
judge of competent jurisdiction in the country where a
demand is filed for recognition and enforcement that:

62. Id. art. 1457.
63. Id. art. 1458.
64. Id. art. 1459.
65. Id.
66. Código de Comercio de Mexico, supra note 8, art. 1461.
67. Id.
• One of the parties to the arbitration agreement was affected by a legal incapacity;

• The agreement is invalid under the applicable law chosen by the parties, or if nothing is mentioned in that respect, by the laws of the country where the award is pronounced;

• Said party was not duly notified regarding the designation of an arbitrator or in reference to the arbitration proceedings, or was unable for any other reason to assert his rights;

• The award refers to a controversy not foreseen in the arbitration agreement, or contains decisions that exceed the terms of the agreement; and

• The composition of the arbitral tribunal or the arbitration proceeding was not in accordance with the agreement between the parties, or in the absence of such an agreement, it was not in accordance with the law of the country where the arbitration was held;

• The award has not yet become binding on the parties or has been annulled or suspended by the judge of the country where the award was pronounced, or whose legal system was applied to pronounce said award.

B. The judge finds that according to Mexican law, the subject matter of the controversy is not susceptible of arbitration; or the recognition or enforcement of the award is contrary to public policy.

C. If a petition to declare the nullity or suspension of an award is brought before a judge of the country pursuant to whose laws the award was pronounced, the judge before whom the recognition or enforcement of the award may, if he so deems admissible, withhold his decision, and, upon request of the party petitioning recognition or enforcement of the award, he may also order to give sufficient security from the other party.

D. The recognition and enforcement proceedings shall be brought on by special motion in accordance with Article 360 of the Federal Code of Civil Procedure. The resolution shall not be subject to any appeal.68

68. Id. art. 1462.
VIII. RULES OF ARBITRATION OF THE MEXICO CITY NATIONAL CHAMBER OF COMMERCE

The Rules are integrated in four sections. The first section is named General Provisions, which describes the scope of application, notice, computation of time periods, representation and assistance, confidentiality and the release from liability.69 These Rules define international arbitration as such arbitration in which the parties, at the time of entering into the arbitration agreement, have their domicile or establishment in different countries; or if the arbitration site is stipulated in the arbitration agreement or arranged thereunder, the site shall be a place to comply with a substantial portion of the obligations out of the country where the parties have their establishment.70

The second section is entitled “Composition of the Arbitral Tribunal,” which provides the number of arbitrators to participate in the arbitration, which can be a sole arbitrator or three. Likewise, this section refers to the appointment, challenge, removal and death or resignation. In case of replacement of an arbitrator, the hearing shall be repeated.71

The third section refers to the Arbitration Proceeding, in which it is provided the place of arbitration, language, written statement of a claim, its response; including the amendments to the claim or to the response, the pleas related to the competent jurisdiction of the arbitral tribunal, time periods, evidences, hearings, experts, contempt, closure of hearing, waiver to object and the waiver to appeal before the judicial authority, as well as the accelerated arbitration.72

The fourth section pertains to The Award, its form and effect, the applicable law and the amiable compositeur, the settlement or other grounds for termination of arbitral proceedings, costs, their deposit and payment as well as the administrative fees.73 The Transitory Article contained in section four rules in regard to the arbitration clause to be read as follows: “Any litigation, dispute or claim resulting from this contract or related to this contract, its default, resolution or nullity, shall be settled by arbitration in accordance with the Arbitration Rules of the

70. Id. art. 5.
71. See id. arts. 7-19.
72. See id. arts. 20-37.
73. See id. arts. 38-49.
of the Mexico City National Chamber of Commerce, in force at the time of initiating the arbitration proceedings."74

IX. RULES OF ARBITRATION OF THE UNITED MEXICAN STATES CONFEDERATION OF INDUSTRIAL CHAMBERS

The Rules are integrated by four sections: the first section is named General Provisions, the second section refers to the Composition of the Arbitral Tribunal, the third section is known as the Arbitration Proceeding, and the fourth section describes in detail the award in the same manner as it is provided in the Rules of Arbitration of the Mexico City National Chamber of Commerce. As their title indicates, the present rules are addressed to the members of the Confederation of Industrial Chambers of the country.

It is fair to say that the Confederation of Industrial Chambers provides Rules of Commercial Mediation, which are useful to avoid the operation of litigation in arbitral or judicial forums; among the advantages of these Rules we can mention its flexibility, the preservation of business relationships among the parties, and the reduction of time and costs. Besides, this commercial mediation is easier and shorter than a litigious proceeding. The Rules of Commercial Mediation are integrated by one section only and contains 22 articles.

X. REGIONAL ARBITRATION: TREATIES EXECUTED BY MEXICO

Up to the present date, Mexico has executed several commercial treaties with other countries, but the most important are the NAFTA75 and the EU-MEX FTA.76 The Free Trade Agreement between several European Union member states and Mexico has a section related to the solution of controversies, and it provides for the establishment of a mechanism for consultation and solution of controversies with clear and quick procedures. This is the first time that the European Union incorporated this discipline in a commercial treaty and for concession prior to conciliation, before an appearance at an arbitration proceeding, Mexico reserves its right to challenge before the WTO. In this context, it is also important to mention the commercial treaty executed by Mexico and Japan.77

74. Reglamento De Arbitraje De La Cámara Nacional De Comercio De La Ciudad De México, supra note 69, art. 49.
77. ADRIANO, COMMERCIAL INSTITUTIONS, supra note 6, at 535-48.
In reference to the analysis of commercial arbitration, Mexico has acceded and maintains in force\(^78\) the United Nations Convention subscribed to in New York in 1958 on the Recognition and Enforcement of Foreign Arbitral Awards; the Inter-American Convention subscribed in Panama in 1975 on International Commercial Arbitration;\(^79\) the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, subscribed in Montevideo in 1979,\(^80\) the UNCITRAL Model Law on International Commercial Arbitration 1985;\(^81\) the 1989 document between Mexico and Spain known as the Convention on the Recognition and Enforcement of Judgments and Arbitral Awards in Civil and Commercial Matters subscribed by the United Mexican States and the Kingdom of Spain;\(^82\) and the North American Free Trade Agreement Mexico-United States-Canada,\(^83\) which specifically, in its article 2022 provides the following rule: "will encourage and facilitate the use of arbitration and other means of alternative dispute resolutions for the settlement of international commercial disputes between private parties."

XI. ARBITRATION IN THE MERCOSUR

The legal frame that rules the MERCOSUR is, among others, the Protocol of Brasilia for the Resolution of Controversies, 1991;\(^84\) Commercial Arbitration Agreement of Mercosur, 1998; Agreement on International Commercial Arbitration Among Mercosur, Bolivia and Chile, 1998; the Protocol of Olivos for the Settlement of Disputes, Permanent Court of Review, 2002;\(^85\) International Conciliation and Arbitration Court for Mercosur, TICAMER; International Arbitration Court for Mercosur; Arbitration Awards; Santiago Arbitration Center in

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Chile, 1992; Arbitration Chamber of Brazil, 1995; Arbitration Center of Uruguay; Arbitration Chamber of Paraguay, 1996.

XII. LEGAL FRAME FOR INTERNATIONAL REFERENCE

The evolution of mercantile or commercial legislation in all States is linked to historic and political phenomena in any of the three geographic levels: States, regions or international-global zones. In the evolution of legal amendments the harmonizing trend has been constant and the adoption of rules through "Model Laws" or through those derived from bilateral or multilateral treaties. The foregoing rules are a consequence of the intense activity of the United Nations Organization known as UNCTAD/UNCITRAL with the objective to make easier the commercial transactions, nowadays increasing in number and more dynamic which final destination is the satisfaction of their needs, along with the increase in consumption markets all around this globalized world, since distances are shorten and the accessibility offered by diverse technologic and scientific advances. All the above has been reflected in the decodifying movement that allowed the existence of specialized laws, and it is worth to mention the importance of making bilateral or multilateral treaties.86

In reference to the denomination of treaty, the practice provides a wide range of nomenclatures to invoke international treaties. In this order of ideas, it is to say that said denomination is also denoted as convention, settlement, agreement, pact, letter, declaration, protocol, exchange of notes, among others, all of them attributable to the same juridical act.87

XIII. INTERNATIONAL CONVENTIONS ON ARBITRATION AND MEDIATION.

In this respect the following international instruments will be cited: New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958;88 Inter-American Convention on International Commercial Arbitration, Panama Convention, 1975;89 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards or Montevideo Convention, 1979 (CIDIP II);90 UNCITRAL Model Law on International Commercial Arbitration,

86. Adriano, Legal-Commercial Evolution, supra note 78.
87. Id. at 535 (analyzing the topic in a wider fashion).
89. Inter-American Convention on International Commercial Arbitration, supra note 79.
90. Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, supra note 80.


- Inter-American Organizations for Arbitration: Commercial Arbitration and Mediation Center for the Americas, CAMCA; Inter-American Commercial Arbitration Commission, IACAC, 1934.

92. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, supra note 82.
XIV. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK, JUNE 10, 1958).

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated on June 10, 1958 is integrated by 16 articles and this international instrument is in force as of June 7, 1959. The Convention, when ratifying or accessing to it, shall come into force on the ninetieth day following the date of deposit of the third instrument. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

This Convention is used to recognize and enforce arbitral awards that are “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.” The Convention also applies to “arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.” The arbitral award shall include awards “made by arbitrators appointed for each case, but also those made by permanent arbitral bodies to which the parties have submitted.”

There are two effects of the arbitration clause: the positive effect and the negative effect. The first positive effect refers the parties in dispute to arbitration; and the second, a negative effect, provides an inhibition of the tribunals in respect to disputes in arbitration, without infringing the domestic law.

When States sign or ratify this New York Convention, the State may apply the Convention rules to recognize and enforce awards. Additionally, the State may apply the Convention to disputes “arising out of legal relationships.” In this manner, the signing States shall recognize a written agreement where the parties agree to arbitration “concerning a subject matter capable of settlement by arbitration.” The agreement, in writing, shall include an arbitral clause.

The court of a Contracting State shall “refer the parties to arbitration, unless it finds that the said agreement is null and void,

101. Id. at 9.
102. Id. art. 1, ¶ 1.
103. Id.
104. Id. ¶ 2.
106. Id. art. 1, ¶ 3.
107. Id.
108. Id. art. 2, ¶ 1.
inoperative, or incapable of being performed." Each Contracting State shall recognize the authority of the arbitral award and shall also allow its enforcement. More onerous conditions, higher fees, or charges shall not be "imposed on the recognition or enforcement of domestic arbitral awards." To obtain the recognition and enforcement at the time of application, the Contracting State shall supply "the duly authenticated original award or a duly certified copy" of said original, which meets the conditions required for its authenticity; and the original agreement or a duly certified copy of the original, which meets the conditions required for its authenticity. If the agreement is not made in an official language of the country, "the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language." The translated agreement must be "certified by an official or sworn translator or by a diplomatic or consular agent." Recognition and enforcement of the award may be refused if:

a) It is applied, "at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that":

b) The parties were "under some incapacity";

c) "The agreement is not valid under the law to which the parties have subjected it";

d) One of the parties "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case";

e) "The award deals with a difference not contemplated by the commitment to arbitration";

f) "The composition of the arbitral tribunal or the arbitral proceeding was not in accordance with the agreement of the parties";

g) "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country." The recognition and enforcement of an arbitral award may also be refused if the competent authority where the recognition and enforcement is sought, finds that: the subject matter of the difference is not capable of settlement by arbitration," or the recognition or

109. Id. ¶ 3.
110. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, supra note 88, art. 3.
111. Id.
112. Id. art. 4, ¶ 1.
113. Id. ¶ 2.
114. Id.
enforcement of the award would be contrary to the public policy of that country.\textsuperscript{116}

If petition to set aside or suspend an award has been made to the proper authority, said authority may "adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."\textsuperscript{117} "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States."\textsuperscript{118} Additionally, the provisions shall not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the legislation or the treaties of the country where such award is sought to be relied upon."\textsuperscript{119} "The Geneva Protocol on Arbitration of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention."\textsuperscript{120}

"This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations."\textsuperscript{121} This Convention is open for accession to all Member States of any specialized organization of United Nations.\textsuperscript{122} Any State may "declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible" or only to one or several of its territories.\textsuperscript{123} "Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General."\textsuperscript{124} "Any State which has made a declaration or sent a notification," may declare at any time thereafter that "this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General."\textsuperscript{125}

\begin{footnotes}
\item[116] Id. ¶ 2.
\item[117] Id. art. 6.
\item[118] Id. art. 7, ¶ 1.
\item[119] Id.
\item[120] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, supra note 88, ¶ 2.
\item[121] Id. art. 8, ¶ 2.
\item[122] Id. art. 9, ¶ 1.
\item[123] Id. art. 10, ¶ 1.
\item[124] Id. art. 13, ¶ 1.
\item[125] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, supra note 88, ¶ 2.
\end{footnotes}
XV. INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION (PANAMA, JANUARY 30, 1975)\textsuperscript{126}

The Inter-American Convention on International Commercial Arbitration, dated on January 30, 1975, incorporates 13 articles and this international instrument is in force as of June 16, 1976.\textsuperscript{127} At the moment of accessing or ratifying this Convention, it shall enter into force on the 30th day following the date of deposit of the second instrument of ratification.\textsuperscript{128} By signing this Convention, the Governments of the Member States of the Organization of American States ("OAS") undertook "to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction."\textsuperscript{129}

Arbitrators for the dispute are "appointed in the manner agreed upon by the parties," or they may be appointed by a third party.\textsuperscript{130} Arbitrators of the dispute may be from a country party to the dispute or may be foreigners.\textsuperscript{131} "In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission."\textsuperscript{132} "An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment."\textsuperscript{133} Its enforcement or "recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts."\textsuperscript{134}

The recognition and enforcement of "the decision may be refused, at the request of the party against which it is made": by the parties, since they were subject in the agreement to some incapacity; the party was "not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable to present his defense"; "that the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration"; "that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by

\begin{itemize}
\item \textsuperscript{126} See The Inter-American Convention on International Commercial Arbitration, \textit{supra} note 79.
\item \textsuperscript{127} \textit{Id}.
\item \textsuperscript{128} \textit{Id.} art. 11.
\item \textsuperscript{129} \textit{Id.} art. 1.
\item \textsuperscript{130} \textit{Id.} art. 2.
\item \textsuperscript{131} The Inter-American Convention on International Commercial Arbitration, \textit{supra} note 79, art. 2.
\item \textsuperscript{132} \textit{Id.} art. 3.
\item \textsuperscript{133} \textit{Id.} art. 4.
\item \textsuperscript{134} \textit{Id}.
the parties," or "the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place"; "that the decision has not yet become binding on the parties or has been annulled or suspended by a competent authority of the State in which, the decision has been made."135

"The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and enforcement is requested finds that the subject of the dispute cannot be settled by arbitration under the law of that State; or, that the recognition or execution of the decision would be contrary to the public policy of that State."136 If the competent authority "has been requested to annul or suspend the arbitral decision, the authority before which such decision is invoked may, if it deems it appropriate, postpone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to post suitable securities."137

Member States of the OAS may sign this Convention138, which is ultimately subject to ratification.139 "The instruments of ratification shall be deposited with the General Secretariat" of the OAS.140 Additionally, this Convention remains open for signature by any other State.141 "This Convention shall remain in force indefinitely, but any of the States' Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.142 The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States.

135. Id. art. 5.
136. Id. art. 5, ¶ 2.
137. The Inter-American Convention on International Commercial Arbitration, supra note 79, art. 6.
138. Id. art. 7.
139. Id. art. 8.
140. Id.
141. Id. art. 9.
XVI. INTERNATIONAL ARBITRATION

The emergence of international arbitration began at the end of the 18th Century by means of the Jay Treaty, dated on November 19, 1794, and executed by and between Great Britain and the United States of America. Additionally, the First Peace Conference of The Hague in 1899 is presented as the first and most important step to arbitration: the establishment of the Permanent Court of Arbitration.

This article asserts that International Arbitration has grown due to an enormous evolution based on different modalities of law, and that those modalities derive from procedures which have been specifically established in international treaties among different States. Arbitration is considered a method by which the parties in dispute agree to submit their differences to a third party or to a Tribunal specially composed for such purpose to resolve said dispute according to rules of law specified by the parties, with the understanding that the decision has to be accepted by the contenders as a final arrangement. In other words, arbitration is a manner in which to resolve international controversies in a peaceful and amicable form, when the parties in dispute agree to submit their difference to a person or group of persons, which decision shall be binding on the contenders. In this way, the purpose of arbitration is to carry out the arrangement of litigations between the States as sovereign entities, by means of arbitrators appointed freely by the parties or by the judge on a basis of respect to juridical institutions.

XVII. RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE

The Rules of Arbitration of the International Chamber of Commerce ("ICC") are formed by 35 articles and 3 appendices. Specifically, the rules include a Model Clause for Arbitration and other Model Clause for the Pre-Arbitral Referee Procedure:

143. "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 of Arbitration."

In addition, the rules offer a model clause for pre-arbitral referee procedure of ICC and ICC Arbitration:

144. Id.
Any party to this contract shall have the right to have recourse to and shall be bound by the pre-arbitral referee procedure of the International Chamber of Commerce in accordance with its Rules for a Pre-Arbitral Referee Procedure. 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 of Arbitration.  

The International Court of Arbitration is the arbitration body attached to the ICC. The Court is comprised of members appointed by the World Council of the ICC. The primary purpose of the Court is "to provide for the settlement by arbitration of business disputes of an international character." If provided in the arbitration agreement, the Court may also require "settlement by arbitration in accordance with these Rules of business disputes not of an international character." "The Chairman of the Court or, in the Chairman’s absence or otherwise at his request, one of its Vice-Chairmen shall have the power to take urgent decisions on behalf of the Court, provided that any such decision is reported to the Court at its next session." The rules also provide for a Secretariat of the Court (the "Secretariat"), which "under the direction of its Secretary General ("Secretary General") shall have its seat at the headquarters of the ICC."

The Rules define the Arbitral Tribunal as the Tribunal that "includes one or more arbitrators." Claimant is defined as including one or more claimants," Respondent is defined as including "one or more respondents," and finally, an “Award includes, inter alia, an interim, partial or final Award.”

“All notifications or communications from the Secretariat and the Arbitral Tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification or communication may be made by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram or any other means of telecommunication that provides a record of the sending thereof.” "A notification or communication shall be deemed to have been made on the
day it was received by the party itself or by its representative, or would have been received.\textsuperscript{154} Periods of time specified in or fixed under the present Rules, shall start to run on the day following the date a notification or communication is deemed to have been made.\textsuperscript{155} "When the day next following such date is an official holiday, or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall commence on the first following business day."\textsuperscript{156}

The rules also proscribe the manner for commencing the arbitration. "A party wishing to have recourse to arbitration under these Rules shall submit its Request for Arbitration ("Request) to the Secretariat, which shall notify the Claimant and Respondent of the receipt of the Request and the date of such receipt. The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitral proceedings."\textsuperscript{157} The Request shall "contain the following information: a) the name in full, description and address of each of the parties; b) a description of the nature and circumstances of the dispute giving rise to the claim; c) a statement of the relief sought, including, to the extent possible, an indication of any amounts claimed; d) the relevant agreements and, in particular, the arbitration agreement; e) all relevant particulars concerning the number of arbitrators and their choice, and any nomination of an arbitrator required thereby; and f) any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration."\textsuperscript{158} The Claimant shall also "make the advance payment on administrative expenses."\textsuperscript{159}

The Secretariat, once it has sufficient copies of the Request and the required advance payment, "shall send to the Respondent for its Answer to the Request, a copy of the Request and the documents annexed thereto."\textsuperscript{160}

The Answer to the request and the counterclaim will be made within 30 days from the receipt of the Request from the Secretariat. The Respondent must file an Answer (the "Answer") containing "the following information: a) its name in full, description and address; b) its comments as to the nature and circumstances of the dispute giving rise to

\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} International Chamber of Commerce, Rules of Arbitration, supra note 143, art. 4, \textsuperscript{158} Id. art. 4, \textsuperscript{159} Id. art. 4, \textsuperscript{160} Id. art. 4, \textsuperscript{1}
the claim(s); c) its response to the relief sought; d) any comments concerning the number of arbitrators and their choice in light of the Claimant's proposals" and "any nomination of an arbitrator" that may be required; and "e) any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration."¹⁶¹

Counterclaims made by the Respondent must be filed with its Answer and must "provide: a) a description of the nature and circumstances of the dispute giving rise to the counterclaim(s); and b) a statement of the relief sought, including, to the extent possible, an indication of any amount(s) counterclaimed."¹⁶²

If the Respondent does not file an Answer with the Court, "or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist."¹⁶³

"If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure."¹⁶⁴ The rules offer specific guidelines for the person or persons deciding the matter. "The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void."¹⁶⁵ "Every arbitrator must be and remain independent of the parties involved in the arbitration."¹⁶⁶ "The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated. By accepting to serve, every arbitrator undertakes to carry out his responsibilities in accordance with these Rules."¹⁶⁷ "The disputes shall be decided by a sole arbitrator or by three arbitrators. Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators."¹⁶⁸ "In confirming or appointing arbitrators, the Court shall consider the arbitrator's nationality, residence and other

¹⁶¹ Id. art. 5, ¶ 1.
¹⁶² Id. art. 5, ¶ 5.
¹⁶³ Id. art. 6, ¶ 2.
¹⁶⁴ Id. art. 6, ¶ 3.
¹⁶⁵ Id. art. 6, ¶ 4.
¹⁶⁶ Id. art. 7, ¶ 1.
¹⁶⁷ International Chamber of Commerce, Rules of Arbitration, supra note 143, art. 7, ¶¶ 4-5.
¹⁶⁸ Id. art. 8, ¶¶ 1-2.
relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator’s availability and ability to conduct the arbitration in accordance with these Rules.”

“Where the Court considers that the circumstances so demand, it may choose the sole arbitrator or the chairman of the Arbitral Tribunal from a country where there is no National Committee, provided that neither of the parties objects within the time limit fixed by the Court. The sole arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties.”

Generally, “[t]he Court shall be at liberty to choose any person whom it regards as suitable” to fulfill functions as an arbitrator. “An arbitrator shall be replaced upon his death, upon the acceptance by the Court of the arbitrator’s resignation, upon acceptance by the Court of a challenge, or upon the request of all the parties. An arbitrator shall also be replaced on the Court’s own initiative when it decides that he is prevented de jure or de facto from fulfilling his functions, or that he is not fulfilling his functions in accordance with the Rules or within the prescribed time limits.”

“When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the Arbitral Tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted Arbitral Tribunal.”

141. “The Secretariat shall transmit the file to the Arbitral Tribunal as soon as it has been constituted, provided the advance on costs requested by the Secretariat at this stage has been paid.” The place of the arbitration shall be fixed by the Court unless agreed upon by the parties.” Additionally, “the Arbitral Tribunal may deliberate at any location it considers appropriate.”

“In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.”

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169. Id. art. 9, ¶ 1.
170. Id. art. 9, ¶ 3-4
171. Id. art. 9, ¶ 6.
173. Id. art. 13, ¶ 4.
174. Id. art. 13
175. Id. art. 14 ¶ 1.
176. Id. art. 14, ¶ 3.
regard being given to all relevant circumstances, including the language of the contract.” 178

The Arbitral Tribunal shall draw up a document stating the terms of reference and a procedural timetable. This document should be based on the basis of documents or in the presence of the parties, and it “shall include the following particulars: a) the full names and descriptions of the parties; b) the addresses of the parties to which notifications and communications arising in the course of the arbitration may be made; c) a summary of the parties’ respective claims and of the relief sought by each party, with an indication to the extent possible of the amounts claimed or counterclaimed; d) unless the Arbitral Tribunal considers it inappropriate, a list of issues to be determined; e) the full names, descriptions and addresses of the arbitrators; f) the place of the arbitration; and g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the Arbitral Tribunal to act as amiable compositeur or to decide ex aequo et bono.” 179

“The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means. After studying the written submissions of the parties and all documents relied upon, the Arbitral Tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.” 180 “The Arbitral Tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.” 181 “When a hearing is to be held, the Arbitral Tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it. If any of the parties, although duly summoned, fails to appear without valid excuse, the Arbitral Tribunal shall have the power to proceed with the hearing.” 182 “When it is satisfied that the parties have had a reasonable opportunity to present their cases, the Arbitral Tribunal shall declare the proceedings closed. Thereafter, no further submission or argument may be made, or evidence produced, unless requested or authorized by the Arbitral Tribunal.” 183

“As soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure

178. Id. art. 16.
179. Id. art. 18, ¶ 1.
180. Id. art. 20, ¶¶ 1-2.
181. Id. art. 20, ¶ 3.
183. Id. art. 22, ¶ 1.
it deems appropriate."184 "Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures."185

"The time limit within which the Arbitral Tribunal must render its final Award is six months. Such time limit shall start to run from the date of the last signature by the Arbitral Tribunal or by the parties of the Terms of Reference," or "from the date of the notification to the Arbitral Tribunal by the Secretariat of the approval of the Terms of Reference by the Court."186

"When the Arbitral Tribunal is composed of more than one arbitrator, an Award is given by a majority decision. If there be no majority, the Award shall be made by the chairman of the Arbitral Tribunal alone. The Award shall state the reasons upon which it is based. The Award shall be deemed to be made at the place of the arbitration and on the date stated therein."187 "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."188 "An original of each Award made in accordance with the present Rules shall be deposited with the Secretariat. The Arbitral Tribunal and the Secretariat shall assist the parties in complying with whatever further formalities may be necessary. Every Award shall be binding on the parties."189

"After receipt of the Request, the Secretary General may request the Claimant to pay a provisional advance in an amount intended to cover the costs of arbitration until the Terms of Reference have been drawn up."190 "As soon as practicable, the Court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative costs for the claims and counterclaims which have been referred to it by the parties."191 "The advance on costs fixed by the Court shall be payable in equal shares by the Claimant and the Respondent." Any provisional advance paid "will be considered as a partial payment. However, any party shall be free to pay the whole of the advance on costs in respect of the principal claim or the counterclaim

184. Id. art. 23, ¶ 1.
185. Id. art. 23, ¶ 2.
186. Id. art. 24, ¶ 1.
188. Id. art. 27.
189. Id.
190. Id. art. 30.
191. Id. art. 30, ¶ 1.
should the other party fail to pay its share." 192  

"When the Court has set separate advances on costs," each of "the parties shall pay the advance on costs corresponding to its claims. When a request for an advance on costs has not been complied with, and after consultation with the Arbitral Tribunal, the Secretary General may direct the Arbitral Tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims, or counterclaims, shall be considered as withdrawn. Should the party in question wish to object to this measure, it must make a request within the aforementioned period for the matter to be decided by the Court. Such party shall not be prevented, on the ground of such withdrawal, from reintroducing the same claims or counterclaims at a later date in another proceeding." 193

"If one of the parties claims a right to a set-off with regard to either claims or counterclaims, such set-off shall be taken into account in determining the advance to cover the costs of arbitration in the same way as a separate claim insofar as it may require the Arbitral Tribunal to consider additional matters." 194

"The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitral proceedings, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for their defense in the arbitration." 195  

"The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case." 196  

"The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties." 197  

"The parties may agree to shorten the various time limits set out in these Rules." 198

"The Court, on its own initiative, may extend any time limit which has been modified" if it deems it "necessary to do so in order that the Arbitral Tribunal or the Court may fulfill their responsibilities in accordance with these Rules." 199


193.  Id. art. 30, ¶ 4.

194.  Id.

195.  Id. art. 31, ¶ 1.

196.  Id. art. 31, ¶ 2.


198.  Id. art. 32, ¶ 1.

199.  Id. art. 32, ¶ 2.
"In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law."\textsuperscript{200}

XVIII. CONCLUSION

The harmonizing movement motivated and encouraged by United Nations within the UNCTAD/UNCITRAL, through model laws and international treaties, is clearly expressed in the regulation as it relates to the solution of disputes by means of the commercial arbitration, whether it is of a national, regional or international nature. The legislation has been adopted at those three levels. However, it is a must the continuous study, analysis and modifications of the Internal Procedure Law as to the enforcement of awards.

\textsuperscript{200} \textit{Id.} art. 35.