

# **THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS & INTERNATIONAL COMMERCIAL ARBITRATION**

## ***INTRODUCTION***

When analysing a topic like the 1980's Convention, one cannot stop without observing the big picture, that is to say, its primitive origin, the genus it belongs to, and the most important species within that genus. In other words, the reasons that inspired this type of document, the relevance that the Convention has regarding the worldwide efforts to harmonise and unify private international law, and, other important instruments created due to the same reasons.

In that sense, this paper deals with three basic topics. The first one, which includes and explains briefly the fundamental grounds for the existence of multiple initiatives looking forward to the unification or at least the harmonisation of private international law (or more precisely, international commercial law), e.g., Conventions, Treaties and/or Model Laws. The second one, which introduces the reader to the main characteristics of one of the most important and advanced topics regarding law harmonisation, that is to say, International Commercial Arbitration<sup>1</sup>; And the third one, which highlights the relevance of the 1980's Convention in relation with International Commercial Arbitration, emphasising in the area of common applicability between the 1980's Convention and the principal instruments on arbitration

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<sup>1</sup> Special emphasis is made on this topic, taking into account that the other articles of this publication are mainly referred to the 1980's Convention.

## **ORIGIN AND GENUS**

Following the aforementioned scheme, we can assert that: the economic and technological development that the world has been experiencing since the last century, the globalisation phenomenon, the economical cycles, the creation and improvement of state communities such as the European Union and the enhancement of international trade, *inter alia*, are the reasons that have been leading the international community to focus its diplomatic and legislative efforts in the creation of a harmonised and/or unified commercial law, or at least, in the harmonisation of its principles.

In that order of ideas and due to the increasing convergence of communitarian and international trade, the Law of different jurisdictions has to be harmonised, in order to handle or solve the relations created around and among the economical subjects or agents of the market within a desirable legal certainty. In other words, as much as the international trade grows, the amount of problems arising from the international relations between nationals of different states increases, strengthening the necessity of a uniform set of rules or at least principles.

The above-mentioned trends have influenced the development of different conventions, treaties and Model Laws, with great impact all over the world. The majority of those instruments have been created, agreed or inspired by the United Nations and particularly by the UNCITRAL (organisation that has been in to the project of harmonising international private law since its creation in 1966). The UNCITRAL has produced, *inter alia*, conventions, model laws, guides to enactment, legislative guides, legislative recommendations, and model contract rules. Among all these instruments we can identify as the most important ones, the Convention on Contracts for the International Sale of Goods (herein after CISG).

Therefore, we can stress out that the CISG and the documents related to International Commercial Arbitration (herein after ICA) that will be mentioned ahead, belong to the genus of instruments for harmonising and/or unifying International Private Law, with clear grounds on the development of international trade and the obvious and subsequent relations.

## **RELEVANCE**

Much can be said in order to justify or stress the relevance of the CISG and the ICA; however, the best way to do it is by observing the amount of countries that have signed those instruments. That is to say, 62 Countries have signed the CISG; meanwhile, arbitration is the most used procedure in order to resolve the disputes that arise from international commercial relationships.

On the other hand, as it is stated later on this paper, the most important instruments on International Commercial Arbitration are: the ***New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)***<sup>2</sup>; and ***The Model Law (1985)***<sup>3</sup>.

From the empirical or practical point of view, 8 or 9 international contracts out of 10 contain an arbitration clause or are linked to an arbitration agreement. Among the multiple reasons that justify this worldwide preference for arbitration,

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<sup>2</sup> This is one of the most important international regulations about arbitration (some authors have named it as the “fundamental text” for international arbitration). Nowadays, it has 132 parties.

<sup>3</sup> This, added to the New York Convention, is the most important effort in order to achieve uniformity on international arbitration law. It is product of years of work inside the UNCITRAL, organisation that has been in to the project of harmonising international private law since its creation in 1966. The process of creating the uniform arbitration rules had begun in the early 70's and still continues. The Model Law consists basically in a set of rules (taking into account the provisions of the New York Convention) for international commercial arbitration that can be adopted by any country, and in some legislations, it can be applied to non-international arbitrations. Nowadays, legislation based on the *UNCITRAL Model Law on International Commercial Arbitration* has been enacted in more than 39 states.

it is useful to mention the neutrality and speciality of the arbitration tribunal and the flexibility and confidentiality of the procedure.

## ***INTERNATIONAL COMMERCIAL ARBITRATION***

### **Historical Antecedents.**

It is quite difficult to affirm that arbitration has its origins in a specific legislation, but it is possible to assert that canon and Roman law have played an important role in its development, and that it has only emerged, as we know it, since the creation and the recognition of the modern state.<sup>4</sup>

The appearance of arbitration in Continental Law systems is due to the 1806 Procedural Code (France), which was one of the first codifications that introduced in its articles rules related to arbitration. Meanwhile, in Great Britain there are previous backgrounds, like for example the Scots' Articles of Regulation 1695. Thereafter, almost every single legislation has developed or created its own arbitration law (most of them in the 19<sup>th</sup> century), not only by the national experience but also influenced by the enhancement of international commercial relations.

At this point the international community realised that arbitration could be a helpful tool in order to solve international conflicts, not only between states, but also between members of different states, therefore, a wide number of international efforts have been made in order to regulate the international aspects of arbitration.

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<sup>4</sup> The church has a very important influence in the development of arbitration as a consequence of the medieval conception of the superiority of the church over the state (the law of God was supposed to be over the Law of the state) that is why the churchmen were solving conflicts between common citizens and sometimes, between states.

The most significant initiatives, conventions or treaties subscribed by different states aiming to the harmonisation of international arbitration rules or at least to the recognition of the arbitration awards in different jurisdictions are, the New York Convention (1958), the Washington Convention (1965) and the Model Law (1985)<sup>5</sup>. However we can also find the following: ***Montevideo Treaties on Procedural Law (1889 and 1940); Code of Bustamante; Geneva Protocol on Arbitration Clauses (1923); Geneva Convention for the Execution of Foreign Arbitral Awards (1927); Washington Convention on the Settlement of Investment Disputes (1965); Inter-American Convention on Commercial Arbitration (1975).***

### **Legal Nature of Arbitration.**

#### Private or Contractual Theory.

Arbitration is an institution of **contractual nature**. This concept is followed at least by French, Italian, German, British and Spanish jurisprudence.<sup>6</sup> It is based on the free will or autonomy of the will principle, which grants the parties, inter alia, the freedom to choose the arbitrators, the governing or applicable law, the place and rules for the operation of the tribunal; that is to say, arbitration fundamentally consists on a contract based on the parties' free will, that delegates the adjustment of their disputes or differences in a referee or arbitrator. Nevertheless, many problems can arise from this interpretation, for example determining the will of the parties in relation to the procedural applicable law when, they have not been clear or they have kept silence (In this case, is very difficult to determine if the applicable law would be the law of the

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<sup>5</sup> It is important to remember that the Model Law is not a treaty or convention, it is a set of rules that the countries are free to incorporate to their own legislation in order to achieve some uniformity on international arbitration law.

<sup>6</sup> As we will see later, this position has changed after the ratification of the New York Convention.

place of celebration of the contract, the one of the place of its execution or the one ruling the arbitration agreement).

#### Public or Jurisdictional Theory.

According to this conception, arbitration constitutes a procedure of **jurisdictional nature**. This theory assimilates arbitration to the ordinary court proceedings and therefore affirms that it is subject to all the procedures, stages and recourses of the latter; thus arbitration is a quasi judicial procedure certainly generated by an agreement of wills, its essential characteristic is not the agreement to refer (contract) but the arbitral award or sentence, which is a third party juridical act similar to judicial decisions. The implementation of this theory makes difficult the achievement of the flexibility that international arbitration must have.

#### Eclectic or Mixed Theory.

According to this theory, arbitration is a **two-stage procedure**: (1) private and (2) public. In that order of ideas, arbitration in its first stage is a private ADR<sup>7</sup> that depends entirely on the will of the parties, and later, when entering the procedural phase, it is public and demands the control of the state (as it exist in the U.S.A.). As a conclusion, we can say that this conception defines arbitration as a sui generis institution of hybrid nature, in which the contractual origin and the jurisdictional teleology coexist in an indissoluble way.

Following one or another of the above-mentioned theories has its own consequences in the international private law field, e.g., for the first one the fundamental element of arbitration is its contractual character, which will create

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<sup>7</sup> Alternative Dispute Resolution Method.

problems in different jurisdictions around the world because not all of them recognise the same degree of free will or autonomy of the will to the parties (this will be especially problematic if the parties try to choose the procedural law in certain countries and in the worst of the situations even if they choose the substantive law); in the second one, the problem does not arise from the state policy but from the parties themselves, because they would not want to refer their conflicts to arbitration in those countries that restrain the will of the parties. Fortunately, the polemic around these two theories has ceased and they have been replaced by the eclectic theory (described above).

### **International Commercial Arbitration. Building the Concept.**

As it was mentioned at the beginning of this paper, defining arbitration is a very difficult issue. In words of Professor Davidson's Arbitration "Yet immediately a difficulty is encountered, for although almost everyone has a broad idea of what arbitration involves, obtaining a precise definition is by no means straightforward", and this complications are not strange to international commercial arbitration. So, what does "international commercial arbitration" means?

It would be easier to answer this question analysing each term involved in the concept. Arbitration was defined above as a *sui generis* jurisdictional procedure by which (by express will of the parties), the resolution of private conflicts (actual, potential or future) is submitted to a collegiate body composed of referees or arbitrators, those who transitorily are invested with jurisdiction in order to make an award with the same legal category and effects of a judicial sentence. The legal nature of arbitration and its definition remains invariable in the international and domestic fields; therefore, the next step is to analyse what does commercial and international means in this context:

Commercial or Mercantile.

The development of arbitration on international private law is indissolubly linked to the enhancement of international trading between individuals and/or companies from different states. This fact is the first key for understanding what does “mercantile” means in this context by taking out of its scope those international arbitrations in which the parties are states or international organisations (this arbitrations are studied by international public law).

Because different countries have radically dissimilar conceptions in what could and could not be considered to be commercial,<sup>8</sup> it is very difficult to define in the international arena what type of transaction or operation is commercial and which one is not.

Nevertheless international treaties have tried to give a solution to the ambiguity of the concept, the problem still continues and depends in a high percentage on definitions made by domestic law, e.g., New York Convention submits the evaluation of commerciality to the state or states in which the arbitral award is going to be enforced [Article I (3)].

The Model Law has achieved the biggest step until now in the search of a uniform international meaning for “commercial”. The concept is defined in Article 2(d) as “...matters arising from all relationships of a commercial nature, whether contractual or not” and précised by Article 2(g) which contains a *numerus apertus* list of transactions that can be considered as “relationships of commercial nature”. This description or definition of “commercial” is very focused on the nature of the operations and not in the status of the parties,

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<sup>8</sup> Different conceptions such as: commerciality of the act due to the subject (subjective theory), due to the act its self (objective theory), eclectic theories (subjective and objective theories mixed in different ways) or commerciality due to the inclusion of the act on a *numerus clausus* list.

which allows to regard as mercantile some disputes or conflicts in which one of the parties is a governmental entity or state organisation.

### International.

A first approach can be to say that arbitration is international when it includes extra-national facts, in other words, issues that activate two or more different domestic legal systems or jurisdictions. It is very important to distinguish if arbitration is whether domestic or international in order to acknowledge which law and legal mechanisms are the parties able to use for enforcing the award, and because nowadays there are still countries that apply different laws to domestic and international proceedings.<sup>9</sup>

As a matter of fact, it can be said that between the multiple criteria surrounding the concept of “nationality of the arbitral award”, most legislations prefer to apply one or both of the following two, in order to attribute the nationality of their State to an arbitration: (1) the site of the arbitration proceeding or (2) the governing law for procedural matters. Some authors state that the mentioned criteria is justified because it can happen within international arbitration that the procedural law applied is not the one of the forum, or because the procedural rules are made up by the parties without regarding a particular legislation.

The New York Convention recognises both criteria, stipulating that it applies to arbitration awards obtained within the territorial jurisdiction of a state different from that in which recognition and enforcement are sought or requested, as well

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<sup>9</sup> For example, in certain countries you have to homologise domestic arbitration awards in order to enforce them, meanwhile the international ones have to be enforced by an exequatur.

as to those awards that are not considered as national in the very state in which recognition and enforcement are sought or requested.<sup>10</sup>

On the other hand, the Model Law has a much precise criteria in order to consider an arbitration proceeding as international, that is to say in its own words that it is international if [Article 1(3)]: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected.

For the purposes of the mentioned definition of internationality, Article 1(4) also clarifies that: (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; (b) if a party does not have a place of business, reference is to be made to his habitual residence.<sup>11</sup>

### ***THE CISG AND ITS INTERRELATIONS WITH INTERNATIONAL COMMERCIAL ARBITRATION***

Analysing the text of the CISG, searching for direct links or references to ICA, one can assert that there are to little direct connection points between the two international figures. That is to say, the 1980's Convention only makes

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<sup>10</sup> It is important to remember that the distinction between national and foreign awards is fundamental in order to choose the procedure for its recognition and enforcement (homologation, exequatur, etc.).

<sup>11</sup> As it was mentioned, nationality of the award is a very important issue, but it would depend in which criteria, convention or parameter each state uses for defining it.

reference to arbitration three times: the first one is to stress out that the arbitral tribunal must realise when interpreting the convention its international character; meanwhile the other two establish that no period of grace may be granted to the seller or buyer by an arbitral tribunal when the buyer or seller resorts to a remedy for breach of contract.

However, as it was mentioned before, there are multiple indirect links or connection points between the New York Convention, the Model Law and the 1980's Vienna Convention. Those links can be observed in the fact that almost every contract based on the CISG has an arbitration agreement, more precisely, between 80% and 90% of international contracts (not only on the sale of goods) are bounded by this type of clause.

In this point of the study and to conclude this paper, it is necessary to establish when are the CISG and the ICA instruments going to be applicable. That is to say, it is necessary to analyse what does internationality means under the scope of the aforementioned conventions and the model law.

As it was mentioned when defining international commercial arbitration, there are 4 basic criteria in order to establish the applicability of the New York convention and/or the Model Law, defining obviously when an arbitration is international, which are: when (1) the arbitration awards obtained within the territorial jurisdiction of a state different from that in which recognition and enforcement are sought or requested; (2) when the awards are not considered as national in the very state in which recognition and enforcement are sought or requested; (3) when the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (4) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of

the obligation of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected.

As understandable from the internationality criteria of the ICA, it is possible to affirm that there is a big gap in which the parties can agree the applicability of the convention or the model law and consequently the internationality of the arbitral procedure and award, that is to say, there is a wide definition of what internationality means and therefore, when the New York Convention and the Model Law are going to be applicable.

On the other hand, in order to apply the CISG, there is a narrow criterion, which is the place of business of the parties to the contract. In other words, a sale of goods would be regarded as international and under the scope of the CISG only if the parties have their places of business in different states.

According to the previous analysis, we can find multiple contracts for the sale of goods regarded as international under the scope of the ICA (that is to say for arbitral purposes) but not international under the scope of the CISG, therefore not subject to its provisions. The only common point of applicability between ICA and CISG is found in the case in which the parties to the contract are the same to the arbitration agreement and all of them have their places of business in different states.