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ARE INTERNATIONAL ARBITRATION AGREEMENTS SUITABLY DRAFTED? SOME REFLECTIONS BY A MID-NIGHT-CLAUSES REVIEWER IN A MULTI-DISCIPLINARY LAW FIRM

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The use of arbitration to adjudicate international commercial transactions is indisputably widespread nowadays. International arbitration agreements are increasingly included in international commercial contracts related to a full variety of situations (sales, M&A, distribution, construction, IP, energy, etc.). However, such agreements are not always drafted (or at least reviewed) by international arbitration practitioners, but by lawyers and/or parties unfamiliar with the intricacies of international commercial arbitration. This article includes some reflections by an international arbitration practitioner in a multi-disciplinary law firm who is usually requested to conduct reviews of draft international arbitration agreements at the eleventh hour.[1]

1. ONE PROBLEM IDENTIFIED IN PRACTICE: THE LACK OF FAMILIARITY WITH INTERNATIONAL COMMERCIAL ARBITRATION OF THE DRAFTERS OF INTERNATIONAL ARBITRATION AGREEMENTS IN MULTI-DISCIPLINARY LAW FIRMS

The vast majority of arbitration statutes provide for a definition of what an (international) arbitration agreement is as well as the legal requirements for it to be considered valid and enforceable under a domestic law.[2]

1 This article is the result of the author's involvement in the review of an internal protocol for the drafting of international arbitration agreements (see infra Section 2). The author wishes to thank his fellow colleagues at Cuatrecasas, Gonçalves Pereira (in particular, María Xiol Bardají) for the invaluable discussions on how best address this important issue by transactional lawyers unfamiliar with international commercial arbitration and the assistance they may receive from international arbitration practitioners.

2 See, *per omnes*, the *UNCITRAL Model Law on International Commercial Arbitration (1985). With amendments as adopted in 2006*, Chapter II, *Arbitration Agreement* (both Option I and Option II, as adopted by the Commission at its 39th. session in 2006), at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last access: 7 December 2017).

In the same line, many arbitral institutions provide for model (international) arbitration agreements[3] that allow the parties to confirm in advance that (i) they have agreed to have the arbitration proceedings administered by that specific arbitral institution; and (ii) the (international) arbitration agreement is valid and enforceable in many jurisdictions because it was drafted following a model very much tested in practice. Moreover, on 7 October 2010 the International Bar Association adopted its *Guidelines for Drafting International Arbitration Clauses* ("IBA Arbitration Clause Guidelines"),[4] which provide for well-contrasted solutions to usual problems that the parties may have to address when considering an international arbitration agreement. Additionally, many authors have provided their views on how best draft international arbitration agreements.[5]

For all the foregoing, it may be said that parties and their lawyers[6] currently have access to a body of provisions, commentaries and other materials that may provide them with reasonable comfort for the drafting of international arbitration agreements that will in the end comply with the relevant legal requirements. In this sense, the parties have *ab initio* many tools to help them clearly state their will to have the potential disputes arising out of their contractual relationship adjudicated by arbitration, as well as to choose (i) between *ad hoc* and administered arbitration; (ii) the method of selection and number of arbitrators; (iii) the arbitration rules; (iv) the place of arbitration; or (v) the language of arbitration, to name a few of the basic elements of international arbitration agreements.[7]

However, it is important to note that, save in the case of a *compromis* (i.e., an arbitration agreement entered into for the settlement of an existing dispute),

3 See, e.g., the Standard ICC Arbitration Clauses, at https://iccwbo.org/publication/standard-icc-arbitration-clauses-english-version/; LCIA's Recommended Clauses, at http://www.lcia.org/dispute_resolution_services/lcia_recommended_clauses.aspx; ICDR Clause Drafting, at https://www.icdr.org/icdr/faces/clausedrafting?_afrLoop=52998484551132&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D52998484551132%26_afrWindowMode%3D0%26_adf.ctrl-state%3Df0uh533ln_87 (last access: 7 December 2017).

4 At https://www.ibanet.org/ENews_Archive/IBA_27October_2010_Arbitration_Clauses_Guidelines.aspx (last access: 7 December 2017).

5 See, e.g., S. R. BOND, "How to draft an ICC Arbitration Clause (Revisited)", *ICSID Review – Foreign Investment Law Journal* (March 1992), Vol. 7, Issue 1, pp. 153-167; R. E. CROTTY and J. M. METZINGER, "How to draft an International Arbitration Agreement", The Metropolitan Corporate Counsel (August 2009), Vol. 17, No. 8, pp. 1-2; G. B. BORN, "International Commercial Arbitration", (Wolters Kluwer, 2009), Volume 1, pp. 172-180 and publications cited by this author.

6 As indicated in the Foreword to the *IBA Arbitration Clause Guidelines*, they "*have been developed in order to assist not only arbitration specialists but, particularly, in-house counsel and business lawyers ordinarily involved in contract drafting but unfamiliar with the complexities of arbitration.*"

7 See *IBA Arbitration Clause Guidelines*, supra note 4, Section II, Basic Drafting Guidelines.

the drafting of an international arbitration agreement is not normally made by experts in international commercial arbitration. In many occasions this circumstance derives from the peculiar internal division of work within multi-disciplinary law firms, where one legal relationship is analysed by different areas of practice organized as independent departments (i.e., commercial, labour, tax and, of course, dispute resolution).

In this context, the discussions among the parties during the negotiation of international commercial contracts tend in general to refer to the substantial aspects stemming therefrom (i.e., the obligations they will enter into under the prospective contract), something which is absolutely understandable. In addition, the international commercial contracts are drafted by lawyers with specific knowledge of the substantial aspects thereof and whose main aim is to have the contract successfully entered into by their respective clients. The international arbitration agreement is not, hence, the main concern of the parties (save, of course, in the case of a *compromis*, where the arbitration agreement is actually the subject-matter of the contract).

As a result, transactional lawyers (i.e., those in charge of drafting the merits of the legal relationship) may lack the necessary familiarity with the intricacies of international commercial arbitration for the drafting of a suitable international arbitration agreement. It might also happen that they do not have any compelling reason to analyse the obligations stemming from the contract from a procedural point of view (in other words, that things may go wrong during the application of the contract that they are carefully drafting). Moreover, as it is typically said, the dispute settlement clause of a contract is in many occasions negotiated at the eleventh hour and, in purity, it does not have an essential character for the contract because, in case of a dispute, a court of justice may be always seised to solve the dispute even if the parties have not so agreed[8]

8 The same applies to the clause indicating the law or rules applicable to the contract. In the absence of such a clause, the arbitral tribunal may apply the rules of law which it determines to be appropriate; see, e.g., Article 21(1) *ICC Rules of Arbitration*, Article 22(3) *LCIA Arbitration Rules*, Article 31(1) *ICDR International Arbitration Rules*, Article 27(1) *SCC Arbitration Rules*, Rule 31(1) *SIAC Arbitration Rules*, Article 35(1) *HKIAC Administered Arbitration Rules*, Article 49(2) *CIETAC Arbitration Rules*, Article 35(1) *UNCITRAL Arbitration Rules*. The *IBA Arbitration Clause Guidelines* (supra note 4) include as Guideline 8 (Basic Drafting Guidelines) the specification of the rules of law governing the contract and any subsequent disputes; nonetheless, the recommendation is qualified by '*ordinarily*' (contrary to the previous recommendations on the place of arbitration, the number of arbitrators, the method of selection and replacement of arbitrators or the language of the arbitration) as in Comment 43 the *IBA Arbitration Clause Guidelines* acknowledge that the choice of substantive law can be made in a clause separate from the arbitration clause "*because issues can arise under the substantive law during the performance of the contract independent of any arbitral dispute.*"

(as the right to a fair trial/access to justice is considered a fundamental right.)[9]

Consequently, there are certainly some evident risks surrounding the suitability of the international arbitration agreement resulting from such an approach towards potential disputes that may arise out of the contract at stake. In this scenario, transactional lawyers need additional guidance for the purposes of drafting the suitable international arbitration agreement.

2. SOME PRACTICAL REFLECTIONS: THE PARTICIPATION OF AN EXPERT IN INTERNATIONAL ARBITRATION TO DRAFT OR REVIEW THE INTERNATIONAL ARBITRATION AGREEMENT

In view of their internal division of work, multi-disciplinary law firms can set up internal protocols for an effective drafting of international arbitration agreements to be inserted into international commercial contracts. Such protocols should be prepared by international arbitration practitioners for obvious reasons but for the purposes of being primarily used by transactional lawyers in charge of drafting international commercial contracts. Any ordinary protocol should normally respond to a threefold structure:

(i) generalities about international commercial arbitration and its applicability to international commercial contracts, which should be updated from time to time after new developments take place in international commercial arbitration (whether changes in institutional arbitration rules, arbitration statutes, or case law trends, approval of new soft law rules or the emergence of new arbitral practices like third-party funding);

(ii) specific recommendations for the drafting of international arbitration agreements in line with the *IBA Arbitration Clause Guidelines*, from the selection of the place of arbitration to the optimal number of arbitrators; and,

(iii) notwithstanding its primary users, a requirement to the drafter to consult an international arbitration practitioner before the draft inter-

9 See Article 6, *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)*, Rome, 4 November 1950 (213 U.N.T.S. 221); Article 8, *American Convention on Human Rights*, San José, 22 November 1969 (1144 U.N.T.S. 123); Article 7, *African Charter on Human and Peoples' Rights (Banjul Charter)*, Nairobi, 27 June 1981 (1520 U.N.T.S. 217).

national arbitration agreement is incorporated into the draft contract, in order to confirm its suitability for the case at hand.[10]

The application of points (i) and (ii) of such a protocol should, in principle, allow the drafting of international arbitration agreements in a straightforward manner. Nonetheless, some problems persist and still justify the participation of an international arbitration practitioner in the preparation of international arbitration agreements as in point (iii). Three reflections can be offered from the author's experience under point (iii) above that could be incorporated into internal protocols for the drafting of international arbitration agreements.

2.1. THE DRAFTING OF THE INTERNATIONAL ARBITRATION AGREEMENT MUST BE MADE BEARING IN MIND THE UNDERLYING LEGAL RELATIONSHIP AND THE PARTY'S INTERESTS

The first and foremost reflection is that an arbitration must be tailor-made to the case at hand, having due regard of the underlying legal relationship and the party's interests. There is a great difference between a well-drafted arbitration agreement in abstract for academic purposes and a well-crafted arbitration agreement *in concreto* for a party and a specific legal relationship.

In this sense, when drafting or reviewing an international arbitration agreement, it is essential to understand the kind of disputes that might arise out of the underlying contract as well as the procedural position that the drafter's client would likely have in a potential arbitration, leaving the principle of separability of the international arbitration agreement aside for one moment. Although many examples can be proposed, we can limit ourselves to review two typical contractual relationships and the different interests at stake therein:

(i) On the one hand, in a sale and purchase contract the seller's main obligations are to provide the buyer with the goods and to respond

10 A similar situation can be seen in the issuance of *legal opinions* by law firms to certify the contents of the law applicable to a transaction. In many transactions one party may require a law firm to confirm in writing that certain provisions of the contracts are valid according to the law chosen by the parties (including the interpretation given by the Judiciary). Many law firms have approved templates for the issuance of such legal opinions, which in many occasions have to be signed by a number of partners as the resulting document might engage the responsibility of the law firm *vis-à-vis* the requesting party. However, this approach does not preclude from requiring experts in specific areas of law to confirm the suitability of the legal opinion on a case-by-case basis. In particular, the template may contain references to the validity of international arbitration agreements for the purposes of confirming such quality of the arbitration agreement at stake.

of any defect of the goods in case of a complaint by the buyer under a reps & warranties clause or statutory provisions, while the buyer's main obligation is to pay the price.

(ii) On the other hand, in a bank loan the lender's main obligation is to provide the money, while the borrower's main obligation is to repay the debt.

Depending on the likelihood of a dispute under the contract at the time of entering into it and the party's position in any subsequent dispute, the analysis of the contents of an international arbitration agreement may vary considerably, like the number of arbitrators (a basic element for the *IBA Arbitration Clause Guidelines*)[11] or the inclusion of a document production request phase (an optional element for the *IBA Arbitration Clause Guidelines*)[12]:

(i) On the one hand, in the sale and purchase contract, a seller who understands that the goods will comply for sure with the contractual requirements on quality may prefer an international arbitration agreement that allows them to obtain an award enforceable against the buyer in a fast-track manner. On the contrary, if the buyer understands that a dispute on the quality of the goods may likely arise, they would be interested in a more complex international arbitration agreement to better protect their contractual rights.

(ii) On the other hand, in a banking contract the bank may be interested in including as many precautionary mechanisms as possible to assure the correct enforcement of the resulting award, the main feature of which is a specific resort to an emergency arbitration (particularly if the institutional rules chosen by the parties do not still expressly foresee such a mechanism as part of the ordinary international arbitration agreement).

In this regard, the first questions to be posed by the reviewer of the international arbitration agreement are: 'who is our client?' 'what is the contract about?' 'how many possibilities are there for a dispute under the contract to arise?' and 'which would be our client's position in such a dispute?'. In view of the answers provided, the reviewer will adapt their recommendations to

11 See *IBA Arbitration Clause Guidelines* (supra note 4), Guideline 5 (Basic Drafting Guidelines).

12 See *IBA Arbitration Clause Guidelines* (supra note 4), Option 2 (Drafting Guidelines for Optional Elements).

an order of payment of liquid amounts of money against the debtor.[19] In the case of non-payment, the creditor can simply request to the competent court of justice the enforcement of the authentic instrument against the debtor as if it were a final court judgment (i.e., without first filing a lawsuit claiming for payment). Put in a different way, the authentic instrument allows the creditor not to start an arbitration proceeding to obtain an award ordering the debtor to pay the outstanding debt, but to request the enforcement of the authentic instrument itself when non-payment takes place. The practice of using authentic instruments can be seen, for example, (i) in banking contracts at the banks' request; or (ii) in settlement agreements offsetting obligations from previous contractual relationships.

The qualification of the contract as an authentic instrument overrides any dispute settlement provision set out therein – including international arbitration agreements. In this regard, the subsequent transformation of the contract into an authentic instrument renders the discussions (and the underlying work) on the international arbitration agreement virtually moot. It is true that the international arbitration agreement may still be applicable to the settlement of a dispute about the interpretation or application of clauses of the contract other than those related to the payment of liquid amounts of money. Nonetheless, the conversion of the contract into an authentic instrument is precisely the consequence of the fact that the main (if not the sole) obligation stemming from the contract is actually the payment of liquid amounts of money and, consequently, the commencement of an arbitration proceeding on the interpretation or application of other clauses is really remote.

For the foregoing, the drafter of the international arbitration agreement needs to understand the full effects of the subsequent conversion of the contract into an authentic instrument in order to better ascertain the need to draft an international arbitration agreement in such a contract.[20]

19 In Spain, Article 517(2) *Civil Procedure Act* provides: "*Only the following titles shall involve enforcement: (…) (iv) public instruments (…) (v) commercial agreements signed by the parties and by a Notary Public who is a member of the association of Notaries who supervises these.*" Article 520(1) states: "*When it is a question of the enforcement titles stipulated in numbers (iv), (v), (vi) and (vii) of paragraph 2 of Article 517, enforcement may only be applied as regards a certain amount which exceeds EUR 300: 1st. In cash.*" Article 571 states: "*The provisions of this Title shall apply when the compulsory enforcement is appropriate by virtue of an enforcement title directly or indirectly resulting in the obligation to deliver an amount of liquid money.*" Article 572(1) states: "*For the purposes of the dispatch of the enforcement a liquid amount shall be considered any specified amount of money expressed in the title with comprehensible letters, figures or numbers.*" Finally, Article 572(2) states: "*An enforcement may also be dispatched for the amount of the balance resulting from transactions deriving from contracts executed by public deed or in a policy authenticated by a certified trade broker, provided that it has been agreed in the title that the amount due in case of enforcement shall be that resulting from the settlement carried out by the creditor in the manner agreed upon by the parties in the enforcement title itself.*"

20 In principle, the drafters of the *IBA Arbitration Clause Guidelines* did not contemplate such a situation. See See *IBA Arbitration Clause Guidelines* (supra note 4), Guideline 3 (Basic Drafting Guidelines), Comment 15.

2.3. NO INTERNATIONAL ARBITRATION AGREEMENT SHOULD BE ENTERED INTO WITHOUT SELECTING THE PLACE OF ARBITRATION

The third reflection refers to the selection of the place of arbitration in the international arbitration agreement.

It is widely understood that the place of arbitration is not an essential feature of international arbitration agreements for its validity.[21] In fact, there are sufficient default mechanisms for the selection of a suitable place even after the commencement of the arbitration proceeding: either by the arbitral tribunal itself,[22] the institution administering the arbitration proceeding,[23] or combined formulae (including pre-determined places).[24] Nonetheless, the *IBA Arbitration Clause Guidelines* consider it within its *basic* drafting guidelines[25] alongside the choice between institutional and *ad hoc* arbitration or the number of arbitrators and the method of selection and replacement thereof, thus inviting the parties to pay due attention to it during the negotiation and drafting of the international arbitration agreement.

Bearing in mind how an international commercial contract is negotiated and drafted in practice, it may be hardly understandable for a transactional lawyer in charge of its drafting to leave significant elements of the contract lawless. It is very probable that sophisticated parties choose the law governing the contract, even though there are well-known default mechanisms established for its determination.[26] Equally, the parties should draft fully-fledged international arbitration agreements. May we suggest that the selection of the place of arbitration should have an essential character like the unequivocal expression of the parties' will to have their disputes finally settled by arbitration.

In addition, the support to be given by the international arbitration practitioner to the drafter of the international arbitration agreement is actually

21 G. B. BORN, see supra note 5, p. 176, considers it "*vital*" but not in terms of the validity of the international arbitration agreement.

22 See, e.g., Article 18(1) *UNCITRAL Arbitration Rules*, Rule 21(1) *SIAC Arbitration Rules*.

23 See, e.g., Article 18(1) *ICC Rules of Arbitration*; Article 25(1) *SCC Arbitration Rules*.

24 See, e.g., Article 16(1) and (2) *LCIA Arbitration Rules*, with London (England) as a default seat in the Rules themselves; Article 17(1) *ICDR International Arbitration Rules*; Article 14(1) *HKIAC Administered Arbitration Rules*, with Hong Kong SAR as a default seat in Rules themselves; Article 7(2) *CIETAC Arbitration Rules*, fixing the domicile of CIETAC or its sub-commission/arbitration center administering the case.

25 See *IBA Arbitration Clause Guidelines* (supra note 4), Guideline 4 (Basic Drafting Guidelines), Comment 23: "*An arbitration clause that fails to specify the place of arbitration will be effective, though undesirable.*"

26 See supra note 8.

fully conditioned upon the choice of the place of arbitration by the parties. Although the legal conditions for arbitrating disputes in the major places in the world are well known even for international arbitration practitioners not qualified in such jurisdictions, it may happen that the parties prefer less known places with which the reviewer of the draft international arbitration agreement is unfamiliar. The review of the draft international arbitration agreement cannot be then made separately from the place to which it is going to be legally linked.[27]

3. CONCLUSIONS

In multi-disciplinary law firms the drafters of international arbitration agreements may be unfamiliar with the intricacies of international commercial arbitration. Law firms can then prepare internal protocols for the drafting of international arbitration agreements to be primarily used by transactional lawyers but with a strong recommendation for consultation with international arbitration practitioners, who previously participated in the preparation of such protocols.

When drafting or reviewing an international arbitration agreement, it is essential to understand the kind of disputes that might arise out of the underlying contract as well as the procedural position that the drafter's client would likely have in a potential arbitration. The effectiveness of a carefully drafted international arbitration agreement can be rendered moot by other factors, like the conversion of the contract in which the agreement is included in an authentic instrument that allow the enforcement of payment of liquid amounts of money without the need of a previous arbitral award ordering such payment. The place of arbitration should be considered an essential element of the international arbitration agreement for a proper assessment of all the effects stemming from it.

27 As the *IBA Arbitration Clause Guidelines* note, "*The place of arbitration is the juridical home of the arbitration. Close attention must be paid to the legal regime of the chosen place of arbitration because this choice has important legal consequences under most national arbitration legislations as well as under some arbitration rules.*" *IBA Arbitration Clause Guidelines* (supra note 4), Guideline 4 (Basic Drafting Guidelines), comment 21.