TRASNATIONAL ARBITRATION LAW
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IECOLS

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WHAT IS ARBITRATION?

UNITED NATIONS CONVENCTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS
(a.k.a. **NEW YORK CONVENCTION**)

ART. 2.1.

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

UNITED NATION COMMISSION ON INTERNATIONAL TRADE LAW MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

a.k.a. **UNICITRAL MODEL LAW**

Article 7

Definition and form of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defi ned legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

What we have just seen is not sufficient to find the correct definition of arbitration.
We have to see the further features of the same.

A) **CONSENSUAL MEANS TO RESOLVE DISPUTES**

Arbitation is a consensual process that requires the agreement of all the parties.
You can claim, in front of a govermental decision maker, the parties without their consent.

UNICITRAL MODEL LAW
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NEW YORK CONVENCTION
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B) **NON-GOVERMENTAL DECISION-MAKER SELECTED BY OR FOR THE PARTIES**

The dispute will be decided by arbitrator.
An arbitrator isn't a judge but is a subject selected by (or for) the parties.
If they are not selected by the parties they will be selected by an arbitral istitution chosen by the parties.

C) **FINAL AND BINDING DECISION**

Arbitration doesen't produce a merely recommendation. Arbitral award is a binding decision for the parties that can be coercively enforced against the unsuccessful party or its assets

D) **USE OF ADJUDICATORY PROCEDURES**

During the conduct of the arbitration, adjudicative procedures are used. This means that the parties can present their views and they can carry out their defenses.

Simply put, an arbitration procedure must respect the parties' right of defense and must allow them to participate in the formation of the decision

ARBITRATION IS DIFFERENT FROM FORUM SELECTION CLAUSES

International contracts can contain forum selection clauses.
With these clauses the partie can choose which jurisdiction will decide the dispute.
We speak about:

a) **Prorogation agreements**. Specified litigations may be decided in a specific forum.

Example: The parties submit to the non exclusive jurisdiction of the court of Macerata for any disputes relating to this agreement.

b) Derogation agreements. Specified dispute can be solve exclusively in front of a specified courts.

Example: The court of Macerata shall have exclusive jurisdiction over alla disputes relating to this agreement.

What is the difference with arbitration?
Only the forum is chosen but not the law or procedural rules to be applied.

ARBITRATION=ADR

ADR means alternative despute resolution compared to the ordinary course of civil proceedings.

ADR THAT ARE DIFFERENT FROM ARBITRATION

A) MEDIATION AND CONCILIATION

In these proceedings the mediators or the conciliators can't provide for a binding decision that can be imposed to the parties.
Mediators and conciliators assist the parties to find a solution to prevent the dispute.
If is reached a mutually-agreeable resolution, ordinary legal proceedings will not be necessary.

B) EXPERT DETERMINATION

Commercial contracts may contain provision for the resolution of certain categories of disputes an "expert" selected by (or for) the parties.
This expert has the power to render a binding decision on the issue.

C) MINI-TRIALS AND NEUTRAL EVALUATION

Parties can resolve their differences in front of a judge or a panel of judges using a brief presentation.
The judge or the judges, similar to the mediation and the conciliotaion, can adopted an advisory decision that isn't binding for the parties.

D) BASEBALL OR FINAL OFFER ARBITRATION

At the conclusion of the parties submission, the parties provide a final offer sent to the tribunal in a sealed envelope.
The tribunal will choose the offer that seems closer to the correct resolution under applicable law after an indipendent determination.

AN ITALIAN EXAMPLE

A(rbitro) B(ancario) F(inanziario)

https://www.arbitrobancariofinanziario.it/?dotcache=refresh

Is a judge who decides, quickly and easily, on disputes arising between consumers and banks.
The arbitrators are selected by various bodies such as the Bank of Italy and the representatives of intermediaries and customers

ARBITRATION… WHAT DOES IT MEAN <u>INTERNATIONAL</u>?

UNICITRAL MODEL LAW

Art. 1.3

An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States;

(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 obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected;

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

The New York Convention and Unicitral Model Law apply only to arbitrations that have an international element…

Why this focus on international arbitrations?

Reasons

a) Efficiency and expedition;

b) Even-handedness;

c) Expertise;

d) Enforceability of agremeents and awards;

e) Finality of decisions;

f) Party autonomy and procedural Flexibility;

g) Confidentialy or Privacy of Dispute resolution;

h) Arbitration involves States and State-entities

EFFICIENCY AND EXPEDITION

International arbitration can be both cheaper and more expensive than international litigation.
For an example see https://www.camera-arbitrale.it/it/arbitrato/calcolatore-costi-arbitrato.php?id=718.
Can be both faster and slower.
It may dependes on the level of complexity of the dispute.
It can be expensive why the process colud require a lot of defensive activity.
It can be because the arbitrator could have a lot of work to do.
International arbitration could be longer than expected because they can last from 18 months to 38 months.
Is correct say that arbitration isn't fast… but it is fast enough copared to the ordinary civil trial…especially thinking about the Italian trial.
An example: https://osservatoriocpi.unicatt.it/ocpi-pubblicazioni-i-tempi-della-giustizia-civile-si-sono-ridotti-grazie-al-pnrr
That's the state of art thinking about the ordinary civil trial in Italy without international elements…the trial is going to last even longer if there were international element in the dispute.

EVEN-HANDEDNESS

Is incorrect to say that pubblic judges aren' even-handedness.
The principle of impartiality of the judge is one of the cornerstones of the so-called "fair trial".
We can think about art. 111.2 Cost. wich provides that "Ogni processo si svolge nel contraddittorio tra le parti, in condizioni di parità, davanti a giudice terzo e imparziale. La legge ne assicura la ragionevole durata.".
It is true, however, that each party would try to bring the trial to the judge that best suits them.
The elements of internationality, in fact, would allow the possibility of choosing between multiple judges.
With an arbitration agreement, in fact, a neutral forum could be chosen during the contractual negotiations.

COMMERCIAL COMPETENCE AND EXPERTISE

It's very hard, maybe impossible, that the pubblic judges are all ables to decide on a dispute that has an high rank of specilization.
We can think about high rank complexity that involves trademarks, commercial law, ecc…, ecc…
This is even harder if, during the desputive, elements of internationality were to emerge.
International arbitration solves this problem since the parties could appoint subjects who are experts in the matter and who possess specific skills on those international profiles.

ENFORCEABILITY OF AGREEMENTS AND AWARDS

Decisions rendered in international arbitrations enjoy greater force than forum selection clauses (often you need an exequatur's process to give enforceability to the arbitral's award).
The New York Convention, although only among the signatory states, adopts pro-arbitration legislation allowing the awards to immediately have binding force in all member countries of the agreement.

NEW YORK CONVENCTION
Art. 3

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

FINALITY OF DECISIONS

Decisions rendered by public judges are often subject to review through appeal.

We can think about Italian jurisdiction in which it is possible to appeal pursuant to art. 339.1 c.p.c. which predicts that "Possono essere impugnate con appello le sentenze pronunciate in primo grado, purché l'appello non sia escluso dalla legge o dall'accordo delle parti a norma dell'articolo 360, secondo comma."

The arbitral awards, except for the necessary exceptions, are definitive and cannot be subject to revision through appeal.

PARTY AUTONOMY AND PROCEDURAL FLEXIBILITY

With an international arbitration agreement the parties can choose not only the substantive law to apply (for example the Italian one instead of the German one) but they can also choose the procedural rules with which to regulate the arbitration proceedings (for example the German ones instead of the Italian).
Arbitration therefore allows the parties a very high level of flexibility.

Confidentiality and privacy of dispute resolution

Trials are very often public and for this reason it is difficult for information concerning them to remain confidential.
By choosing the seat of the arbitration, even in a very distant country, it is difficult for the privacy of the parties to be violated. This is also due to the fact that it is very difficult for the arbitrators to miss details relating to the trial as they are easily identifiable and could easily be called upon to refund for any damages.

ARBITRATION INVOLVING STATES AND STATE-ENTITIES

With an arbitration agreement it is possible to reach a consensual resolution of the dispute even with states or parastatal bodies.
This allows it to be possible to apply a substantive law different from that which would guarantee them immunities and a procedural law which cancels the privileges they could enjoy.

COMMERCIAL INTERNATIONAL ARBITRATION RULES

There are various disciplines that can regulate international commercial arbitrations.

They are:

a) International arbitration conventions (for example New York Convection);
b) National arbitration legislation. We think in particular of local enactments of Unicitral Model Law.;
c) Institutional arbitration rules incorporated by parties' arbitration agreement;
d) arbitration agreements that apply both international convention and local legislation.

NEW YORK CONVENTION

(https://www.newyorkconvention.org/)

The New York Convention succeeds the Geneva Protocol of 1923 and the Geneva Convention of 1927.

This international agreement was concluded in 1958 after three weeks of discussions during the United Nations Conference on Commercial Arbitration.

The official languages in which this document was drawn up are English, Chinese, French, Spanish and Russian.

The New York Convention, unlike the Single Model Law, is rather short and does not deal with the procedural aspects of arbitration but is concerned with guaranteeing the recognition and direct enforcement of international arbitration agreements and awards in the contracting States.

NEW YORK CONVENCTION'S PRINCIPLES

1) NATIONAL COURT HAS TO RECOGNIZE AD ENFORCE FOREIGN ARBITRAL AWARDS

Art. 3

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards

Art. 4

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
(a) The duly authenticated original award or a duly certified copy thereof;
(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

EXEPTION OF THIS PRINCIPLE

Article V

1. Recognition and enforcement of the award may be refused, 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:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

2) NATIONAL COURTS HAS TO RECOGNIZE THE VALIDITY OF AN ARBITRATION AGREEMENT

Art. 2

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3) Court has to refers parties to arbitrations if they've been entered into a valid arbitration agreement

Art. 2

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Compared to the Geneva Convention and Protocol already mentioned, the New York Convention has introduced new provisions.

They are:

a) reversal of the burden of proof of the invalidity of the arbitration agreement on the defendant party;
b) the parties are allowed to choose the substantive and procedural law to apply to the arbitration agreement;
c) the exequatur procedure has been eliminated.

The same was necessary to allow the recognition of the award in countries other than those in which it had been adopted.

UNICITRAL MODEL LAW*

*** The parties are free to alter these prescriptions by agreement**

PRINCIPLES

1) PROVVISION CONCERTING THE ENFORCEMENT OF ARBITRATION AGREEMENT

Article 7.

Definition and form of arbitration agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defi ned legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but notlimited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Article 8.

Arbitration agreement and substantive claim before court

(1)A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his fiRst statement on the substance of the dispute, refer the parties to arbitration unless it fi nds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9.

Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

2) APPOINTMENT OF AND CHALLENGES TO ARBITRATOR

Article 10.

Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

Article 11.

Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement, (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specifi ed in article 6; (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specifi ed in article 6.

(4) Where, under an appointment procedure agreed upon by the parties, (a) a party fails to act as required under such procedure, or (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specifi ed in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specifi ed in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifi cations required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12.
Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifi able doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifi able doubts as to his impartiality or independence, or if he does not possess qualifi cations agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13.
Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fi fteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his offi ce or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specifi ed in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14.

Failure or impossibility to act

(1) If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his offi ce or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specifi ed in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his offi ce or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15.

Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from offi ce for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

3) JURISDICTION OF ARBITRATORS

Article 16.

Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justifi ed.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specifi ed in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

4) PROVISIONAL MEASURES

Article 17.
Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is fi nally decided, the arbitral tribunal orders a party to: (a) Maintain or restore the status quo pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent award may be satisfi ed; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

5) CONDUCT OF ARBITRAL PROCEEDINGS

Article 18.

Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19.

Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20.

Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21.

Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22.
Language

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specifi ed therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23.
Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24.

Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

Article 25.

Default of a party

Unless otherwise agreed by the parties, if, without showing suffi cient cause, (a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings; (b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations; (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26.

Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal; (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

6) EVIDENCE TAKING

Article 27.

Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.

The court may execute the request within its competence and according to its rules on taking evidence.

7) SUBSTANTIVE LAW APPLICABLE

Article 28.

Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its confl ict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

8) ARBITRAL AWARDS

Article 29.

Decision-making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30.

Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31.

Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffi ce, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32.

Termination of proceedings

(1) The arbitral proceedings are terminated by the fi nal award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when: (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a fi nal settlement of the dispute; (b) the parties agree on the termination of the proceedings; (c) the arbitral tribunal fi nds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33.
Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties: (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature; (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specifi c point or part of the award. If the arbitral tribunal considers the request to be justifi ed, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justifi ed, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

9) RECOGNITION AND ENFORCEMENT (AND CASES WHERE THIS DOES NOT HAPPEN) OF FOREIGN AWARDS

Article 34.

Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specifi ed in article 6 only if:

(a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is notvalid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or (b) the court fi nds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Article 35.

Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an offi cial language of this State, the court may request the party to supply a translation thereof into such language.4

Article 36.

Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) (ii) (iii) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;

or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made;
or (b) if the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.
(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

TyPES OF ARBITRATION

INSTITUTIONAL ARBITRATION AND *AD HOC* ARBITRATION

Institutional arbitration: is administered by specilized arbitral institution like ICC, SIAC, AAA, LCIA, ICDR, ICSID and PCS.

These institutions have promulgated their rules for developing an arbitration process and these rules are often incorporated in the arbitration agreement.

Frequently in the arbitration agreement there is the prevision which allows the institution to choose the arbitrators (or to assist the parties in this activity), select the sit of the arbitration, ecc…, ecc…

Benefits: The parties can avoid procedural breakdowns, it's likely that arbitrator has the competences to decide de dispute, ecc…, ecc…

***Ad hoc* arbitration**: isn't conducted under the supervision or the assist of an arbitral institution.

The parties simply agree to arbitrate.

Theu can seetle the rule of the arbitration or they can use pre-existing set of rules. An example are the Unicitral Arbitration rules settled by Unicitral.

Often the parties select an appointing-authority to select the arbitrators in the case they can't reach a mean on this point.

Benefits: More flexibility.

UNICITRAL ARBITRATION RULES
https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration

ICC (International Chamber of commerce) ARBITRATION RULES
https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/
About ICC: *https://en.wikipedia.org/wiki/International_Chamber_of_Commerce*

LCIA (London court of international arbitration) ARBITRATION RULES
https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Article%201
About LCIA: https://en.wikipedia.org/wiki/London_Court_of_International_Arbitration

ARBITRATION AGREEMENT

First of all, obviously it is essential that there is consent to submit disputes to arbitration

An arbitration agreement has to contain these following features:

a) Agrrement to arbitrate;
b) Scope of arbitration agreement;
c) Arbitration rules;
d) Seat of arbitration;
e) Number, Method of selection and qualifications of arbitrators;
f) Language of arbitration
g) Choice of law clauses

Scope of arbitration agreement

This feature is about what is reffered to arbitration.
It's possible to refer all the disputes between the parties that are linked to their contractual relation.
Is permitted too to refer to arbitration only a specific claim.

Examples:
Are reffered to arbitration all/ any disputes:

a) Arising under this agreement;
b) Arasing in connection with this agreement;
c) Relating to this agreement.
d) Relating to this agreement, including any question regarding its existence, validity, breach or termination;
e) Relating to this agreement or the subject matter hereof.

Arbitration rules

The parties can select a model of arbitration created by an arbitral institution.
Examples:

a) Any dispute, controversy or claim arising out or relating to this contract, or the breach, termination or invalidy thereof, shall be settled by arbitration in accordance with the UNICITRAL arbitration rules (Model UNICITRAL Arbitration Clause);
b) All disputes arising out or for 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 (Model ICC Arbitration Clause);
c) Any dispute arising out or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore Arbitration Centre (SIAC) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules) for the time being in force, which rules are demendeed to be incorporated by reference in this clause.

The parties can select an ad hoc arbitration too.
Example;
All disputes shall be settled by arbitration in accordance with the Unicitral Arbitration Rules…

Seat of arbitration

Is the place where the award will formaly be made.
This feature have pratical consequences like the selection of:

a) The procedural law of the arbitration;
b) The court that is responsible to apply that law and responsible to solve the issues relating to the costitution of the arbitral court and responsible for annullment the arbitral award.

Example: The seat of arbitration shall be Castelfidardo, Ancona.

Number, Method of selection and qualifications of arbitrators

Arbitration agreement can predict the number, the qualification and the way to appoint the arbitrators.
If the partis don’t predict the number of the arbitrators, if the parties don't predict the number of the arbitrators is possible that this activity will be made by an institution or by the national court in which the seat of arbitration is settled.
It’s possible that the arbitrators are selected directly with the arbitration agreement (ex: the arbitration shall be Chiar.mo Prof. Romolo Donzelli).
When the arbitration court is made up of three people, it may be foreseen that each party appoints its own arbitrator and that the third party is appointed by an appointing authority.

Language of arbitration

In the arbitration agreement the parties can foresee the language of the arbitration.
In absence of a selection by the parties, tha tribunal where the seat of arbitration is settled can select the language of the arbitration.

Example of clause:
The language of arbitration shall be Italian.

Choice of law clauses

Is possible with the arbitration agreement select the substantive law to apply to solve the dispute.

Example: This agreement will be governed by, and all disputes relating to or arising to in connection with this agreement shall be resolved with, the laws of Italy.

We can find four type of choice-of-law disputes:

a) Subtantive law governing the merits of the partis' underling contract and other claims;
b) The law governing parties' arbitration agreement;
c) The law applicable to the arbitral proceeding;
d) The conflict of law rules to solve the disputes relating to the choice of the laws just mentioned.

Subtantive law governing the merits of the partis' underling contract and other claims

In the arbitration agreement is permitted to the parties to select the substantive law by a choice of law clause.
In absence of this clause, will be the arbitration court to select the substantive law that will be applied to the solve of the dispute.

The law governing parties' arbitration agreement

Commonly the arbitration agreement has considered separable from the contract in wich is contained.
This law can be selected by the parties or can also be determined by: 1)the law of the arbitral seat; 2) the law governing the parties' underlying contract; 3) international principles.

The law applicable to the arbitral proceeding

It's possible, in the pro arbitration jurisdiction, select the procedual rules with freedom. Iin these case the arbitral's procedding has to follow the basic rules of procedural regularity.
In abcence of this determination, is most commonly permit to follow the arbitration seat's law.

The conflict of law rules to solve the disputes relating to the choice of the laws just mentioned

To resolve disputes that may arise in identifying the points covered previously can be used: 1) the arbitral seat's conflict law rules; 2) international conflict law rules; 3) interested states law of the states involved; d) direct application of substantive law.

Jurisditional objection

It is possible that jurisdictional objections may be proposed before the arbitral tribunal or the ordinary one.
In the first case the arbitrators will have to establish whether the dispute is devolved to them as established by the artistic agreement. In the event that this requirement is not met, the referees will have to close the proceedings immediately.
In the event that the application is brought before the ordinary judge, the same will have to refer the parties before the arbitral tribunal, in accordance with the provisions of the art. 2.3 of the New York Convention.

New York Convention application requirements

The New York Convention applies only to certain arbitration agreements that has the following requirements:

1) **Agreement to arbitration** (Art. 2.1 and 2.2 NYC).
See what we have already seen speaking about "consensual means".
2) **Differences** (Art. 2.1 NYC).
With an arbitration agreement the parties have to refer some disputes that aren't already ongoing in front of the public jurisdiction.
3) **Commercial relationship** (Art. 1.3. NYC)
The New York Convention applies only to disputes relating to commercial relationships. Some contracting states, as provided for by art. 1.3., they also proceeded to establish which relationships should be defined as commercial.
4) **Exiting of future of the dispute** (Art. 2.1 NYC)
The disputes that the parties can be refer to arbitrate ae existing or has to be rised.
5) **Defined legal relationship** (Art. 2.3 NYC)
The relationship referred to arbitrate can be contractual or non contractual.
6) **International** (Art. 1.1. NYC)
The award has'nt to be considered like "domestic. This means that thera are mutual links between two different States.
7) **Reciprocity** (Art. 1.3 NYC)
Every contracting State of the NTK has to apply this regulation when the award is made in another contracting State.

PRESUMPTIVE VALIDITY OF INTERNATIONAL ARBITRATION

Art. 2.3 NYC

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, **unless** it finds that the said agreement is null and void, inoperative or incapable of being performed

SEPARABILITY OF INTERNATIONAL ARBITRATIOM AGREEMENT

The arbitration agreement is deemed severable from the contract it enters into.
The presumption of separation is explained by the fact that it allows the arbitration agreement to not suffer from the exceptions that can be proposed against the commercial contract existing between the parties.
This separation is also provided for by the Unicitral Model Law pursuant to art. 16.1.

UNICITRAL MODEL LAW

Art. 16.1.

... For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

These consequences derive from the principle of separation:
1) The invalidity of the contract does not necessarily lead to the invalidity of the arbitration agreement and vice versa;
2) A different choice of law may be made for the commercial contract and the arbitration agreement;
3) Different forms are possible for the arbitration agreement and the commercial contract.

ALLOCATION OF COMPETENCE TO DECIDE DISPUTES OVER EXISTENCE, VALIDITY AND INTERPRETATION OF INTERNATIONAL ARBITRATION AGREEMENT

Competence Competence Doctrine

The arbitral tribunal is presumed to have the power to decide whether or not it has jurisdiction.

UNICITRAL MODEL LAW

Art. 16.1

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

Prima facie inquirity of the national court

Pursuant to art. 8 of the Unicitral Model Law, it is doubtful whether the national court should decide with a binding provision on the existence or otherwise of the jurisdiction of the arbitrators in the event that the dispute subject to an arbitration agreement is brought before it.

It seems that it should only be limited to referring the parties to the arbitration panel in the event that it finds the nullity of the arbitration agreement.

UNICITRAL MODEL LAW

Art. 8

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his fi rst statement on the substance of the dispute, refer the parties to arbitration unless it fi nds that the agreement is null and void, inoperative or incapable of being performed.

LAW APPLICABLE TO FORMATION, VALIDITY AND INTERPRETATION OF INTERNATIONAL ARBITRATION AGREEMENTS

Most common choices:

1) Law of Judicial Enforcement Forum

2) Law chosen by the parties – 3) Law of the arbitral seat

UNICITRAL MODEL LAW

Art. 34.2.a.i

An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State.

Art. 36.1.a.i

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

NYC

Art. 5.1.a.

1. Recognition and enforcement of the award may be refused, 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:
(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made

4) Validation Principle

In some cases, any law that can be applied under the principles of private international law is expected to apply. This is, for example, the case of art. 178.2 of the Swiss Code of Private International Law.

5) International Law

In other countries, such as France, domestic law does not apply in the application of the law of the arbitration agreement but the resolution of the internal issue is devolved to private international law.

Additional requirements of the arbitration agreement not determinable by the parties' choice of law

a) Formal Validity

The form of the arbitration agreement chosen is the written one.

NYC

Art. 2.1. e 2.2.

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

UNICITRAL MODEL LAW

Art. 7

1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
2) The arbitration agreement shall be in writing.
3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

b) Capacity

To define the respect of the parties' capacity requirement the law of their domicile or residence must be applied.

NYC

Art. 5.1.a.

1. Recognition and enforcement of the award may be refused, 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:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made

c) Nonarbitrability

In same cases a State could not recognize a valid arbitration agreement.

This is the case in wich the dispute refer to arbitration isn't cappable to settle under arbitration in according of that State.

NYC

Art. 5.2.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

UNICITRAL MODEL LAW

Art. 36.1.b.i.

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State

EFFECTS OF INTERNATIONAL ARBITRATION AGREEMENT

Positive effects: Obligation to arbitrate in good faith

The parties, with the conclusion of an arbration agreement, are obbligated to ensure the sui generis process created by thier consensual means with their cooperation.

They have to partecipate knowing that they have to start the process in front ab arbitrat cort stated in a certain state, with some substantial rules and procedural rules, ecc…, ecc…

If these obligations are breached, the national court should will dismiss the process that the parties has settled in front of it.

Negative effects: Not to litigate.

In according to the art. 2 of the NYC, for the courts it's mandatory to dismiss a dispute that is referred to arbitration.

When this happens, there are several way to stop the breaching of the arbitration agreement.

The national tribunal of the state where the artitration's seat is settled can use an **antisuit injunction** to notice the other foreign court that their is a valid arbitration agreement between the parties that refers the dispute in front of it.

It's possible that the court witch one of the parties will be ask the enforce of the decision will **not recognize** it due the violation of the arbitration agreement in according to art. 2 of the NYC.

For the breaching of the arbitration agreement one of the party could demand the damages that him suffered by this violation.

INTERPRETATION OF ARBITRATION AGREEMENTS

As regards the interpretation of the arbitration agreement, the same must be interpreted in the first instance according to the rules governing contract law and its rules of interpretation.

This interpretation can also be integrated by following the rules of interpretation for and against arbitration.

The first rule of interpretation, typical of the most democratic states, tends to resolve interpretative conflicts by expanding the jurisdiction of the arbitral court.

The anti-arbitration interpretation, on the other hand, acts in the opposite way by attempting to reduce the cases in which a dispute is referred to arbitration.

INTERNATIONAL ARBITRAL PROCEEDINGS

ARBITRAL SEAT

The choice of the seat of arbitration has important practical consequences in international arbitration.
The seat of arbitration is the legal domicile of the arbitration.
A series of possible consequences arise from the choice of venue:
a) national arbitration law applies for some external procedures relating to the arbitration proceedings;
b) national substantive law presumptively applies;
c) the arbitral decision is deemed to have been adopted in that place.

Arbitral seat's location

The arbitral's seat is located where the partis have agreed or, without this prevision, where the tribunal has specified.

UNICITRAL MODEL LAW

Art. 31.3

The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

Art. 20.1

The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

NYC

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

There is no necessary coincidence between the seat of the arbitration and the place where the hearings are held.

UNICITRAL MODEL LAW

Art. 20.2

Notwithstanding the provisions of paragraph of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

During the proceeding is possible that some issues may arise and someone of these are (normally) regulated by the law of the arbitral seat.

This law govers: 1) the internal procedures in the arbitration, with expecially regards to the standard of the procedural fairness and 2) the axternal relationship between the arbtral court and the national tribunal that has the duty to supervise it.

Thinking about the internal procedures, we speak about these mainly topics: a) oaths of witnesses; b) the conduction of the hearings; c) disclosure and discovery powers of arbitrators; d) arbitrators' discrection; e) arbitrators' remedial power (including to order provisional relief; f) form, making and publication of the award …

Thinking about the external procedures, we speak about these mainly topics: a) the govern of the jurisdictional issues between the national cout and the arbitral tribunal; b) selection, removal and replacement of the arbitrators; c) jurisdictional rewiew of the award.

Considering the **annulment of the awards** the court in the seat are usually competent to entetain actions to annul arbitral awards made in the seat. The court is authorized to apply the domestic law.

There is the rare exception in wich the parties have agreed to submit the action to annul award even outside the arbitral seat.

NYC

Art. 5.1.e.

Recognition and enforcement of the award may be refused, 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:

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

UNCITRAL MODEL LAW

Art. 1.2.

The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

Art. 5

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Art. 34

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specifi ed in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or (ii) (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in confl ict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;
or (b) the court fi nds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in confl ict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Speaking about the rules about qualifications, selection and removal of arbitrators, domastic legislation can prescribe some prescriptions on these points.
Considering some exceptions, the arbitration agreements don't permit local courts to remove arbitrators in foreign arbitration.
The power to appoint and remove arbitrations is often recognized at the local court where is settled the arbitration.

UNICITRAL MODEL LAW

Art. 1.2

The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

Art. 11

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
(3) Failing such agreement, (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specifi ed in article 6; (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specifi ed in article 6.
(4) Where, under an appointment procedure agreed upon by the parties, (a) a party fails to act as required under such procedure, or (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specifi ed in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specifi ed in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifi cations required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Art. 13

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fi fteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his offi ce or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Art. 14

(1) If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his offi ce or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal. (2) If, under this article or article 13(2), an arbitrator withdraws from his offi ce or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Speaking about the **interlocutory jurisdiction disputes**, is the law of the seat the is going to govern this topic.

UNICITRAL MODEL LAW

Art. 1.2.

The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

Art. 16

(1)The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specifi ed in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Speaking about the **provisional measures**, changing from the past, now is presumptive the power of the national court where the arbitral seat is settled but there is the possibility to grant this power to other courts.

UNICITAL

Art. 17 (version 2006)

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to: (a) Maintain or restore the status quo pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Is important to notice that in the developing of the arbitration procedure, there is the possibility to apply internal law to gover the processual aspects fo the arbitration.

The domestic law which we are thinking about, in absence of other provisions, is the internal arbitral law and not the normal processual civil law rules.

However, is possible too that the parties are going to agree to apply a different procedural law than the domestic one. This choice can produce some undesired consequences like the possibility to grant another tribunal to annul the award. Art. 5.1.e. of the NYC, in the part in which provides that the award can been set aside or suspended by «country in which, or under the law of which, that award was made" must be interpreted by referring to the procedural law of arbitration.

WAYS TO SELECT THE ARBITRAL SEAT

1) By Parties' Agreement

The parties have the authonomy to select the arbitral seat in according to art. 2 of the NYC and art 20.1 of the Unicitral Model Law (The parties are free to agree on the place of arbitration…)
To do this, is commonly used the following clause «The seat of the arbitration shall be Geneva, Switzerland».

2) By the arbitrators or arbitral institution

If the parties fail to determine the seat of the arbitration, is granted to the arbitral court the power to settle it attending art. 20.1 of the Unicitral Model Law (…Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.).

3) By National Courts

Residually, if the parties have not defined the seat of the arbitration and in the event that the arbitral tribunal is not constituted, the seat will be determined by the national court with the possibility of conflicts between the multiple courts of the parties' domicile.

SELECTION AND REMOVAL OF ARBITRATORS

In international arbitration processes, the choice of arbitrators is left to the autonomy of the parties. Where the same is not provided for such appointments or the established rules fail, it is possible that the arbitrators are appointed by an appointment authority.

NYC

ART. 5.1.d.

Recognition and enforcement of the award may be refused, 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:

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

UNICITRAL MODEL LAW

ART. 11.2.

The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

In the event that the arbitrators are not appointed according to the methods prescribed in the arbitration agreement, in compliance with the provisions of the national rules, either they will have to be removed or the arbitral award will have to be declared null.

UNICITRAL MODEL LAW

ART. 34.2.a.iv

An arbitral award may be set aside by the court specifi ed in article 6 only if:

(a) the party making the application furnishes proof that:

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.

PARTIES' AUTHONOMY TO SELECT THE ARBITRATORS

a) Number of arbitrators

i) Sole arbitrators; or

ii) Three person arbitral Tribunal (or unpair):it is often possible to request the appointment of one of the arbitrators to a third party. In this case we are in the a system with two arbitrators and a subject as known as umpire;

iii) in the case in wich that parties didn't select the number of the arbitrators it's possible that the national court it's going to prescribe that number. In the Unicitral Model Law, without this prescription, the number of the arbitration will be three.

UNICITRAL MODEL LAW

Art. 10

The parties are free to determine the number of arbitrators.

Failing such determination, the number of arbitrators shall be three.

THE APPOINTMENT OF THE ARBITRATORS AND THE FAILING IN THIS ACTIVITY

Normally the parties appoint co-arbiters by sending notes informing the other party of the appointment. This activity must be carried out within the deadline set out in the arbitration agreement or according to the rules imposed by the arbitration company you turned to.

The arbitrators must maintain their impartiality and independence but it is certain that the parties will try to appoint arbitrators who can espouse their legal reconstructions.

In the event that the parties are unable to appoint their arbitrators, it will be possible to resolve this inadequacy by applying the rules of the arbitration companies. Normally, it will be possible for the other party to directly appoint the second arbitrator or request that this activity be done by an appointment authority.

Alternatively, if an arbitration company has not been contacted, this conflict will be resolved according to national law.

UNICITRAL MODEL LAW

ART. 11.4

Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

SELECTION OF THE PRESIDENT/SOLO ARBITRATOR

As regards the appointment of the president of the arbitral tribunal or of the possible sole judge, there are various ways in which it can be proceeded.

It is possible that the sole judge is already decided by the parties in the arbitration agreement.

In the event that the president is to be appointed, however, the appointment is often left to the agreement of the parties or that of the co-arbiters.

Normally, the parties, in the latter case, do not have the power of veto but the co-arbiters are still allowed to discuss the choice of the president of the arbitral tribunal with the parties who appointed them.

Alternatively, the parties may provide that the sole arbitrator or the president of the arbitration panel is appointed by an appointment authority.
It is also possible that, unless the parties have provided otherwise (see Unicitral Model Law art. 11.4), this appointment is made by a national court.

UNICITRAL MODEL LAW
Art. 11.4

Where, under an appointment procedure agreed upon by the parties,
(a) a party fails to act as required under such procedure, or
(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,
any party may request the court or other authority specified in article 6 to
take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

In the latter case, the choice of court must be guided according to the rules of national legislation.

UNICITRAL MODEL LAW
Art. 11.5

A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

RESTRICTIONS ON ARBITRATORS' IDENTITIES

While the will of the parties is central, the choice of arbitrators may be limited by the arbitration agreement, international conventions or national law.

THE REQUIREMENT OF IMPARTIALITY AND INDEPENDENCE OF THE ARBITRATORS

UNICITRAL MODEL LAW

Art. 12.2.

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Art. 34.2.a.iv.

An arbitral award may be set aside by the court specified in article 6 only if:

a) the party making the application furnishes proof that:

iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in confl ict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.

Art. 36.1.a.iv- 1.b.ii.

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;

(b) if the court finds that:

ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

The Unicitral Model Law, in according to the Art. 12, doesn't prescribe a different standard of impartiality and independence for president/ sole arbitrator and the co-arbitrators.

DISCLOSURE OBBLIGATIONS OF ARBITRATORS

The arbitrators, where they see or think their independence or impartiality is undermined, have obligations to disclosure such circumstances.

the standard required to manifest or criticize such circumstances is different, usually lower when the arbitrators declare it and higher when one the parties ask for their removal.

UNICITRAL MODEL LAW

Art. 12

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances **likely to give rise to justifiable doubts** as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist **that give rise to justifiable doubts** as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

EXAMPLE OF CASES OF LACK OF IMPARTIALITY

1) **Judge in own cause;**

2) **Financial interest in dispute;**

3) **Adversity to one party;**

4) **Issue conflict:** the arbitrator has already expressed an opinion on the dispute out of court;
5) **Double-Hatting:** conflict of interest for the position of arbitrator held in a previous trial with the position of arbitrator or consulent in a subsequent trial.

CONTRACTUAL LIMITATION ON ARBITRATORS' QUALIFICATIONS

In practice the following limitations may be found:

1) **Nationality** (often different by the parties's nationality);

2) **Language**;

3) **Expertise and accreditation** (often the arbitrators must have a certain certification)

4) L**egal qualification** (often the arbitrators must be lawyers)

PROCEDURES FOR CHALLENGING THE ARBITRATORS
UNICITRAL MODEL LAW
Art. 13

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fi fteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the

decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the

challenged arbitrator, may continue the arbitral proceedings and make an award.

REPLACEMENT OF THE ARBITRATORS
UNICITRAL MODEL LAW
Art. 15

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from offi ce for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

ARBITRATORS' RIGHTS, DUTIES AND IMMUNITY

As regards the **rights** of arbitrators, the Unicitral model law says nothing about it.

In the elaborations of the courts, the contractual nature of the relationship between the parties and the arbitrators is recognised.

Upon payment of their fees, arbitrators are required to carry out the following **duties**:

a) resolve the dispute between the parties using an adjudicatory manner;

b) Conduct the arbitration in accordance with the arbitration's agreement;

c) maintain the confidentially of the arbitrators;

d) Propose settlement to the parties (eventually);

e) complete the arbitrators' mandate.

An example of **immunity**

ICC RULES 2021

Art. 41

The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.

PROCEDURAL ISSUES

CHOICE OF THE PROCEDURAL CIVIL LAW

The choice of procedural law to apply in arbitration is a vitally important issue. The law of arbitration may differ from both the substantive law governing the contract between the parties and the law of the arbitration agreement.

Both the New York Convention and the unicitral model give enormous importance to respect for procedural law, even going so far as to impose non-recognition of the foreign award where it is not observed.

Often the procedural law will be that of the seat of the arbitration.

NYC

Art. 5.1.d.

1. Recognition and enforcement of the award may be refused, 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:

The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place

UNICITRAL MODEL LAW

Article 18.

Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19.

Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

Article 24.

Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

Discretion of the arbitrators in selecting the procedural law

Although this power is recognized in theory to the parties, in practice it is not exercised in a very detailed manner.

Precisely for this reason, referees are recognized as having the power to set these rules on a discretionary basis.

NYC speaks about it only indirectly pursuant to articles. II.3 and V.1.b and .d

NYC

Art. II.3

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Art. V

1. Recognition and enforcement of the award may be refused, 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 party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

Greater details can instead be found in the Unicitral Model Law

Article 19.
Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Even though the power of choice of the parties and the discretion of the arbitrators in completing their failed choices are recognised, the arbitral judgment must respect the principles of due process.

NYC

Art. 5.1.b. e 5.2.b.

1. Recognition and enforcement of the award may be refused, 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 party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article 18.

Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19.

Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

Always dealing with the conduct of the trial, there is a general principle according to which the arbitral judgment must generally take place without external interference. This flow of judgment is enshrined in both the NYC and the Unicitral Model Law.
In NYC art. 2.3 it is expected that the parties must be referred to the arbitral tribunal without it being possible for the public judge to adopt an interlocutory decision on its jurisdiction. This is provided that the arbitration agreement is not void or invalid.

NYC

Art. 2.3.

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article 5 of the unicotral model law is also of a similar nature

UNICITRAL MODEL LAW

Art. 5

Extent of court intervention In matters governed by this Law, no court shall intervene except where so provided in this Law.

The only cases in which the intervention of the state judge seems to be possible are:

a) Jurisdictional objection;
b) Challegers to arbitrators;
c) Provvisional measures;
d) Assistance in taking evidences for using in the arbitral proceedings;
e) annulment of the awards;
f) Recognition of the awards.

EXAMPLES OF PROCEDURAL STEPS

a) Notice of arbitration

We speak of notice of arbitration when it concerns the act with which the arbitration proceedings are initiated.

With this request, whoever wants to start the trial informs the other party of this wish in writing. It refers to the arbitration agreement and provides the details of the parties. The plaintiff's arbitrator may also already have been appointed in the same document.

b) jurisdictional objection

We speak of jurisdictional objection where the exception of jurisdictional incompetence of the national court is proposed.

As will be remembered from the art. 2 of the NYC, this defect must be raised by one of the parties to the arbitration agreement before the national judge unless the latter finds the nullity or invalidity of this agreement.

TIMETABLES

During the arbitration proceedings, the arbitrators must schedule the proceedings, including, with the possibility of subsequent modification, the scheduling of the hearings.

The arbitrators must however establish a priority order of the issues to be dealt with, giving greater priority to the most urgent ones.

This activity has to be done considering the time limit of the arbitration proceeding.

DISCLOSURE AD EVIDENCE TAKING

There is a general duty of disclosure on the parties to the arbitration which must be understood as a duty of transparency and information that they have towards the counterparties and the arbitral judges.
There is no specific regulation of disclosure in the NYC and Unicitral Model Law. This last act, in fact, takes more into consideration the issue of the taking of evidence.
Therefore, although there is no express provision for arbitrators to have the power to order disclosure, there is no doubt that they are the holders of it.

UNICITRAL MODEL LAW

Art. 19

Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Art. 27

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.
The court may execute the request within its competence and according to its rules on taking evidence.

Although there is no doubt about this power held by judges, it is possible that it is limited by the arbitration agreement and by the principles of due process of the law chosen to regulate the trial.
In any case, it is also possible, again due to the arbitration agreement, the disclosure powers of the arbitral tribunal may be broader than those of the national court.
In the event that this action is foreseen or where the parties have no agreement on the matter, the arbitrators can use the power of disclosure on a discretionary basis.
They will have to exercise it by understanding what the purposes of the disclosure are and ordering or not ordering the acts that are considered consistent with the same.
It is possible that, before exercising it, the arbitrators proceed to summon the parties to listen to them.
Doesn't exit a general right of the parties to make disclosure demands on the other party.

IBA RULES

Art. 3.1.

Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.

SCOPE OF DISCLOSURE
Art. 3.7 IBA Rules

Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in timely fashion, consider the Request to Produce, the objection and any response thereto. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Articles 9.2 or 9.3 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

The **sanction** that can be imposed in the event that a party does not comply with the disclosure obligations is not unique.
There is no direct possibility of ordering compensation but a general power of referees to impose a sanction is recognized.
There is no general power for arbitrators to obtain enforcement of the disclosure order. In some systems, however, where the party does not give a justified reason for failure to comply with the same, the referees could go so far as to consider the result of the test to have been formed in a manner contrary to that party.

IBA RULES

Art. 9.6 and .7

If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.
If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.

ROLE OF INTERNATIONAL COURTS IN OBTAINING EVIDENCE AND JUDICIAL ASSISTANCE OF THE NATIONAL COURT LOCATED IN THE SEAT OF THE ARBITRATION

Art. 1.2.

The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

Art. 27

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.

The court may execute the request within its competence and according to its rules on taking evidence.

EVIDENCES: witnesses, evidentiary rules and burden of proof

Witnesses are generally people who are informed about the facts of the dispute.
Their declarations can be freely evaluated by the arbitral tribunal.
Where the parties wish to involve witnesses, it is necessary for them to be identified and the chapters of evidence, or the questions to be asked, to be formulated.
The witnesses must in any case be summoned to court.

EVIDENTIARY RULES
UNICITRAL MODEL LAW

Art. 19.2

Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

It is also important to establish what the **burden of proof** is (in Italy see art. 2967 of the Civil Code). The same allocates the risk of failure to prove on the counterparties. The party who will have to prove the existence of the right will suffer from the lack of proof of the facts constituting the right. The opposing party, who will have to prove the facts preventing, extinguishing or modifying the right claimed by the plaintiff, will suffer from the failure to prove the latter.

PROVISIONAL MEASURES

Provisional measures are rulings which result in commands given to the parties and which are aimed at attempting to preserve the factual or legal situation relating to the dispute in order to safeguard the rights deduced therein and which are adopted by the court having jurisdiction according to the rules dictated by the parties in the arbitration agreement.
NYC does not provide for provisional measures. An arbitrator will rarely grant interim relief if the law applicable to the arbitration does not grant him or her such power. Furthermore, such awards may be unenforceable in state court unless the arbitration law permits such an outcome.
The limits on the power of arbitrators to issue precautionary measures have gradually been overcome in many countries. Curiously, Italy was one of the countries that continued to deny referees such power. Following the legislative decree of 10 October 2022, n. 149 (and subsequent amendments), however, the sector regulations were innovated with the introduction of art. 818 c.p.c.

Art. 818 Italian c.p.c.

Le parti, anche mediante rinvio a regolamenti arbitrali, possono attribuire agli arbitri il potere di concedere misure cautelari con la convenzione di arbitrato o con atto scritto anteriore all'instaurazione del giudizio arbitrale. La competenza cautelare attribuita agli arbitri è esclusiva.
Prima dell'accettazione dell'arbitro unico o della costituzione del collegio arbitrale, la domanda cautelare si propone al giudice competente ai sensi dell'articolo 669 quinquies(4).

Following this provision, the power of the arbitral tribunal to issue provisional measures (which in Italy are called precautionary measures) is now admitted where the arbitration agreement recognizes this possibility for them. The jurisdiction for such rulings is exclusive unless they are requested before the establishment of the arbitral tribunal since, in this case, the national court will decide on such rulings.

In this regard, the Unicitral Model Law should be mentioned, which expresses this tendency to expand the powers of the arbitral tribunal in matters of provisional measures. Article 17, in its original 1985 form, limited this possibility only to such measures as the arbitral tribunal deemed necessary.
Today, however, the text provides for greater expansion of this faculty.

UNICITRAL MODEL LAW
Art. 17

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

Limits on the power of arbitrators

There are some limits that can be recognized to the power of referees:
a) limits according to the agreement between the parties;
b) limitations of arbitrators in executing their provisional rulings: normally, in fact, if they are not executed voluntarily by the parties, these rulings require the activity of the national court to be made enforceable;
c) the power cannot be exercised until the arbitral tribunal has been constituted.

Conditions for exercising the power of provisional rulings

UNICITRAL MODEL LAW
Art. 17/A

The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:
(a) **Harm not adequately reparable** by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
(b) **There is a reasonable possibility that the requesting party will succeed on the merits of the claim**. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

A) Urgency
B) Irreparable Injury
C) Non prejudgement of Merits;
D) Probability of success of merits.

TYPES OF MEASURES

Normally, a certain discretion of the court is recognized in granting the measure considering its type.
The measures that are selectabled by the Tribunal are:

a) Preserving assets and evidences;
b) Preventing aggravation of disputes;
c) performing contractual obbligations;
d) Ecc…

UNICITRAL MODEL LAW
Art. 17/B

Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.
The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.
The conditions defi ned under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

Art. 17/C

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case. (5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

CHOICE OF SUBSTANTIVE LAW

The international arbitration procedure is selected by the parties not only for its greater speed and efficiency but also to be able to select a neutral court and to establish the settlement of the dispute in advance.

At present the major choices in terms of establishing the law to be applied are related to:

a) the definition of the law that will regulate the contract and related disputes;

b) the predetermination of the law applicable to the arbitration agreement;

c) the regulation of the law of the trial;

d) the selection of law aimed at resolving conflicts regarding the choice of law referred to in the previous points.

There are two ways to determine which law should be applied in a specific case. The first is to refer to the agreement of the parties. the second, however, is to leave the choice of the law to apply to the judge, in the absence of the parties' prediction.

Only the parties, and not even the arbitrators in cases where they have to determine the applicable rules, are also allowed to choose to choose non-national legal systems.
This solution is explained pursuant to art. 28 of the Unicitral Model Law.
The first paragraph, in fact, allows the parties to choose the rules of law. The second, however, allows judges to select, in the event that this choice has not already been made by the parties, the law to be applied.
Rules of law has been interpreted as legal systems.

UNICITRAL MODEL LAW
Art. 28.1. and .2

The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

UNICITRAL MODEL LAW
Art. 28

The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the confl ict of laws rules which it considers applicable.

Arbitral Tribunal's Authority to select Applicable substantive law under the national arbitration legislation

There are various ways in which the arbitral tribunal can select the law to apply.
In the system of national legislation this choice can be made according to the following criteria:
a) using the law of the seat of the arbitration;
b) applying the law that would apply due to greater proximity to the case (so-called closest connection and applied in the Swiss code of private international law pursuant to art. 187.1);
c) leaving to the discretion of the arbitral tribunal the application of the conflict law most "applicable" or "appropriate" for resolving the case in question (Art. 28.2 Unicitral Model Law). The power of selection held by the arbitrators isn't limitless and they has to choose the law applicable thinking about the law that is applicable in the case (for example they can't select their home law only because is the best law that they know);
d) allowing arbitrators to select, without taking into account the parameter of the law of conflicts, the substantive law to be applied directly to the specific case (as for example happens in France pursuant to art. 1511 of their procedural code). In that case is possible that the arbitrators are going to select directly a specific domestic law or they are going to find the law applying the principles of international law.

LIMITS TO THE PARTIES' CHOICE OF LAW

a) **Mandatory laws and public policy**: the autonomy of the parties cannot be contrary to mandatory laws and public policy.

ROME I REGULATION
Art. 21

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum.

It is possible that emphasis is not only given to the pure mandatory laws of states other than that of the seat of the arbitration.

ROME I CONVENCTION REGULATION
Art. 7.1

When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

ROME I REGULATION
Art. 9.3

Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

NON NATIONAL CHOICE OF LAW

As stated above, the parties, and only they being prevented from making such selection by the arbitrators, may decide to apply non-national legal systems.
Among them, the Lex Mercatoria and the principles of Unidroit have particular relevance.
The **lex mercatoria** is a type of customary law that refers to the regulation of commercial relations in a specific sector. The choice of this system is not frequent as this regulation normally applies directly to the contract and as, due to its being an unwritten law, it is difficult to enforce.
The **Unicitral** (United Nations Commission On International Trade Law) **Principles** consist of specific provisions aimed at providing neutral regulation of the contract, also providing solutions regarding its interpretation and validity.
The latest version of these rules is from 2016 and follows the two previous ones from 2004 and 2010.

It is possible that the parties, rather than requiring the arbitrators to decide according to law, require the arbitrators to decide ex aequo et bono or as amiable compositeur, deciding the dispute according to the general principles of fairness, equity and justice.
This possibility is also provided for by the Unicitral Model Law.

UNICITRAL MODEL LAW
Art. 28.3

The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

LEGAL RULES SELECTION

It is necessary to understand, once the choice of substantive law has been made, whether this selection can also apply to the law of conflicts.
Although it may be tempting to give an affirmative answer to this question. Normally, however, the opposite is true as for example dictated by the Unicitral Model Law.

UNICITRAL MODEL LAW
Art. 28.1

The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.