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**DISPUTE RESOLUTION SYSTEMS AND GLOBAL MARKETS:
WHY ARBITRATION?**

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1. The appearance of an international civil society is considered to have been triggered by the emergence of problems of a transnational nature which: (i) can only be managed from a scope which is above that of a State; (ii) directly affect multinational non-state agents; and (iii) are not appropriately addressed by the traditional state-wide judicial systems.

2. The first signs of this phenomenon appeared in the field of international trading, after the consolidation of the capitalist production system. A significant part of international trade between individuals is conducted through international contracts, which are characterized by (i) the parties choosing the governing law and dispute resolution system; (ii) the preference of the parties for international arbitration (either *ad hoc* or managed by private institutions); and (iii) the role of

the *lex mercatoria* as a “non-national” legal system which governs international contracts.

3. The widespread use of international arbitration by companies in the sphere of international trading takes place simultaneously with the expansion of internal arbitration in commercial relations.

The increasing success of the “arbitral movement” is often seen as a result of the lack of confidence in Justice in certain types of disputes or, in other words, as a result of the “concerns with the failure of the legal system to solve the problems of most Americans”(Pound, 1906). This lack of confidence is emphasized in international trade and may have increased in recent times.

It has been said in this regard that “society is reluctant to continue accepting that the supreme regulator, a judicial system that used to be despised, remains a miserable, badly equipped and badly remunerated public service, whose lack of diligence and resources can be measured by the cases piled up in the courts and the absurdly long extent of the proceedings” (A. Minc, 1997). Nevertheless, the cause of this crisis does not only reside, in our opinion, in the situation of Justice. It is also based on the increasing complexity of the judicial systems, the lack of quality legislation and the needs imposed by globalisation, an issue which we will refer to later.

4. At this point, it seems appropriate to refer to the concept of arbitration -at least briefly-, in order to explain the causes of its expansion.

In general terms, arbitration is an alternative to ordinary jurisdiction. It could be defined as “an institution designed to find a private solution to a conflict of interests” (Díez-Picazo). The basis of arbitration resides in the will of the parties, in a contract or in an agreement within a contract, called “arbitration clause”.

However, in the end, -with the exception of cases of voluntary compliance with an arbitral award- the effectiveness of an arbitral award usually requires seeking jurisdictional enforcement mechanisms. On this basis, arbitration is considered to be a jurisdictional equivalent through which the parties can reach the same objectives as in the civil jurisdiction, i.e., the solution to a dispute with the effects of *res judicata*.

5. Unlike the ordinary jurisdiction, domestic arbitration has certain unquestionable advantages for economic operators: greater flexibility and swiftness of the procedure; lack of publicity of the proceedings and the award; greater specialization of the arbitrators; trust is placed in the arbitrators, which are chosen by the parties, or, failing this, by private institutions who are fully aware of the characteristics of the relevant business.

On the other hand, international commercial arbitration is shown not so much as an acceptable alternative to jurisdiction but, in many cases, as the only reasonable option, given that (i) national courts are not always used to applying foreign law and (ii) national courts are not always neutral (or, rather, they are not perceived as such by economic operators).

6. The State has, to a greater or lesser extent, accepted arbitration, as the large number of parties to the New York Convention of 1958 on recognition and enforcement of foreign arbitral awards indicates.

Moreover, the absence of an adequate response from the jurisdictional system of States to the needs of international trade explains that even the latter were soon forced to turn to international contracting (known as *State contracts*) in its relations with foreign economic operators, agreeing with them on the governing Law and on the submission to international commercial arbitration. On the other hand, the desire to attract foreign investments has led foreign economic operators to ensure

legal certainty by submitting their disputes to investors in international arbitration and even accepting the application of either International Law rules or the *lex mercatoria* to resolve their disputes.

The creation of the *International Centre for Settlement of Investment Disputes (ICSID)* by the Washington Convention of 1965 (which administers arbitrations between States and investors in the field of foreign investments) or the execution of more than 2,000 bilateral treaties for the promotion and reciprocal protection of investments are aimed at achieving this purpose. These instruments have enabled many controversies between States (usually developing States, but not always) and foreign investors to be solved by arbitral awards. In many cases these awards have imposed the payment of high compensations for state measures which are contrary to the international standards of protection of foreign investments (contrary to the obligations to treat foreign investors in a fair and equitable manner and compensate them in the event of -direct or indirect- expropriation for public policy reasons).

Nevertheless, not all the States have equipped themselves with a legal framework which favours the development of arbitration, be it national or international.

7. The outburst of the international civil society, as a consequence of the appearance of new problems of a transnational nature (human rights, the environment, etc.) and the increase of international economic relations, is causing a thorough transformation of international society. Together with the States and international organizations created by the States to structure inter-State relations, “non-State actors” play an (increasingly) important role in the current international society, in particular, NGOs and international corporations (or corporations that carry out international activities).

“Non-State actors” have not only pierced the structures of international power (interacting with States and international organizations), but they have also

replaced the national and international (inter-State) regulations with new private regulatory mechanisms. It is even said that there is an increase - parallel to state power and international organizations- of a "private authority" in international relations.

In addition to the arrival of corporate codes of conduct (adopted by certain NGOs) and to the process of international standardization which certain industrial sectors are undergoing, the new *lex mercatoria* widens its scope of action to the different areas of economic activity (from an international perspective).

8. The development of the international civil society has taken place together with the "globalization" process. Globalization understood not as an increase of transnational phenomena, but as that "*large and complex group of interrelated processes*" (J.E. Farria, 2001), among which one can highlight the increasing independence of the economy from politics, the appearance of new decision structures which operate in real time and with a global scope of action, the current changes to the conditions in which companies, areas of activity, countries and regions compete, or the denationalisation of rights.

Therefore, the explanation not only lies in the multiplication of the international phenomena and its increasing complexity, but also in the crisis of the traditional State model and, consequently, of the States system. The directive role of the State is under permanent scrutiny, particularly, in connection with the functioning of the market, a fact which favours deregulation and, with it, economic globalization or "*globalization from above*" (R. Falk, 1999). But we are also witnessing a "*globalization from below*" phenomenon, which can mainly be seen in numerous NGOs supporting human rights.

9. It is easy to understand that, in this context, both international and domestic commercial arbitration are at their best: international transactions are increasing

spectacularly and, in addition, there is a need to promote flexible systems which can provide solutions on the basis of the costs and the market tendencies, as opposed to the rigid judicial model. On the other hand, the scope of the areas which are considered to be freely decided by the parties has been widened considerably and, consequently, more matters can be subject to arbitration. Moreover, nowadays the arbitrability of a dispute is not considered to be excluded merely because mandatory public laws (e.g., antitrust or securities laws) apply (which the arbitrators can and must apply).

With regard to this latter aspect, the gradual reduction of the protective role of the national public order vis-à-vis the freedom of the parties to govern their relationships should be taken into account. As we have seen, the increase of international trade and, moreover, globalization, have favoured self-regulation by the economic operators as a method to favour exchanges and, consequently, the use of arbitration.

Nowadays the problem is how to reach a balance. There are people who warn of the risks of arbitration being “out of control”, which could neglect the needs of the weaker parties and which could not satisfy the requirements of “legal certainty” and “predictability” expected from any efficient dispute resolution system. In order to reach such a balance, the arbitral institution cannot neglect its connection with the freedom of contract of the parties. If the contract foresees arbitration at law and sets forth the application of a national legal system, the arbitrators are compelled to abide by this contractual provision. It would be different if the contractors wanted to “denationalize” their agreements by resorting to generic principles, such as the general principles of the international commercial order (the *lex mercatoria*), or if they opted for arbitration in equity.

In this field, we can refer to the efforts of some arbitrators to consolidate international “commercial public order” principles. The *Lagergren* case is usually quoted as the first case where the use of public order in a foreign law led to a declaration that the prohibition of corruption is an issue of international public

order (ICC, 1963). In some other cases, such as the *Reynolds* case (Cour d'appel de Paris, 1994), the focus is placed on the importance of the existence of a single universal conception of the concept itself of non-national public order. However, in fact, this single conception is still far from being reached, not even in actions such as the prohibition of corruption or the exercise of undue influence (G. Quiroga, 2001).

10. Several facts confirm that the arbitral institution is in good health: the exponential increase in the number of arbitrations, in particular the arbitrations administered by the main existing arbitration institutions (International Court of arbitration of the International Chamber of Commerce of Paris -ICC-, London Court of Arbitration, ICSID, etc.), the appearance of new private arbitration institutions or the enactment of new regulations extremely favourable to arbitration.

In line with the above, the new Spanish Law on Arbitration, of 2003, inspired by the Model Law on International Commercial Arbitration of 1985, offers an ideal framework to develop domestic arbitration and for the establishment of Spain as an international arbitration seat. As the laws of other countries in our area of influence, the Spanish law provides complementary and mutually beneficial relations between arbitration and jurisdiction, setting up mechanisms of close cooperation of the tribunals with the arbitrators in fields such as interim measures, the examination of evidence or the enforcement of awards. The reason for this is that Justice needs arbitration and, of course, arbitration needs the support of the courts.

11. In connection with the matters subject to arbitration, in addition to commercial transactions, the institution has been extended to new fields of influence, such as, maritime transportation and foreign investments. In such matters, arbitration has to a great extent replaced state courts. Air transportation, intellectual property,

competition law, insurance or, in relation to domestic arbitration, construction law, must also be mentioned. Some of these fields of influence currently have specialized arbitral institutions, for instance, ICSID or the Arbitration and Mediation Centre of the WIPO (World Intellectual Property Organization).

12. Globalization has not only favoured the use of arbitration by the States but also of other types of dispute resolution systems (ADR) such as conciliation or mediation, which are regarded both as a previous step to arbitration or to state jurisdiction and as an alternative to both. The United States and the United Kingdom are examples of the success of these “news” methods.

On the other hand, globalization has also caused the national rules governing arbitration and the rules of the arbitral institutions to converge. In this regard, the content of most of the recently promulgated laws on arbitration is easily identifiable for the economic operators, since they share a common base, namely, the mentioned UNCITRAL Model Law. As for the rules of the arbitral institutions, the regulation of the ICC of 1998 is a good example of the trends and standards generally accepted in international arbitration.

13. However, globalization and consequently, the appearance of the international society - as an area of *"markets, associations and the sphere of the public debate"* (V. Perez Díaz, 1993) - are phenomena with unequal effects across the world. In the same way, the development of arbitration (and other alternative dispute resolution systems) has taken place fundamentally in the most industrialized countries or in countries with emerging economies. In contrast, there are still many countries that, reluctant to give up sovereignty, maintain a negative opinion of arbitration, as an inevitable institution to be used in certain cases.

14. At present, the State is not in danger: it is undergoing an identity crisis. National jurisdictions are not under threat either. Arbitration is not intended to substitute them, but rather to coexist and cooperate with them. Apart from that, arbitration not only needs help from the courts but also a State regulatory framework, or an or inter-State one (of International Law), that allows it to fulfil its role: laws which are favourable to arbitration and that respond to internationally recognized standards. International arbitration does not intend to free itself from the State, but rather to work together with it.

15. There is therefore no risk of fragmentation between arbitration and jurisdiction, or within the arbitral world itself. On the contrary, as economic globalization forces the harmonization of the national legal systems, it could favour the use of the courts over international arbitration. Nevertheless, this is a phenomenon that, up to date, has only arisen within the framework of certain regional integration processes.

If one considers European integration, the harmonisation of the laws of the Member States of the European Union, as well as the creation of effective judicial cooperation mechanisms, has increased the confidence of the European economic operators in the courts of other Member States. Therefore, the exponential rise of intra-community exchanges has not signified a parallel increase of international arbitrations. In the context of the European Community, nowadays, the recourse to international arbitration is explained in terms of comparative advantages over jurisdiction, as is the case with national arbitration.

In our opinion, a process of integration that attempts to replace - as someone claims - the role of the national courts as guarantors for the application of community law with international arbitration (or supranational courts) is unthinkable. In the European Union, national courts have become actual community courts, which receive the assistance of the Court of Justice of the European Communities. On the other hand, the jurisdictional duties of the Court

of Luxembourg are limited to promoting a uniform interpretation of European Community law, to exercise control over the legality of actions and omissions of the European institutions and to declare breaches of the law by Member States.

The performance of national courts as community courts in the European Union even applies - if not mainly - to conflicts between Member States and nationals of other Member States. For example, the freedom of establishment within the Community territory, set forth in the EC Treaty with a widespread scope, is not guaranteed by arbitral mechanisms (nor by investment protection bilateral agreements), but rather by the national courts assuming their status as community courts.

16. International arbitration has not become a mere alternative -an extremely attractive one in certain cases- over jurisdiction, as is the case of domestic arbitration. It is still the only reasonable option for many transnational transactions.

However, one cannot discard the fact that this situation could change in the future, at least partly, as a result of two potential events: (i) the reinforcement of the legal-institutional mechanisms in the framework of integration processes in America and Asia; and, with reference to international arbitration between States and the foreign economic operators, (ii) the creation of a new constitutional framework for international trade which provides judicial mechanisms available individuals.

This last possibility does not seem to be included in the States' agenda, as the review of the Dispute Resolution System of the World Trade Organization (WTO) which is underway seems to evidence. Moreover, it would demand a significant transformation of the current WTO system, which is to a great extent linked to the philosophy of the GATT of 1947, aimed at opening markets on the basis of reciprocal advantages for the parties, rather than to guarantee the access to markets for the economic operators. This explains not only that individuals do not have capacity in the present dispute resolution system of the WTO; it also explains why

the enforcement mechanisms of the Dispute Resolution Body decisions are based on the negotiation between the parties and on the application of certain counter-measures. In particular, we refer to the possibility of agreeing commercial compensations for the benefit of the aggrieved party and, in the absence of an agreement, to the possibility of the latter imposing commercial “reprisals”.

Davos has been described as the globalization summit. But, does the WTO structure feet with globalization? The WTO structure -an intergovernmental one- evidences a certain lack of relation of the States system with globalization; however, it operates at its service.

With regard to the American and Asian integration processes, it does not seem, for the moment, to be showing enough maturity. There appear to be free trade areas coupled with the rhetoric of integration and the need to advance in institutionalising it. How can one explain, for example, the wording of Chapter XI of the NAFTA Treaty, concerning the protection of investments? Chapter XI contains the typical wording of a bilateral treaty for the protection of foreign investments, including the possibility of subjecting potential controversies between a Member State of the NAFTA Treaty and national investor of another Member State to international arbitration (the ICSID, for example).

17. A concluding remark.

The economic operators demand confidence in the judicial system. If the idea of confidence is projected over the dispute resolution system, elements such as swiftness and certainty or predictability will arise. Besides the specific problems arising from internal or domestic arbitration, international arbitration is favoured by the distrust towards the “neutrality” of national jurisdictions in agreements between foreigners. International arbitrators are seen as impartial decision-makers who are not “contaminated” with “national” bias. The certainty of the system revolves around such impartiality.

In most cases, large international economic operators resort to arbitration seeking a rule of decision to solve the dispute rather than a decision based on law. It is a question of reaching a reasonable negotiated agreement, which takes into consideration the time, costs and market interests. Problems can arise when the parties in conflict are not consistent, do not belong to the same area or “business group”. In these cases, in order for the international arbitration system not to run the risk of being perceived as a partial structure at the service of certain “corporate circles”, arbitrators must apply the decision rules set forth in the contract which gives rise to the controversy. Therefore, the national law which governs the parties must not be avoided as an excuse to apply general principles of international public order.

The future of international arbitration depends on the permanent respect of the negotiating freedom of the parties. Just as in national jurisdictions it is necessary to guarantee the subjection of Judges to the democratic legality, in order to avoid the creation of “*law lords*”, it is necessary to ensure the subjection of arbitrators to the provisions governing the contract in order to avoid the creation of “*trade lords*”.

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