The OHADAC Court of Arbitration.

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1. - The Organization for the Harmonization of Business Law in the Caribbean (OHADAC).

The Organization for the Harmonization of Business Law in the Caribbean (OHADAC, by its French abbreviations), is a project inspired by regional experiences of legal harmonization, especially by those of its similar, the Organization for the Harmonization of Business Law in Africa (OHADA) [2], as well as by other regional processes of integration. It has its origin in the Declaration adopted in the conference of Pointe a Pitre, Guadalupe, on May 15th 2007. The Second Conference celebrated in Port Prince, Haiti (June 17th and 18th 2008), drew up a list of legal fields to be developed, among them, international commercial Arbitration.[3]

The OHADAC departs from the criteria that the Caribbean is a mosaic of States where different legal orders coexist, that is to say, domestic legal systems originating from different families of

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[2] The OHADA was created on October 17, 1993 in Port Louis, Mauritius, with the Treaty regarding the Harmonization of Business Law in Africa adopted by 14 African countries: Benin, Burkina Faso, Cameroon, Congo, the Comoros, Côte d'Ivoire, Gabon, Equatorial Guinea, Mali, Niger, Central African Republic, Senegal Chad and Togo. Later, Guinea Bissau, Guinea-Conakry and Democratic Republic of the Congo joined the OHADA, totalizing the 17 African States members of the Organization. See "*La Armonización del derecho mercantil en África, impulsada por la OHADA*", by José María Cueto Álvarez de Sotomayor, Sergio Esono Abeso Tomo and Juan C. Martínez García, Ministerio de Justicia, Madrid, 2006.

[3] The OHADAC follows in that way the OHADA style. The Treaty for the Harmonization of Business Law in Africa addresses a chapter (IV) to Arbitration. See *OHADA, Tratado, Reglamentos y Actos Uniformes,* Instituto de Cooperación Jurídica, Faculty of Law, Lisbon University, ALMEDINA, 2008.

law, like *Common Law* and the Romano-Germanic system or family (also called Roman French). This legacy was received by these Caribbean States from the old metropolis, whether they be English-speaking countries or of European continental Law (Spanish, French and Dutch). It created differences within their internal orders, demanding rules of common interpretation in order to support the flows of commerce and investment within the region. It is evident that the Latin American and Caribbean countries urgently need to bring their mutual and common interest relationships closer, through processes of legal harmonization that contribute to reinforce the international position of the region in international forums regarding the unification and harmonization of both, Private International and Business Laws.

It is necessary to take into consideration that regional integration processes constitute a way to move forward towards an universal process of globalization properly balanced and respectful of the interests of all the States integrating the International Legal Community; and, on the other hand, it must be also noticed that the harmonization of Business Law is an effective instrument for providing the international and regional trade with greater legal certainty and for reducing their costs, fostering the commercial exchanges, the development of the national economies and their progressive integration.

Based on these premises OHADAC has already taken the first steps with the Latin American and Caribbean Congress celebrated in Havana in June 2010, emphasizing the promotion of Arbitration, as a paradigmatic institution providing support to international trade, and as a fundamental pillar of the initial development of the process of harmonization of Business Law in the Latin American and Caribbean region.

The Congress held in Havana, culminated in a Declaration[4] encouraging the OHADAC to promote and design an institutional system of international commercial arbitration, with a modern and efficient regulation, that takes into consideration the most recent comparative law contributions, fills their gaps and be oriented towards an arbitration procedure which cares about party autonomy, respects State sovereignty, allows efficient arbitrators' performance and guarantees arbitral awards improving the quality of justice, legal certainty and effectiveness of their decisions.

The Declaration also proposes the promotion of comparative law studies within the Caribbean, which would allow these countries to have a mutual knowledge of their respective legal systems, facilitating in that way the harmonization of business Law, and the introduction into their agenda of a catalogue of substantive law matters, whose harmonization is considered advisable to reach the legal integration objective, mainly regarding commercial contracts, international transportation, commercial registries, commercial companies, guarantees and payment mechanisms, industrial property rights, insolvency law, and cross-border enforcement of debts.

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[4] See *Statement by the Latin American and Caribbean Congress of International Commercial Arbitration*, held in Havana, June 23-26, 2010, in www.ohadac.com

All this, of course, as expressed in the Declaration, with absolute respect for the sovereignty of States, for culture diversity, for the values and political conceptions, in search of a loyal cooperation making feasible the legal harmonization whose last aim, and main common interest, is to promote the progress and the economic growth of the Caribbean countries, as well as the conditions of life of the Caribbean and Latin American Community.

II. - Some considerations on the present situation of international commercial Arbitration in Latin America.

- **Background:**

Only a few years ago, the legal doctrine, both Spanish and Latin American, was quite critical with respect to the panorama of international commercial Arbitration in Latin America. An important author said: *"… there is an atmosphere of distrust, both legislative and interpretative, towards an institution traditionally considered intrusive regarding the jurisdictional sphere. This atmosphere, in addition, has exerted a pernicious influence in other countries, mainly in Latin America…"*[5]

The analysis of the causes of the arbitration's peculiar situation in Latin America have been expound by many authors[6], it is enough to mention a commentary: *"Such situation is related to our history, to the abuse of foreign diplomatic protection, to the foreign intervention, the origin of Calvo*[7] *doctrine, to the causes of the "Drago doctrine", to the reasons that originated the*

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[5] J.C. Fernández Rozas, "*Ius Mercatorum*, Autorregulación y Unificación de Derecho de los Negocios Transnacionales", Colegio Notariales de España, Madrid, 2004, Pag. 68.

[6] JC Fernández Rozas, "Tratado del Arbitraje Comercial en América Latina", IUSTEL, Madrid, 2007;, F. Mantilla Serrano, "Nouvelles d'Arbitrage en Amérique latine", *Revue de l'arbitrage* 1995, Pag. 552, and "Le traitement législatif de l'arbitrage en Amérique latine (quelques reformes récentes)", *Revue d'arbitrage,* 2005 No. 3, Pag. 561

[7] The so called "Calvo Clause", has its origin in the Doctrine developed by the Argentine jurist Carlos Calvo (1824 – 1906). It holds that the States cannot protect their nationals in the event of possible damages caused to them or their patrimonies, beyond what the local law establishes for their own citizens, making clear the fact that aliens would not have more rights than citizens of the sovereign State where the dispute arises. As contractual clause consists of a stipulation in a contract between a State and a foreigner, by means of which the foreigner agrees to be considered like national with respect to assets and concessions, and not to invoke the protection of his governments; it was a logic and coherent reaction to the unjust armed intervention that, under a supposed "diplomatic protection" of interests of their nationals, certain European states and the United States carried out in the Latin American territories that had just gained their independency from their respective colonies. This policy is known as "gunboat diplomacy". Calvo doctrine has three fundamental elements: one, foreigners must resign diplomatic protection and any other right derived from International Law; two, the applicable law will exclusively be the law of the State in whose territory foreigners develop their activities; three, national courts (of the state where investment is made) are the exclusive jurisdiction for the solution of the possible conflicts arising from a default in the investment concession. About Calvo clauses and their influence in Arbitration in Latin America, see, among others, B.M. Cremades Sanz-Pastor, *"Resurgence of Calvo doctrine in Latin America",* Business Review, vol. 7, January, 2006, Pag. 53 – 72, and *La participación de los Estados en el Arbitraje internacional*, Conference given in the *Latin*

incorporation of the so-called "Calvo clause" in many Latin American constitutions, to the rejection of the Kompetenz-Kompetenz principle, to the allowed and provoked immission of local courts to intervene in arbitration, before, during and after the arbitral award, to the authorization of a wide panoply of situations to attack its validity, to the arbitration clause's lack of autonomy and the imposition of the rigid forms our regulation imposes to the arbitration process" [8]

The above mentioned reasons are all certainly valid, but it should be added that, as also affirms the same author [9], very few Latin American regulations specifically established the possibility of continuing the arbitral procedure, when one of the parties fails to comply with either the agreement or arbitration agreement and resort to a State court, to request the nullity of the agreement so that party considers such agreement null, ineffective or impossible to enforce, or, sometimes, simply, to bring the claim before the court taking no notice of the existing arbitration agreement, in spite of the regulations on this matter established by the European Convention (Geneva, 1961) [10]. There is a lack of regulations establishing the assistance and the necessary judicial control, or rather, the necessary intervention of the judge in both, the arbitral phase (taking of evidence, interim measures and judicial assistance), and the post-arbitral one. Unfortunately, regarding the post-arbitral phase, there have been obvious intrusive vocations with noticeable tendency to exert a double control when reviewing the merits or content of the award, going beyond the arbitrability of the difference and the exception of public policy, in addition to many other deficiencies that have been critically expound by some legal scholars[11].

This panorama, that in no way was flattering, has changed almost totally in the last years, due to different factors. It can be said that Arbitration in Latin America, that had shifted "from hostility to tolerance" [12], has experienced great diffusion, and has been winning supporters, not only

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American and Caribbean Congress of International Commercial Arbitration, held in Havana, June 23-26, 2010, Pag. 3-6.

[8] A.I. Piaggi, "La vinculación entre UNCITRAL y el Arbitraje Comercial Internacional: Una relación exitosa", Pag. 2 and 3.

[9] A. I. Piaggi, Op. Cit.

[10] See Geneva Convention, 1961, Article VI, "Jurisdictions of Courts of Law",

[11] See different critical analysis about Latin American Arbitration legislations in: J.C. Fernández Rozas, Tratado…O. cit.; H. Griguera Naón, " Arbitration in Latin America: Overcoming traditional hostity", in International Arbitration, Vol. 5 , No. 2, 1989.; " Países de América Latina como sede de Arbitrajes Comerciales internacionales" , ICC International Court of Arbitration Bulletin, El Arbitraje Comercial Internacional, Suplemento especial, 1995. G. Giusti, Op. Cit.; S. L. Feldstein, Op. Cit.; A. I. Piaggi, Op. Cit.; F. Cantuarias S., "Breve descripción del Arbitraje Internacional en América Latina", Revista (electrónica) Laudo, Arbitration Center of the American Chamber of Commerce of Peru; ¿Ha sido correcta la decisión de que la Ley General de Arbitraje regule dos tipos de Arbitraje: Nacional e Internacional?, Revista Iberoamericana de Arbitraje, Noviembre de 2004; G. Boutin, I.; Op. Cit.; T. B. De Maeckelt, Op. Cit.; A. M. Garro, """The UNCITRAL Model Law and the 1988 Spanish Arbitration Act: Models for reform in Central America" , American Review of International Arbitration, Vol. 1, No. 2, 1990;

[12] G. Martín Marchesini, Conference given in the "Second Congress of International Law and MERCOSUR", Buenos Aires, July 1-2, 2004. Marchesini points out in this Conference that Arbitration was considered *an*

among the regular international commercial operators which is its propitious environment, but also in professional and academic sectors as well as among litigation lawyers, although certain resistance from the judiciary is noticed. However, the notion of arbitration is been consolidated and generalized as the most effective system to solve international trade differences.

It is true that some of the laws approved during the last years in Latin American countries[13] have certain limitations, motivated by local regulations which have shown to be far away from international standards[14]. That is the reason why it is said that those countries could hardly be seat of international arbitrations. It is affirmed that there is a clear increase in ICC[15] Arbitration procedures involving Latin American parties, but it is necessary to point out that the development of International Commercial Arbitration in the region does do not depend, in no way, on the fact that each country establishes a legal regime allowing it to be considered a sort of "arbitration paradise". That is not the issue. The point is, first of all, to encourage the development of an internal legislative framework and a way of legal and judicial performance, creating a favorable atmosphere for the development of International Commercial Arbitration.

There cannot be Arbitration without party autonomy; without avoiding the interference of state courts in the details of the process; without the recognition of the competence-competence principle; without obtaining the necessary judicial assistance and control; without the mandatory enforcement of the award, or the recognition and enforcement of foreign awards as if they were national sentences.

For this reason, the search of new International Commercial Arbitration seats is a healthy aspiration of many specialists of "the South". Unfortunately, it must be noticed that it is still difficult to materialize this hope since finding a permanent seat of institutionalized Arbitration in most of these States, with the same level, guarantees and professionalism as the traditional ones, is a real challenge.

However, it can be said that in Latin America the outcome is positive, because, following the modern tendencies and the recommendations from the specialized institutions and legal doctrine,

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intermediate stage between the exercise of violence and the emergence of State judges". Revista Iberoamericana de Arbitraje, September 7, 2004, Pag.1,

[13] Mexico (1993), Guatemala (1995), Brazil (1996), Peru (1996), Bolivia (1997), Costa Rica (1997), Ecuador (1997), Colombia (1998), Venezuela (1998), Panama (1999), Honduras (2000), Paraguay (2000), El Salvador (2002) Chile (2004) and Cuba (2007).

[14] F. Cantuarias, S. Op. Cit., Pag. 2 and 3.

[15] W. L. Craig, W. W. Park & J. Paulsson, "International Chamber of Commerce Arbitration", 3rd Ed., Ocean Publications, Inc./ICC, Publishing S.A., 2000, Pag.5.

legal obstacles[16] that obstructed or frustrated the development of international commercial arbitration have been eliminated, all this making favorable the recognition and enforcement of foreign awards, so that a coherent internal legal order is created, according to the exigencies of the institution and the international Conventions on the matter.

Arbitration is no longer unknown in Latin America[17], nor is a strange element within the substantive positive legal order of the majority of the countries in the area, although it is necessary to admit that there are countries where a proper normative framework has not yet been established in order to allow its development. Even though, in about twenty Latin American countries there are institutions or organizations that to a greater or lesser extent support Arbitration, which, evidently, contributes to the improvement of the institution[18]. Some of them, perhaps, can become a worthy option for International Commercial Arbitration between parties pertaining to countries of the area.

In summary, it can be said that during some years in Latin America there was certain reluctance to Arbitration due to different factors; even though, today it can be affirmed that some improvements have been taking place, in the strictly legal order, favoring the recognition and acceptance of the benefits of International Commercial Arbitration, as a suitable mechanism for the solution of possible conflicts arising from the international trade and foreign investment relations (within the international business sphere).

This achievement has been obtained due to the ratification of the most important International treaties on the matter, the increasing inclusion of arbitration in contracts and foreign trade treaties, due also to the improvement in the recognition of the values of arbitration, and, more recently, the adoption of modern national laws regulating and facilitating the use of international commercial arbitration.

- **Current problems regarding arbitration in Latin America**

In spite of the well-known, and above mentioned developments, both, international commercial Arbitration doctrine and legal experts point out that some problems still remain, which could be summarized in three great headings: the judicialization of arbitration, the constitutionalization of

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16 One of the last Arbitration Legislations approved in Latin America (that of Chile, September 10, 2004), is an eloquent example of the changes operated in the legislative aspect in the area.

17 This is shown, for instance, by the number of ratifications reached by the Inter-American Convention on International Commercial Arbitration, subscribed in Panama, 1975, within the framework of CIDIP I, which represents one of the Conventions with greater number of ratifications (18).

18 Argentina, Belice, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Chile, Ecuador, El Salvador, Guatemala, Honduras, México, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela.

arbitration, and the lack of knowledge in relation to the specificity of international commercial arbitration[19]. From them we can take the obstacles to overcome, the myths to leave behind and the challenges to be faced by International Commercial Arbitration in Latin America.

Obstacles

1st.- **Judicialization of arbitration**

Most of arbitration laws in Latin American countries have welcomed the principle of limited Court intervention, following the way drawn up by the Model Law. It is a principle, although apparently simple, very important in arbitration, which consists in the States guaranteeing the Courts will abstain from interfering in arbitration issues, except in cases where specifically the arbitration law so foresees. In this way the court control can take place, with the intention of increasing certainty for parties and arbitrators, as well as extending uniformity, and, along with it, the exclusion of any residual power that might be assumed by the Courts of justice by virtue of other domestic laws[20].

In spite of the importance of this principle, only some Latin-American legislation recognized this rule. That is the case of *Bolivia, Chile, Guatemala, Honduras, Mexico, Paraguay, Peru and Dominican Republic*. Other countries, however, chose not to recognize this dimension of the real role of courts in arbitration, as it happens in *Brazil, Colombia, Costa Rica, Ecuador, Panama* and *Venezuela*.

It is so that in *Latin America* there have been cases where courts have intervened in arbitration procedures in relation to issues very different from those where the law expressly authorizes such intervention. Some people have noticed that such interventions have taken place, mainly but not exclusively, in countries where there are no express rules limiting judicial intervention[21]. I am referring to the so called *anti-arbitration injunctions*, or orders to stop arbitral proceedings. Many specialists believe that this is one of the most serious obstacles to the development of arbitration in the region.

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[19] About the Judicialization of arbitration, constitutionalization of arbitration and the lack of knowledge regarding the specificity of International Commercial Arbitration in Latin America, see Cristian Conejero Roos, "*El arbitraje comercial internacional en Iberoamérica: un panorama general*", in "*El Arbitraje Comercial en IBEROAMÉRICA: marco legal y jurisprudencial*", various authors compilation, coordinated by CUATRECASAS, La LEY, Madrid 2009, Pags. 57 - 108.

[20] Ibidem

21 Ibidem

2nd.- The constitutionalization of arbitration

The phenomenon called "constitutionalization of arbitration"[22] has typical characteristics, which will not be analyzed in detail here. These specific characteristics and foundations have their origin in the reasons behind the reluctance to Arbitration already exposed.

Many specialists consider that this tendency towards the constitutionalization of arbitration is highly inadvisable. It has been rightly said, "that all the constitutional declarations are trivial if there are no procedural remedies for supporting their real operation"[23]. Following the reasoning of a young but experienced specialist in the matter[24], the question to be formulated is "whether all the constitutional declarations must necessarily and exclusively find the procedural remedies supporting their operation in the Constitution itself or can be protected through laws in accordance with that one". If the first proposition were admitted (the same author express) it would mean that for everything having a constitutional connotation, the Constitution would be always a rule of direct and *immediate* application, leaving without effect the law that, enacted in accordance with such Constitution, regulates specifically a certain legal issue. It would have no sense then to provide to certain institutions like arbitration with its own and specific legal statute if the Constitution would always have direct effect anyway. Consequently, It would seem that the Constitution should only interfere with arbitration if the own legal arbitration mechanisms are not enough to protect certain constitutional basic values or they are not in accordance with the Constitution. The fact is that the international arbitration legal regime offers suitable solutions to punish actions which could imply a violation of any aspect of the Constitution, even though it is not its main objective and, on the other hand, nothing indicates that such solutions displease in any way the constitutional order".

The legal doctrine gives some examples that allow us to better determine these concepts[25].

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22 See C. Conejero Roos, Op. Cit., Pag. 96; E. Silva Romero, "*A propos de l'inexorable collision de philosophies dans la constitutionnalisation de Earbitrage en Amérique latine,* Pag. 269; A. de Jesús O., *"Le traitement constitutionnel de l'arbitrage au Venezuela*", Pag. 243.

23 P. Calamandrei, quote from J. Colombo Campbell, *"Funciones del Derecho Procesal Constitucional*", Revista *lus Et Praxis*, Vol. 8, num.2, 2002, Pag. 11, quote from C. Conejero Roos, Op. Cit., Pag.96.

24 C. Conejero Roos, Op. Cit., Pag. 96.

25 (i) The arbitral award issued in a process where certain material justice's basic principles or fundamental guarantees have not been respected (like for instance, the right to due process understood in a broad sense as the right to fair and equal treatment, the right to be heard and to be given a full opportunity to present a case), could be annulled according to the dispositions of the Model Law (incorporated in several Latin American countries) replicating the grounds for annulment foreseen in the New York Convention and in most of the recent Latin American Arbitration Laws. Even more, it has been understood that these rights are so essential that they constitute part of a transnational, or really international, public order that can be applied by judges, even in the event of lack of express legal text, if its violation is invoked by some of the parties. Consequently, it does not seem necessary to

This means that in the event of eventual harm to constitutional values, they can be protected by the own mechanisms offered by international arbitration through its basic institutions, that is: the arbitrability of a dispute, due process or public policy, which are recognized as grounds for annulment or refusal of enforcement of a foreign award in international treaties (Geneva 1961 and New York 1958) subscribed and ratified by the Latin American countries, reason why these mechanisms of defense are incorporated into the internal legal order of each country.

The paradox of this extreme constitutional protection, as rightly has been said[26], lies in the fact that an unlimited defense of constitutional guarantees that could be considered affected by the arbitration, ends by affecting and undermining in a more serious and irreversible way the constitutional guarantee of freedom of the parties which have independently agreed to submit their dispute to arbitration, avoiding in that way courts jurisdiction over disputes arising from the contract containing the arbitral clause.

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resort to the constitutional control, if it can be remedied through the mechanisms offered by the special statute regulating international arbitration.

(ii) In the event that the State or a State organization invokes constitutional limitations under its domestic law preventing such State or organization to be submitted to arbitration, an arbitrator will be able, eventually, to declare that he lacks jurisdiction to decide the disputes arising from the contract signed by the State whenever corresponds to him to make this decision according to the law -including the Constitution- of the State from which the State organization is part**.** In this sense, it should not be forgotten that the analysis of the validity and effectiveness of the arbitral agreement does not depend necessarily on the national law of the State and, even if it is the case, there are certain legislations that recognize the principle stating that a State organization, once having signed a contract containing an arbitral clause and having arisen a dispute from the same, cannot evade arbitration by invoking its own domestic law. In the same way, even though the arbitrator declares himself as having jurisdiction to resolve disputes involving a State organization, again that decision -generally in the form of an award- could be attacked through a nullity action if it is considered that the requirement of the capacity of the State to be submitted to arbitration or even, the requirement of arbitrability of the dispute, are not fulfilled, both grounds for annulment are foreseen in the New York Convention and in the majority of the Latin American Arbitration laws. Again, we can notice that the constitutional interference is not necessary as far as, first, the arbitrator will only be forced to apply a Constitution if the law chosen by the parties includes the Constitution of the Latin American country at issue and, in any case, it always will be possible to control the award based on the grounds already mentioned.

(iíí) Finally, if it is considered that *the arbitrator* has not been independent or impartial during the process, he can always be challenged and, if the arbitrator commits serious faults in the management of arbitration, for example: not to lead the procedure according to the agreement of the parties or to lead it in a way that put at risk the right to due process, or if he exceeds the limits of his arbitration mandate, the award resulting from this process can also be annulled. Consequently, it is not necessary to resort to constitutional remedies like the complaint, restraining order or the *amparo* to attack the acts - including the decisions- of an arbitrator who has incurred fault or serious abuse. The own special statute of arbitration foresees the arbitrator's replacement or the annulment of the award issued by such arbitrator. C. Conejero. Roos, Op. Cit., Pags. 96-98.

[26] C Conejero Roos, Op. Cit., Pags. 98.

- **Myths**

3rd.- The lack of knowledge about the specificity of international commercial arbitration

Finally, the third problem frequently mentioned by legal scholars refers to the fact that due to the relatively recent presence of international commercial arbitration regulations in Latin America, the legal practice operators –lawyers and judges- not necessarily thoroughly know arbitration rules, principles and practices, which, often leads to inexact or improper performance of this alternative means of dispute resolution. Of course, it is a remark that cannot be generalized because in Latin America there are many experts in arbitration. For that reason I prefer to consider this situation not a real problem but a myth, although, indeed, the development of arbitration does not reach the levels found in North America or Europe

- **Challenges;**

The development of International Commercial arbitration, rests, undoubtedly, on certain assumptions constituting its foundation, and the presence of such assumptions in a certain country must allow the possibility for this country to be chosen as seat of arbitration. Among these assumptions, necessary so that arbitration can be developed with the effectiveness required, we can mention the following:

1º.- The existence of a Law in accordance with the modern principles of arbitration,

2º.- The presence and validity of party autonomy (basic principle of arbitration)

3º.- Judicial recognition, support and assistance, without excessive interventionism. Based on a proper legal and jurisprudential framework.

4º.- The necessity of creating a favorable national jurisprudence, in accordance with the basic principles internationally admitted in relation to international commercial arbitration. A sort of arbitral *"ius cogens"*.

5º. - The development (or proliferation) of a general culture favorable to arbitration.

Some events such as the Latin American and Caribbean Congress held in Havana, last June, and also this Seminar on International Commercial and Investment Arbitration that is taking place in Panama, directly contribute to achieve the latter of the above mentioned assumptions, and indirectly to the others, because the legal foundation as well as the development of a jurisprudence based on the basic principles of the institution, only can be reached if both, willingness and knowledge, based on a culture favorable to Arbitration, coexist.

II.- International Investment Arbitration: Dispute resolution within the ALBA framework.

As rightly has been said, the International Commercial arbitration in Latin America is being affected by the questioning of investment arbitration. Concerning sovereign States, arbitrator's

decisions have a very serious impact on public opinion. The confidentiality or excessive secrecy atmosphere surrounding international commercial arbitration disappears when it is about sovereign states, whose commitments must be known by the public opinion and mainly by the parliamentary control in their respective countries[27].

As to investments, almost all Latin American countries submit their disputes to the ICSID jurisdiction, with the exception of Cuba that has never accepted it due to the connections between the ICSID and the World Bank, and more recently some ALBA countries, like Bolivia, Ecuador and Nicaragua which have denounced this connection. As Professor Bernardo Cremades explains: *"Venezuela, with its economic possibilities is commanding a strong answer towards the systems of dispute resolution in institutions, although international, most of them with domicile established in the United States of America. Bolivia announced on May 2, 2007 its withdrawal from the ICSID and, in February 2009, approved a constitution where Calvo doctrine postulates clearly appear. Ecuador, on December 4, 2007, announced that it would not accept the World Bank arbitration in the matter of natural resources, such as petroleum, natural gas and mining. In the last years there has been a series of declarations and international policy movements for the constitution of Latin American arbitration institutions. All these States continue to be subject to constant international claims and participate actively in arbitrations, both commercial and of investment protection. Time will say whether these discussions lying on the sphere of international policy materialize technically into an international arbitration institution, according to the Latin American countries' reality, and having, logically, as first task the aim of gaining the confidence of foreign investors".* [28]

In spite of denunciations by some ALBA countries, not only are pending the already existing cases waiting for the complaint to be filed, but also the situation that takes place when the disagreement arises between one of these countries and entities from States with which an APPRI exists and where ICSID jurisdiction is foreseen as a competition forum.

This situation led these countries to create a work group for the creation of a regional entity for the solution of controversies within the ALBA framework. This group drafted and approved on November 30, 2009 a project of framework Agreement, which was subscribed in Havana on December 15, 2009.

The ALBA-TCP's regional dispute resolution entity will be created thus by means of a constituent treaty, which will have international legal personality and the necessary privileges and immunities for the fulfillment of its functions.

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[27] B.M.Cremades Sanz-Pastor, "*La participación de los Estados en el Arbitraje internacional*", Conference given in the Latin American and Caribbean Congress of International Commercial Arbitration, Havana, June 24, 2010, Pag. 21.

[28] B.M. Cremades Sanz-Pastor, Conference…Pags.22 and 23.

This entity's seat will be decided by consensus by the Heads of State and Government of the ALBA-TCP.

This ALBA-TCP's regional dispute resolution entity will be guided in its action by the following general principles:

a) Respect and total applicability of the Parties' internal legislation, and to the principles and rules of international Law, in the solution of controversies;
b) Recognition of the non-existence of pending procedures in the Parties' jurisdictional or administrative seats as a requirement *sine qua non* for the admission and registry of controversies;
c) Priority of non-litigation means of dispute resolution;
d) ADR Suitability (good offices, conciliators, mediators and arbitrators). Transparency in the system for their appointment;
e) costs reduction;
f) Impartiality;
g) Multilateral vocation. It will be open to all the States of the region;
h) Respect to the States' prerogatives in the solution of controversies with individuals;
i) Confidentiality.

The regional entity will be able to apply all the alternative means of dispute resolution, that is to say: Negotiation, Good Offices, Mediation, Conciliation and Arbitration.

The ALBA-TCP's regional dispute resolution entity will consist of: the Executive Council; the Permanent Secretariat; the Consultancy and Legal Defense Center and, all the entities necessary to perform its functions.

The Work group is in charge of drafting the project regarding the "Constituent Treaty of ALBA-TCP's regional dispute resolution entity", and of submitting it to ALBA-TCP Heads of State and Government for its approval.

IV. – The seat of arbitration. Its importance

As it is known, the notion of seat in international arbitration on the one hand designates a place chosen by the parties, where the specific material operations of the arbitral procedure take place, that is: hearings, testimonial evidence, or the arbitral award signature by arbitrators[29]. And, on the other hand, that place will have to determine which is the law applicable to the possible "judicial review" of the decision concerning the dispute, with respect to which the arbitrator or arbitral tribunal has received the task of pronouncing themselves in order to solve such dispute. The

[29] See J.C. Fernández Rozas, "Determinación del lugar de arbitraje y consecuencias del control del laudo por el tribunal de la sede arbitral", Revista Lima Arbitration, No. 2, 2007, Pág. 40.

notion of seat of arbitration has therefore a noticeable legal connotation, rather than a geographical one.

An important sector of the international legal doctrine believes that within international commercial arbitration does not exist a legal order imposed *prima facie* upon arbitrators, that is to say, the arbitrator is not tied to a particular forum, there is not a material order to which he is compulsorily tied demanding of him the strict fulfillment of its rules[30]. Apart from this position, whose extreme side take us to the "a-nationality"of the arbitral award and its more radical aspect support the so-called "floating award", theory parallel to that of "contracts without law", which is the most extreme position (arising from theoretical constructions, generally rejected by the jurisdictional authorities), it cannot be unknown the important role of the seat of arbitration in the arbitral procedure, although it cannot be totally compared to the forum of the ordinary court.

It is necessary to admit, if we want the arbitration to play its role of institution assisting the international trade, that this alternative means of dispute resolution is always related to an State, there is an State connection and this must be the place where arbitration is carried out, reason why the place of arbitration will have to involve important consequences. As it has been said before "one thing is the lack of forum and another thing is the complete lack of a State connection: that is to say, of a seat of arbitration. A procedure without judicial assistance brings insecurity to the development of the institution itself, for that reason it is necessary a certain level of connection between arbitration and forum"[31]

It will also have significant legal consequences the place where the effects of arbitration are expected to be valid, that is to say, where recognition and enforcement of the award is sought. It must be noticed that all the States parties to the Convention of Geneva of 1961, are also parties to the Convention of New York of 1958, because it was intended to avoid unnecessary duplicities and double controls on a same award, although the award annulment and recognition are two different moments. Therefore there is a parallel between the grounds for annulment foreseen in article IX of the Geneva Convention and those regarding the rejection of enforcement foreseen in article V of the New York Convention. It must be taken into consideration that the recognition control are prioritized against the non-arbitrability and the public policy violation which should be the main grounds for annulment of arbitral awards

But that geographic place chosen by the parties as seat of arbitration, where the procedure will take place in order to solve the parties differences, cannot merely be chosen based on reasons beyond the arbitral process ant its requirements, whether they are touristic, cultural or others. The election of the seat based only on touristic reasons can result in some surprises, generally no

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[30] J.C. Fernández Rozas, Ib. Pag. 34 and following.

[31] J.C. Fernández Rozas, Ib. Pag.37

pleasant at all, affecting the procedure itself and even more important, can also involve huge legal dangers[32]. Its location also involves consequences of international judicial competence, given that there will have to be determined which is the jurisdiction of the State whose courts will have to solve the difficulties faced by arbitrators in the exercise of their function and before which the possible actions against the award could be raised.

As general rule the judge of the seat of arbitration will apply his/her own procedural law in the determination of the scope of possible interventions with respect to arbitration.

From this special perspective it seems clear that the existence of a seat of arbitration aims at the effective defense of the interests of the parties and their rights, while making possible the existence of a judge and legal means of assistance.

It is so that, besides the tendencies towards the a-nationality of arbitration, the determination of the place of arbitration continues involving, very significant consequences, for example:

- The determination of the law applicable to the procedure,
- The scope of judicial assistance. It is not accidental that the parties want to lead arbitration towards those seats where their procedural laws assure to them that the state courts are able to assist them when necessary and guarantee to interfere as less as possible with regards to the normal development of the arbitration procedure.
- The consideration of whether an arbitration is national or international,
- The place where the award is considered to be issued,
- The arbitrability of the difference,
- The scope of judicial control of arbitrators' performance.

In terms of applicable Law, the place of arbitration determines the law governing the arbitral procedure. This has important consequences, for example:

- Form and validity of the arbitration agreement;
- the constitution and competence of the arbitral tribunal;
- the arbitral proceedings;
- the content of the award;

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[32] See: Y. Derains, "*El Turismo arbitral: ¿realidad o espejismo?*" en *Liber Amicurum*, Bernardo Cremades (homage book), La Ley, Madrid, 2010, Pags. 327- 334.

- Grounds for annulment of the arbitral award,
- Grounds for refusal of recognition or enforcement of the award,
- Judges' intervention and assistance to the arbitral procedure.

V. – A place for Arbitration. Main factors determining the seat of arbitration

Departing from the importance of the seat in international commercial arbitration, and considering that the OHADAC aims at constituting an arbitration Court within the Latin American and Caribbean framework, it will be necessary to consider within the region not only the development of arbitration in terms of technique and legal matters, and the concern of bringing arbitration closer to the territory, (which can allow these countries to be chosen as seat for certain processes between regional disputing parties, even though such processes are developed under the auspices of a preexisting international Court), but, in addition, to consider the fact that Latin American and Caribbean States have their own Court, and it is, perhaps most important for the purposes of integration in international commercial matter.

First, it is necessary to solve the already mentioned problems regarding arbitration in the region, from here will arise then the possibility of creating places as suitable seats for international commercial arbitration, which supposes undoubtedly the fulfillment of some minimum requirements to develop an arbitration process quickly (without unnecessary ties, nor delays), impartiality (freedom of action of the arbitrators) and with the required guarantees (action within the framework of free disposition, absence of a review on the merits, noninterference, judicial assistance and possibilities of recognition and enforcement of the award).

To that effect, it will be necessary to move forward with deeper analysis, among others, of the following factors:

- ✓ **The place of performance of activities**

The geographic dispersion, as it has been mentioned by legal scholars[33], is important at the time of determining the seat of arbitration. What to do: to move the seat to the place nearest to where the taking of evidence, ocular inspections or others activities must be carried out, so that the process can be cheaper, or to transfer the tribunal to that place?

The arbitration offers the option of mobility of the arbitral tribunal, which is, undoubtedly, one of the advantages over the *judicial litis*. Judges do not move from their courts, whereas arbitrators can develop the process in many places. Article 14 of the ICC Regulation, for example,

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[33] See J.C. Fernández Rozas, "*Determinación…*O. cit., Pag. 32-34.

distinguishes between the place of deliberation of the arbitral tribunal and the one of the seat, also the hearings and the meetings that can be held by arbitrators are not put under any restriction, although the place for issuing the award has to be the same that the one of the chosen seat because the award has a nationality and responds to a specific place that will link it later to the judicial action in the case of a possible action of nullity. It has to be noticed that the seat of arbitration is more a legal notion than a physical one[34].

- ✓ **The arbitration agreement:**

It will be necessary to consider the criterion of local law on the formal validity of the arbitration agreement, how must the consent be expressed?

What is the substantive scope of the arbitration agreement, whether it be a compromisory clause (arbitration agreement included in a contract) or a separate agreement (previous or subsequent to the contract).

What can be submissible to arbitration in accordance with the Law? The objective and subjective arbitrability play an important role, indeed to determine the arbitrators' performance based on a matter on which there is availability. Particular attention should be paid to the concepts "arbitrability of the difference" and "effects of arbitration", as well as the consequences deriving from the arbitral agreement affecting arbitrators.

- ✓ **Independence of arbitrators**

It is obvious that the arbitrator is independent, but his statement of independence is not enough, it is rather necessary that this independence results from the Law and the Regulation of the Court. What the law says about it? How is the independence or impartiality of arbitrators conceived? What is the scope of arbitrators' liability, how it can be demanded, or controlled? These are particularities to take into consideration.

- ✓ **Appointment and nationality of arbitrators**

The arbitrators' nationality is another element of great importance. Can arbitrators be nationals of the same country of the parties or not? Must the President be from a different country? How should arbitrators be appointed? Arbitrators' rejection and the grounds for their rejection is another important issue. Where, how, when, at what moment of the process the rejection takes place and what are the consequences of that rejection for the annulment? Who will be the

[34] Y. Derains, Op. Cit. Pág. 330.

appointing authority in the case of lack of election of one party in the process, or in the designation of the President of the arbitral tribunal?

- ✓ **Challenging arbitral awards**

Is it possible to challenge an award? Is it possible a review on the merits or not? Is the nullity the only one of the foreseen and established grounds for challenging the arbitral award? ¿What will be the grounds for annulment; will they be the same as established by the Geneva Convention? ¿May it be a nullity action, what is the connection between the place of the seat and the New York Convention? Is it necessary a legal relationship (connection) between the place of arbitration and the place of the possible enforcement of the award?

- ✓ **Judicial assistance.**

Some aspects to take into consideration: judicial assistance, the possibility for the arbitral tribunal of issuing precautionary measures, the possibility offered by the local legislation of going before the judge of the arbitral seat. It is not possible to establish the seat of arbitration in a place where there is not judicial assistance, where precautionary measures cannot be issued. Some arbitration clauses establish the seat of arbitration in a place where the minimum requirement for establishing an arbitral seat does not exist. It is something similar to the case where an applicable law is chosen and the substantive law established as applicable to the contract is unknown.

All these particularities and whether or not they can be offered by each local legislation, are an important part of the study and possibilities of turning a particular place into seat of arbitration, taking into consideration whether or not it is a favorable seat.

This investigation that has been initiated separately by the legal doctrine will have to be made in a systematic way in order to determine the possibility of having one or several seats of arbitration in Latin America and the Caribbean.

Finally, it is necessary to insist that the seat of arbitration requires both, legal and judicial protection. It does not mean exaggerated intervention but support and assistance.

Regarding judicial intervention, pre-arbitral intervention, intervention during the development and after the arbitration procedure are all admitted. It must be taken into consideration that the arbitration requires a State connection. It is dangerous to assume radical positions, for that reason I do not support the criteria of a-national arbitration, a-national award or floating award. Arbitration is based on the principle of party autonomy, although once arbitration admitted or agreed becomes into a true jurisdiction that even has State support to ensure that arbitrator's decisions are upheld.

Even though it has been intended to emphasize every time more the value of arbitration like an important part of a new *Lex Mercatoria*, it must be observed that arbitration, exists indeed

because a State connection exists: the Law and the Treaties. It must be taken into consideration the fact that the foundation of arbitration lies in the autonomy of the will of the parties and that this autonomy does not act *ex-lege*, outside the reach of all law.

It should be left to arbitrators everything regarding free disposition of the parties and reserved to the States what is incumbent to them in the role of allowing, protecting and supporting arbitration. The State cannot resign to the control given to it by the international conventions, New York 1958, Geneva 1961, but it does not have either to exceed the scope of the control conferred to it. Radical assumptions can lead to arbitrariness and to provoke problems bigger than those intended to be solved, because when invading the field of the State sovereignty not only the subject at issue is well settled, but it also rises and increases the "offended" State's jurisdictional bodies' opposition to arbitration. [35]

Being able to have an arbitration seat is a great challenge.

VI.- The OHADAC Court

The Congress celebrated in Havana made possible to draw up a work plan in order to prepare the first steps in the search of harmonization or uniformity regarding Arbitration.

First of all, it is needed the compilation and study of international commercial arbitration legislations in force in the Caribbean and Latin American countries. Later, it is expected that a Group or Committee of Experts be in charge of the proposal to obtain the desired aim: uniformity or harmony in the matter of international commercial arbitration within the region.

The first dilemma arises here: Harmonic laws, common Regulation without Court or common Court? Harmonic Laws have already been enacted several times in Latin America, based on the UNCITRAL Model Law, although the above mentioned problems remain, motivated not as much by the presence of the legislative diversity, but still more by the problems of interpretation and the amplitude and intensity of the State connection, as we already exposed. UNCITRAL also

[35] Let us put an eloquent example: "Sometimes arbitral tribunals exceed their mandates, not knowing the consequences of the participation of a sovereign State. I think, for example, on the recent decision of an arbitral tribunal that accepted to adopt precautionary measures as requested by an investor. The tribunal composed of three very experienced and respected world-wide jurists, orders to a Latin American country to retire the interposed criminal complaints regarding an investment made in that country. Can an arbitral tribunal go so far? It is difficult to think that the authorities of this country could retire the charges in the penal jurisdiction without incurring criminal responsibility with the enforcement of the arbitral award so stating. Such arbitral performance logically generates the critique of those who see their sovereign faculties and obligations attacked by arbitration." B.M Cremades Sanz-Shepherd, Conference… Pag. 24 and 25

offers sufficient mechanisms in order to have a common Regulation without an Institutional Court[36]. The option is then the common Court.

Second dilemma: A constituent treaty or agreements from organisms supporting the commerce? Or, what is the same: no-state or state solution for the constitution of the Court of Arbitration of the OHADAC and its Regulation?

The state solution is the style assumed by the Common Court of Justice and Arbitration of the OHADA and consists in the uniformity of legislative diversity, rather than its harmony, contrary to what the name of the organization express[37].

In order to act in the same way in the OHADAC, the countries of the Area would have to provide themselves with a common Law on Arbitration. The legislations in the matter current in force would have to be revoked, or modified to a large extent. The incorporation of Latin American States would be made difficult to a great extent by the existence of relatively recent legislations on Arbitration. It is necessary to consider that is not the same scenario that the OHADA had in Africa, and that the Arbitration has a greater degree of development today in Latin America that the one it had in Africa in 1999 [38]. On the other hand it must be taken into consideration that there is a remarkable influence of ICC and ICSIC Courts in many countries of the area. Although it is not impossible a substantive uniformity by means of a common Court established by an international Treaty in the matter of Arbitration, it is, so far, an obstacle difficult to overcome.

Since Bustamante Code in 1928, unique Regional Global Codification regarding Private

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[36] Regulation of Arbitration of the United Nations Commission on International Trade Law, approved by Resolution no. 31/98, adopted by the General Assembly on 15 December, 1976

[37] "The OHADA is based on unification rather than on harmonization. OHADA consists of several Uniform Acts which are directly applicable and binding on member States. So far, eight (8) Uniform Acts have entered into force. About the OHADA Uniform Acts see …

[38] The Uniform Arbitration Act (UAA) was adopted by the OHADA Council of Ministers on March 11, 1999 in Ouagadougou. This UAA echo the OHADA Treaty whose preamble emphasizes the recourse to arbitration stating that "the parties must promote arbitration as an instrument for the solution of contractual conflicts". The UAA entered into force on June 11, 1999. This legal institution is singular by its innovations and also due to the fact that it became the common arbitration law of seventeen African States as far as ad hoc arbitration is concerned. The UAA is also characterized by having superseded the existing national laws on arbitration. According to article 35 UAA, the Uniform Act of Arbitration "has the force of law regarding arbitration". OHADA Treaty Article 10 states that "*it is directly applicable and mandatory*. Following the editors' aim, the UAA has the abrogative reach enjoyed by all the Uniform Acts adopted within the OHADA framework. Therefore the UAA can directly revoke the internal legislations regarding arbitration". See: Y. Franck, ¿La OHADAC, una oportunidad a elegir para el arbitraje en América latina?, in www.OHADA.com

International Law and the highest expression of the Codification of Private International Law in Latin America, the region has journeyed through different efforts of codification. It is not accidental that the CIDIP system (Inter-American Conventions on Private International Law) has followed, and not without difficulty, the way of the gradual and progressive codification, sometimes through uniform documents, others through harmony in the legislative diversity, as codification technique. But in the matter of arbitration the Inter-American Convention on International Commercial Arbitration -subscribed within the framework of the so called CIDIP I, held in Panama in 1975-, is no more than a document where a few preexisting bases taken from other international conventions (New York 1958, Geneva 1961) appear. A unique system of arbitration (uniformity) does not emerge from it, neither exhaustive rules for its regulation (harmonization) as in fact it has been done later by fifteen (15) Latin American countries, based on the UNICITRAL Model Law[39].

All this shows that the no-state solution, by means of agreements of collaboration between organizations supporting the commerce, Arbitration Courts, Chambers of Commerce or other organizations that participate in the organization and auspice of the institutionalized or administered international commercial arbitration, can offer bigger perspectives and serve to increase understanding between countries in the region.

It is possible, and it cannot be set aside, the fact that this effort receives the approval, the acceptance and support of the Latin American and Caribbean organizations which aim at fostering regional integration, such as CARICOM, ALBA and others, and then a way could consequently lead to the other, when receiving the state support. In spite of this, it seems to be the no-state solution the most practical one in order to start working.

Finally, it is also required to analyze the connections between the seat of the Court and the seat of arbitration, that is to say, of the arbitral tribunal in each specific case. Must The OHADAC Court be situated in the country most appropriate to be seat of arbitrations, or on the contrary the Court and, therefore, the Secretariat, will have to be in a place readily accessible, equidistant from the majority of the other countries, and with possibilities of receiving the local support not only for the arbitral performance, but also for its function as institution of support to the international commerce?

All these questions and challenges will have to be clarified soon. It will be need to work on it. It is not about creating one Court to compete with others, there are sufficient spaces in the world of international business. What it is about is to give another alternative to the Caribbean and Latin American space, with its own Court to solve “at home” the possible disagreements arising from the commerce mutual relationships. This event is a good opportunity to highlight all these issues and to think about it.

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[39] See the list of countries in footnote No.11.