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COMPARADO  
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**SUMMARY REMARKS ON  
THE PRACTICAL ASPECTS OF ARBITRATION**

The use of arbitration as an international dispute resolution process in the place and stead of litigation has grown dramatically in recent years. The engine that drives such growth is the increased use of arbitration clauses within the body of international commercial contracts. In effect, the arbitration clause constitutes a grant of jurisdiction to the arbitrator functioning under a designated body of arbitration rules to determine legal responsibility and award damages. In other words, jurisdiction is consensual, the arbitrator acts in the manner of a judge and the designated arbitration rules are the Code of Civil Procedure which control the process. As a species of jurisprudence, consensual jurisdiction/arbitration of disputes has become universally accepted and arbitration awards are routinely entered as judgments in national courts.

Given the finality of the arbitral decision; often awarding large sums of money, it is surprising to observe the casual and simplistic manner in which some attorneys who write international contracts will obligate their clients to the arbitration process. They do so by utilizing model arbitration clauses recommended by the national and international bodies which promulgate the regulations which govern the arbitral decision-making process. The consequence is a surrender of control of the process to the arbitrator and resultant exposure of the client to uncertainty.

Let us, for purposes of this commentary, consider the model arbitration clause promulgated by the United Nations Convention on International Trade Law (UNCITRAL) as part of its UNCITRAL Arbitration Rules. Thus:

“All disputes, controversies or claims resulting from this contract, or relative to this contract, its non-performance, resolution or nullity shall be resolved by arbitration of the contract under UNCITRAL Rules of Arbitration then applicable.”

The model arbitration clause of the American Arbitration Association is similar.

The clause reads as follows:

“Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof”

The lawyer who inserts the model arbitration clause of the sort above into his contract will have serious problems if a dispute occurs.

Let us, for purposes of discussion, pose a contract between a company in the State of New York, United States of America, and a company in Baja California, United Mexican States, for the manufacture of electronic goods under license. A serious disagreement explodes and the Mexican company is owed \$100,000 USD which the New York company refuses to pay. The director of the Mexican company instructs his attorney to file an arbitration demand because, under Mexican law, the company is entitled to immediate payment. The embarrassed attorney must then inform his client that he does not know what corpus of law will govern the arbitration. He does not know because he chose to insert the UNCITRAL model arbitration clause which is silent as to the law governing the dispute. Rather, the Mexican company must look to the rules of arbitration selected by the model clause. In such circumstances, i.e., where the attorney preparing the contract did not specify which law governs, Article 33, Section 1, of the UNCITRAL Rules will resolve the problem. It will do so by vesting the discretion to select the governing law in the arbitrator. In other words, the arbitrator decides. The lawyer has, in effect, surrendered control of a vital aspect of the matter and it begins to dawn upon the client that his dispute may be treated under the law of the State of New York.

Having suffered the shock of discovering that his \$100,000 USD may be controlled by a jurisprudence neither the attorney nor the client understands, the attorney must now disclose to the client that he is not certain in which language the arbitration will be presented in because the lawyer, as with the law, failed to specify in what language the arbitration should be conducted in. In such circumstances, as with choice of law, one must turn to the UNCITRAL Rules; specifically Article 17, Section 1 thereof which mandates that, where the parties have not designated the idiom, the arbitration will do so. In brief, the arbitrator decides.

The client, now thoroughly apprehensive, tries to comfort himself with the statement that the arbitration will at least be held in Baja California. Such however, may not be the case because, like the law and the language, the model arbitration clauses do not define the place of arbitration. Rather, for purposes of our example, resort must be had to UNCITRAL Rule Article 16, Section 1 which states that if the parties have not agreed upon the place of arbitration, the arbitrator will make the determination. The client, who does not know what law governs his disputed contract, what language the arbitration will be held in or even what country will host the event, does understand one thing. He understands, that his attorney has failed in his professional responsibility.

At bottom, the fundamental issue is one of control. The standard model arbitration clause represents a surrender of control to an arbitrator who (1) is unknown when the contract is prepared and (2) has unappealable discretion over the entire arbitration process. The solution is, of course, to take advantage of the fact that arbitral jurisdiction is consensual, i.e., that the contract of consent which is the arbitration clause can define the terms of jurisdiction. The attorney can therefore remove discretion from the arbitrator by making specific provisions in the arbitration clause. The attorney can:

- a) Specify the governing corpus of law;
- b) Specify the idiom of the arbitration;
- c) Specify the place of arbitration;

- d) Specify, for example, the admission of oral testimony, formality of documents as proofs and other important matters relevant to the type of contract.

For the convenience of the reader I have attached an English language and a Spanish language arbitration clause; both of which contain the elements necessary to remove discretion from the arbitrator and place control where it belongs – in the hands of my client.

Respectfully Submitted,

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Doctor Jack F. Fitzmaurice

15. Arbitraje: El Licenciante y el Licenciario acuerdan resolver mediante arbitraje cualquier disputa o controversia surgida de o en relación con este contrato de acuerdo con los términos establecidos en esta Sección 15.

15.1 Procedimiento de resolución de disputas/ Arbitraje En caso de surgir cualquier controversia entre el Licenciante y el Licenciario relativa a sus obligaciones o a la ejecución de este contrato, dicha disputa, incluyendo el monto de los daños sufridos por cualquiera de las partes y cualquier cuestión relativa a la aptitud de tal disputa para ser materia de arbitraje, será resuelta mediante arbitraje de conformidad con las Reglas de Arbitraje de Uncitral (Arbitration Rules of the United Nations Commission on International Trade) vigentes en ese momento. El laudo será vinculante para las partes quienes se abstendrán de ocurrir a otro tribunal competente para resolver tal disputa. Cada parte elegirá un árbitro y el tercero será elegido por los dos coárbitros así designados. Si los árbitros designados por las partes no llegan a un acuerdo sobre la designación del tercer árbitro, cada parte puede solicitar a la American Arbitration Association la designación del tercer árbitro. La decisión de la mayoría de los árbitros será definitiva y vinculante en relación a las partes, sus sucesores o cesionarios. Cada parte deberá pagar los gastos de sus propios testigos incluyendo peritos en primera instancia. Todos los costos del arbitraje incluyendo, sin limitación, los honorarios y gastos de los árbitros, el costo del expediente o copia del mismo, si hubiera alguno, gastos administrativos, honorarios de abogados de las partes y todo otro honorario y costo serán adjudicados a las partes según lo determine la mayoría de los árbitros. Las partes acuerdan que la parte vencedora en este procedimiento será resarcida por gastos y razonables honorarios de sus abogados.

Sin perjuicio de la existencia de alguna previsión en contrario establecida en las Reglas de Arbitraje Uncitral, las partes acuerdan lo siguiente:

Que el lugar del arbitraje será Tijuana, Baja California, Mexico.

Que la ley sustantiva que deberán aplicar los árbitros para sus decisiones es la ley del Estado de Baja California, Mexico.

Que el idioma en que se desarrollará el arbitraje es el idioma español. Para el caso en que fuera necesario un traductor, los árbitros podrán designar uno, cuyo costo en primera instancia será compartido por ambas partes, y

Que serán permitidas las declaraciones orales de testigos, y

Que cualquiera de las partes, si así lo deseara, puede presentar prueba pericial oral o documental

Que los contratos y acuerdos conducentes en relación a la controversia serán admitidos como prueba y se considerarán válidamente celebrados en tanto la forma en que se hayan (firmado/celebrado) determine su obligatoriedad bajo las leyes de los Estados Unidos Mexicanos o del Estado de Nueva York, USA.-

Que al determinar la responsabilidad, los árbitros también determinarán la fecha o fechas de ocurrencia del daño o perjuicio.

Que el valor de los daños y perjuicios deberá ser determinada en Dólares Estadounidenses a la fecha o fechas en que tales daños ocurrieron, y

Que cualquier laudo a dictarse según estas previsiones deberá incluir intereses a una tasa del 10% anual calculados desde la fecha o fechas en que los daños y perjuicios ocurrieron hasta el momento del pago.

## RESUME

San Diego, CA

**Jack F. Fitzmaurice, Esq.  
Fitzmaurice & Demergian**

**January 1, 2002**

**Current Position**

Senior Partner of Fitzmaurice & Demergian

**Profession**

Lawyer and arbitrator with an emphasis upon commercial and business litigation and transaction events, contract disputes, creditor rights and remedies, business reorganization and United States-Latin America dispute resolution

**Work History**

Partner, Fitzmaurice & Demergian , 1994-present; Partner, Page, Polin, Busch & Boatwright, 1991-1994; Fitzmaurice & Associates, 1985-1991; Partner, Finley, Kumble, Wagner, et al., 1984-1985

**Experience**

More than 25 years employed in the practice of law and more than 10 years as mediator/arbitrator. Focus has been upon the litigation and trial of complex business disputes in the areas of disputed residential real estate purchase transactions, contracts, misrepresentation and fraud as well as the reorganization of businesses, including the conduct of bankruptcy Chapter 11 proceedings leading to successful plans of reorganization. Conduct of and involvement in the dissolution of corporate and partnership entities as well as the wind-up of their affairs. In addition the representation of parties and involvement in the arbitration of disputes arising out of international (Latin American) transactional events involving manufacturing and distribution arrangements, buying and selling businesses, maquila and maquiladora issues and real estate transactions both within and without the restricted zone (zona restringida) defined by Article 27 of the Mexican Constitution; almost all of which have involved disputes and/or transactions between Latin business entities and American business entities. An adjunct professor on the law faculty of Universidad IberoAmericana, Tijuana, Baja California, Mexico. Have written upon the subject of international arbitration and participate from time to time a presenter at seminars in Mexico upon international dispute resolution issues

**Professional  
Licenses**

Admitted to the Bar; California, 1974;  
U.S. District Court: Southern, Central and Northern Districts of California, 1974; U.S. Court of Appeals, Ninth Circuit, 1974

**Professional**

United States Bankruptcy Court,

**Associations**

Mediation Panel

American Arbitration Association  
Panel of Neutrals

American Arbitration Association  
International Panel

Professor Facultad de Derecho  
Universidad Ibero-Americana  
Tijuana, Baja California, Mexico

**Education**

Villanova University  
(BS-1966)

University of Notre Dame School of Law  
(JD-1974)

**Military Service**

Captain, USMC 1966-1971

**Publications**

Author, La Resolution de Conflictos Comerciales a Nivel  
Internacional, Revista Juridica De Baja California, Oct., 1996