International Arbitration: A comparative study of the AAA and ICC rules

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by

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“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time.”

Abraham Lincoln

ABSTRACT

Arbitration has been used throughout history as an alternative dispute resolution method with great success. Today, arbitration is commonly used in international trade related disputes as one of the most common dispute resolution methods. In this thesis I will examine some of the most important international treaties and laws that regulate this dispute resolution method, such as the New York Convention, Uncitral Model Law, as well as the Federal Arbitration Act. The two most known international arbitration institutions are the main focus of this thesis. The international arbitration rules of the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) are analyzed, as well as a selection of cases of each one of these institutions. I offer some suggestions in order to make these rules even more effective; analyze how well each of these institutions reaches its goals, and provide a theoretical perspective regarding non-governmental organizations that deal with international arbitration.

KEY WORDS: Dispute resolution. International arbitration. Arbitration courts. AAA. ICC.

RESUMO

Arbitragem como uma bem sucedida maneira alternativa de resolução de disputas ao longo da história. Atualmente, arbitragem é um dos métodos mais utilizados para resolver disputas relativas à comércio internacional. Nesta tese, alguns dos mais importantes tratados internacionais e leis que regulam esse método de resolução de disputas serão analizados, tais como a Convenção de Nova Iorque, Lei Modelo da Uncintral e o Ato Federal de Arbitragem. As duas mais importantes instituições de arbitragem são o focu principal desta tese. As regras de arbitragem internacional da Associação Americana de Arbitragem (AAA) e da Câmara Internacional de Comércio (CIC) serão analisadas, assim como uma seleção de casos de cada uma dessas instituições. Algumas sugestões serão oferecidas visando melhorar essas regras; uma análise de como cada uma dessas instituições atinge as suas metas será realizada, bem como será oferecida uma perspectiva teórica relativa à organizaçoes não governamentais que lidam com arbitragem internacional.

PALAVRAS-CHAVE: Resolução de disputas. Arbitragem internacional. Cortes de arbitragem. AAA. ICC.

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TABLE OF CONTENTS

TABLE OF ACRONYMS

AAA- American Arbitration Association

ACICA- Australian Centre for International Commercial Arbitration

ADR- Alternative Dispute Resolution

AF- Arbitration Foundation

ASA- Arbitration Society of America

CISG- Convention on the International Sale of Goods

CICA- Centro Internacional de Conciliación y Arbitraje

CIETAC- China International Economic and Trade Arbitration Commission

DIS: Deutsche Institution für Schiedsgerichtsbarkeit

ECOSOC- Economic and Social Council (UN affiliated)

EU- European Union

FAA- Federal Arbitration Act

HKIAC- Hong Kong International Arbitration Centre

IBDR- International Bank for Reconstruction and Development

ICA- International Court of Arbitration

ICAC- International Commercial Arbitration Court

ICC- International Chamber of Commerce

ICDR- International Centre for Dispute Resolution

ICMS- Imposto sobre circulação de Mercadorias e Serviços

ICSID- International Centre for Settlement of Investment Disputes

IMF-International Monetary Fund

IPI- Imposto sobre Produtos Industrializados

IR – International Relations

JCAA- Japan Commercial Arbitration Association

KCAB- Korean Commercial Arbitration Board

LCIA- London Court of International Arbitration

NAI- Netherlands Arbitration Institute

NAFTA- North America Free Trade Agreement

NATO- North Atlantic Treaty Organization

NGO- Non Governmental Organization

NY Convention- New York Convention

PCA- Permanent Court of Arbitration

SAKIG- Court of Arbitration at the Polish Chamber of Commerce

SIAC- Singapore International Arbitration Centre

SCC- Stockholm Chamber of Commerce

UN- United Nations

UNCITRAL- United Nations Commission on International Trade Law

UNIDROIT- International Institute for the Unification of Private Law

VIAC- Vienna International Arbitral Centre

WIPO- World Intellectual Property Organization

INTRODUCTION

Since the beginning of history, there have always been disputes in society. It is part of human nature to disagree, and this causes disputes. Depending upon the level of these, they can be solved in a friendly manner without the mediation of a neutral third party, or they may need an external party to help decide the issue. As human relations became more complex, so did the disputes that arose in society.

Through arbitration a neutral third party conducts a procedure to settle an issue among the disputing parties. With the further development of arbitration and its mass use, laws in several countries and international agreements were created in order to regulate arbitration in the international scenario. Two institutions appeared in the beginning of the twentieth century to regulate and assist arbitration cases. These were the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC). These institutions may appoint arbitrators, set procedural rules to be followed, ensure neutrality of the arbitrators involved, and supervise the procedure, but do not directly handle it.

These two institutions have similar goals and rules; however, there are some points in which they differ. In this Master thesis I will compare and contrast these two institutions. I will analyze the fulfillment of their goals, their arbitration rule, cases previously ruled, and their presence in the international dispute resolution market.

It is necessary to understand which institution is better adapted to supervise international arbitration procedures. I claim that the AAA rules are more apt to solve international arbitration causes because they are more adapted to the modern globalized

world. Another aspect which I will analyze is the importance of arbitration for the globalized economy. With a clear conclusion about which arbitration institution is better adapted to conduct arbitration involving international matters, companies can look for the most appropriate institution and have their case settled faster.

Besides analyzing these institutions, I will also make assertions regarding the historic reasons for the appearance of arbitration and how this dispute resolution method got developed. I will point out and discuss its major advantages. Another section of my research will be to analyze the main arbitration treaties and laws. This legislation recognizes and enforces arbitration awards around the world, and is necessary for the success of this dispute resolution method.

This thesis is divided into four parts. In the first one I will study the origins of arbitration, the main international agreements regulating it such as the New York convention and the model law of the United Nations (UN) on international arbitration, and political science theories related to arbitration. In the second one I will analyze the AAA. The third part will be spent analyzing the ICC. Finally, in the fourth part I am going to discuss my findings and present my conclusion.

I would like to point out that there is a large amount of literature available about international arbitration, the AAA and the ICC. However, this vast literature does not compare and contrasts the two major arbitration institutions and this is a major gap. With my thesis I hope to fill this gap, be able to conclude which institution is better, and stimulate further research.

PART I - ARBITRATION

In this first part I will define arbitration and international arbitration, explaining its history and analyzing some of the major regulations regarding this alternative dispute resolution method. It is important to know the history of arbitration so it can be possible to better understand the importance of arbitration and its current regulations. I will analyze the New York Convention of 1958, the Federal Arbitration Act (FAA), and other regulations related to arbitration. An analysis of arbitration and how it relates to political science theories will also be made in this part.

1.1 Definition

Stating a definition of arbitration is not an easy task and numerous authors have written about this, however there is not complete consensus in their definitions. Before I get to my own definition, I will analyze how other authors have defined arbitration. After introducing my definition, I will specifically talk about arbitration in the international scenario.

The general ideal of arbitration is to have a third party decide a dispute. René David (1985) defines arbitration as a dispute resolution method in which a person not related to the dispute decides it:

> Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons – the arbitrator or arbitrators –who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement (p. 5).

It is essential to notice that the arbitrator's powers do not come from the state but from an agreement of the parties involved in the dispute. The origin of the word arbitration comes from the Latin *arbitraer*, which means evaluator judge.

It is important to emphasize that the third party who is deciding the dispute must be neutral. This is what Edward Brunet et al (2006) emphasize in their longer definition of arbitration. They affirm that there must be an agreement between the persons involved in order to submit their dispute to a neutral third party: "…there is an agreement between two or more persons to submit an existing or future dispute to the persons (arbitrators) who are chosen by the parties. The power of the arbitrators to act depends upon the scope of the agreement" (p. 31). It is essential to have the arbitral agreement; otherwise the arbitral procedure cannot happen. According to the same authors, the arbitrators will then conduct the procedure and make an award in the end, which is binding: "…the arbitrator's award on the merits is normally confidential and is intended by the parties to be final between them. The matter is decided and there are no appeals on the merits" (p. 31). The fact that the award is binding and there are no appeals is an essential characteristic for the success of arbitration, because this way the dispute is settled much faster.

The arbitration procedure will occur only if all the parties involved agree in using this method to settle their issue. Richard Garnett et al (2000) emphasize that arbitration is based on consent: "A fundamental aspect of arbitration is that it is based on consent"(p. 3). This way, it is essential that the parties involved in an arbitration procedure have autonomy in order to decide how they want their issue to be solved. If all the parties involved in the arbitration procedure agree at any point to have their issue settled by

another dispute resolution method, this is also possible. The parties are always free to decide to use arbitration, and are as well free to decide not to use it anymore.

One of the characteristics of arbitration is that the final decision usually cannot be appealed. Sometimes, however, arbitral awards can be appealed to state courts. Steven Bennett (2002) highlights the possibility of having an appeal of the award to a state court:

> An arbitrator or panel of arbitrators conducts an information-gathering process, which may include document exchange, briefing and testimony of witnesses. The arbitrator's decision is generally binding on the parties, subject to limited review by a court on motion to confirm or vacate the arbitration award (pages4-5).

It is important to notice that since parties are completely free to decide to use arbitration, they can also decide how the arbitral procedure will happen and choose that a court can revise the award. This option, however, is not the most common. Usually, an arbitration award is a final binding decision for all the parties involved in the dispute. Because of the similarities with the state jurisdiction, and because it is held by parties not affiliated with the state, arbitration is referred to as private jurisdiction.

The private jurisdiction would not be effective at all if its decisions were not binding to the parties. Albert Fiadjoe (2004) focuses on the facts that arbitration is consensual, there is procedural freedom, and the award is binding:

> The arbitral process is consensual, based on an agreement between the parties. The parties have procedural freedom. This means that the parties may organize their proceedings as they like and may choose an adversarial or inquisitorial procedure as they like, or a mixture of the two….An arbitral award is binding upon the parties (p. 73).

This way, it can be said that *arbitration is an alternative dispute resolution method in which the parties involved in a dispute agree to have their question submitted*

to a neutral third party (which could be one person or a group of people) to have the question settled. There must be an arbitration agreement so this procedure can happen and usually the decision is final and binding to the parties involved. The neutral third party conducting this procedure is called the arbitrator and the final decision is the award.

The parties involved in the arbitration have complete freedom regarding their arbitration procedure. Besides choosing to use arbitration to solve their dispute, they can also decide which rules will be used in the arbitration procedure. Usually the rules which are more proper to solve such a dispute are the ones chosen. These rules can be from the laws of any country or even those of an organization made specifically for the arbitration procedure.

Finally, it is important to notice that there is not any law defining what arbitration is. Several authors have their definition and I have mine according to the existing literature. The laws and international agreements regulating arbitration do not define this dispute resolution method; they only regulate it (with the exception of the Model Law of the United Nations Commission for International Trade Law). This way, it cannot be said that a definition of arbitration is completely correct or incorrect.

In the arbitration procedure the parties can be located in different nations. It can also happen that both the parties are located in the same country, but the arbitration procedure is happening in another state. Another possible scenario is that the arbitrators and the parties are all in the same nation, but the object being discussed in that dispute is located in another state. When those occasions happen, the arbitration is considered international.

Geography and country of residency of the parties involved in the arbitration procedure are essential to determine if this is international or not. Richard Garnett (2000) writes about several factors needed to consider arbitration as international: “In deciding whether a transaction should be seen as international, attention needs to be given to the particular features, whether pertaining to geography, residence of ownership, which will determine that character” (p. 8).

Certainly international arbitration is a very important alternative dispute resolution (ADR) method today. Yasuhei Taniguchi (1998) asserts that all over the world there is the use of arbitration, and this method is used to solve all kinds of disputes:

> Presently, a system of arbitration is found everywhere side by side with litigation and conciliation (negotiation/mediation). But the way it is used seems to vary considerably from country to country. In North America, for example, it is widely used for settling contract disputes in industrial relations (labor arbitration). In many countries, a variety of construction disputes are dealt with by arbitration (p. 32).

Despite being written eleven years ago, this article already mentioned the importance of international arbitration. Currently, international arbitration is even more important. There are several institutions that handle arbitration in the international sphere and institutions have been using these more and more.

Corroborating with Taniguchi’s ideas, Erin Gleason (2007) writes: “Traditionally, arbitration has been the favored means for settling international commercial disputes as it provides parties with the ability to bypass foreign legal systems, and the difficulties related to litigating in unfamiliar forums” (p. 286).

In the past, international arbitration was mostly used by states, which would commonly use arbitration in order to solve disagreements regarding boundary disputes or any other state related issues. Today this alternative dispute resolution is widely used by companies. It is very common to have international arbitration clauses in agreements of multinational companies. The international arbitration which involves companies is the international commercial arbitration. This is the kind of arbitration that I will be referring in this thesis.

1.2 History and Evolution of Arbitration

It is common to think that arbitration is a new method for dispute resolution since these days it is mostly used by multinational large corporations. However, the concept of arbitration dates back to ancient history, even including passages in the bible which are related to arbitration.

Despite not being well developed in the beginning, arbitration has been used as a method of solving disputes for thousands of years. There is evidence that Romans and Greeks used this method to solve conflicts in ancient history. This kind of ADR would be used to solve disputes regarding trade.

Before states were developed and legal systems were created as an option to solve conflicts, humans would try to solve their disputes among themselves. Usually this would cause a lot of discussion and the stronger party would be able to impose his or her wish.

This archaic method led to the development of other dispute resolution methods which were more fair and efficient.

Arbitration was an improvement compared to self resolution of conflict. Through this method, the parties had a procedure and a final decision would be imposed upon them. This way, there was a better chance to have a fair impartial decision prevail, instead of having the strongest party impose his/her will. Only a long time after arbitration was being used as a dispute resolution, was the public justice system developed and able to solve the conflicts that happened in society.

In Roman law, arbitration was well-defined for the first time in history. In the Roman Law code called Digesto, it was written that a third party called an *arbiter* would settle the dispute which was happening. The *arbiter* would usually be an elder with significant wisdom and respect in the community. It is important to note that this person was not a state authority, and his or her decision would be imposed nevertheless to the parties involved in the dispute.

In the Holy Bible there is also a passage that relates to arbitration. In the book of Genesis, chapter 31, lines 36 and 37 a conflict between Jacob and Laban is described. The two of them suggest arbitration as a way to solve their dispute. Ex vi: “Now that you have ransacked all my things, have you found a single object taken from your belongings? If so, produce it here before your kinsmen and mine, and let them decide between us two” (Bible, Chapter XXXI, lines 36 and 37).This way, Jacob and Laban suggested that a third party should decide their conflict, based on the idea of arbitration.

As the Roman state got stronger and more developed, court houses became the standard method of solving disputes in Rome. Arbitration lost importance because Court Houses were used as the standard method of solving conflicts. Later this also happened in other states. As governments got to be more organized, they established Court Houses which became the most common method of solving disputes. Albeit state jurisdiction became the most common way to settle disputes, arbitration continued to be used.

During the middle ages, arbitration became once again a more attractive way to settle disputes. States were no longer so powerful, while landowners were very powerful, creating their own rules; the legislative power produced a small number of legal documents, and there were conflicts among the church and landowners, which contributed even more to a proper environment for arbitration. The Catholic Church would act as arbitrator, and the Pope was constantly deciding conflicts as an arbitrator. At this time, there was not a lot of impartiality from the church, which usually would declare the landowners the winners. The Popes during that period of time also often nominated bishops to be arbitrators.

As the middle ages approached their end, states gained importance again, and there was an upsurge in the number of laws and regulations. The judiciaries' power again started being used more constantly as a reliable way to settle disputes. However, as the courts became more organized and complex, the process of conflict resolution also became slower and more cumbersome.

During the twelfth century, the number of arbitration cases increased exponentially, especially among businessmen. The number of business relations within

Europe increased and so did the use of arbitration. Especially around the sixteenth century, when the European countries started colonizing new territories around the world, the number of international business relations grew rapidly. European merchants were selling their products to the new colonies, and this was an important fact leading to the increasing number of arbitration cases.

When Napoleon ruled in Europe, the usage of arbitration decreased. The rules imposed by the French emperor fostered an increase in the use of courts and a decrease in the usage of arbitration; that was because Napoleon was interested in expanding his power as much as he could, and he thought that disputes had to be solved either by him or his advisors. Having a third party solving an issue was not desirable for a powerful general because other people would be exercising power.

In the nineteenth century arbitration was once again well accepted as a dispute resolution alternative. Regarding that, Machado Neto (2005) asserts: "Since the end of the XIX century, arbitration became a part of the legal system of several countries"[1] (p. 69). Since that century, most legal systems around the world started to officially recognize arbitration as a valid dispute resolution method.

[1] Translated by the author from the original in Portuguese: "A partir do final do século 19 a arbitragem passou a se inserir nos sistemas jurídicos de vários países."

1.3 Major International Agreements and Regulation of Arbitration

There are several documents which regulate arbitration today. It is important to analyze some of the main treaties and laws regarding international arbitration in order to achieve a complete picture. There are two major treaties relating to international arbitration: New York Convention of 1958 and the United Nations Commission on International Trade Law (Uncitral) rules from 1985.

One important point to be raised is that in the past parties would respect international arbitration awards because of the parties' reputation in the international trade. If parties chose not to honor international awards, businessmen would not be interested in trade with them, since if there would be any sort of arbitration, that party would not be likely to enforce the award.

The international agreements to be analyzed in this subtopic codified the customs that have already existed for a long time. However, as any international agreements, countries are free to participate in them or not. If nations choose not to participate in international agreements like the New York Convention, they will not have to enforce arbitration awards, and as a consequence it will be harder for parties in that country to engage in international business.

Another reason why the codification of the customs was necessary is because states are more developed and are the only entities that have the power to enforce arbitration awards. With the further development of states and the greater amount of power held by these institutions, they are the only ones that can use physical power to enforce the awards. However, it is important to mention that states do not give up their

sovereignty by recognizing these foreign awards because they are only obligated to do so because they chose to participate in the international covenants pertinent to these subjects. The fact that there is a large number of countries signing these international treaties makes parties be equally treated, since no matter where they are the award will have to be equally enforced, as a reflex of liberalism principles.

In sum, the success of international arbitration today requires that most nations in the world participate in the international agreements that recognize and enforce arbitration equally around the world. This is necessary due to the large amount of power held by states and the fact that they are the only institutions that can use coercive power to enforce the awards. Even though nations recognize these covenants, they remain sovereign since they only sign them because it is in their interest to do so. A good reputation is a highly persuasive point to encourage states to sign these international treaties, but no state is obligated to sign them.

1.3.1 New York Convention of 1958

This treaty is the most important document regarding the use and enforcement of international arbitration. Despite being fifty one years old, the NY Convention of 1958 continues to be the most important legal document of international arbitration. This treaty, drafted by the United Nations (UN), urges states to recognize and enforce international awards, even if the procedure took place in another country. It is essential to have the awards which were completed in another country validated in the country related to the private jurisdiction case; otherwise what good would the arbitration award

be? This convention entered into force on June 7, 1959, and was ratified by the United States in 1970.

As of February 2009, 142 nations had signed and ratified this important convention. [2] Most of the countries which have not done so are located in Africa and have very small participation in international business and international arbitration. The first draft of the NY convention was made in 1953 by the International Chamber of Commerce in Paris. The United Nations, through the UN Economic and Social Council (ECOSOC), finally voted on and approved it on June 10, 1958.

Previously, these issues were decided according to the Geneva Protocol of Arbitration Clauses of 1923 and the Geneva Convention of Execution of Foreign Arbitral Awards of 1927. Both those treaties were superseded by the NY convention, according to the article VII, subpart 2. The NY convention is a big improvement over the previous documents, as Redfern *et al* assert (2004):

> The New York Convention is plainly a considerable improvement upon the Geneva Convention of 1927. It provides for a much simpler and effective method of obtaining recognition and enforcement of foreign arbitral awards; and it replaces the Geneva Convention of 1927 as between states that are parties to both Conventions (p. 69).

The NY Convention has two requirements for its application. The first one is regarding reciprocity and is in the subpart 3 of article I, *as is:*

> When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it

[2] Source: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, accessed on 02.22.09

> will apply the Convention to the recognition and enforcement of awards *made only* in the territory of another Contracting State (emphasis added).

This way, states which ratified the 1958 Convention only have to enforce it when the award was held in another state that ratified the same Convention. Therefore, if country X did not ratify the NY Convention, country Y, which ratified such Convention, does not have to enforce an award completed in country X (reciprocity reservation). Since most of the countries in the world have ratified it, there are big odds that the award must be enforced where it needs to be.

The other requirement for its application is about legal commercial relationships. According to the NY Convention, it should only be applied to legal relationships which are considered to be commercial. The second part of article I, subpart 3 states: “It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration” (United Nations, 1958).

Article IV of New York Convention requires very simple formalities to enforce foreign awards. The only documents necessary are the original award and the original arbitration agreement. A certified copy is also accepted. This is one of the characteristics of the arbitration process, which is simple and does not have formalities, unlike what happens in the public jurisdiction.

According to the convention being studied, there are 7 reasons why the arbitral award may not be recognized and enforced, given that the opposing party clearly proves that (article V):

1. The parties who signed the arbitration agreement were considered to be incapable, according to the law applicable to them;
2. The losing party was not properly notified about the beginning of the arbitration procedure;
3. The award included aspects which were beyond the ones submitted to arbitration;
4. The private jurisdiction procedure did not happen according to what was agreed by the parties;
5. The award is not binding among the parties;
6. The subject discussed in that arbitration case is not allowed to be submitted to arbitration according to the law of that country;
7. The recognition of that award would be contrary to the public policy of that nation.

All seven of these reasons are good causes for not recognizing the award. They do not happen often, and before the private jurisdiction procedure takes place it is possible to know if the case being submitted to arbitration is possible to be solved by this ADR method. In the case of situations 2, 3 and 4, this will only happen if the procedure was wrongly conducted. As for the two last options, it is also possible to know before arbitration takes place if they are going to be the case or not.

Regarding the last item there could be an in depth discussion of what is against the public policy of a nation. In a New York District Court decision it was stated that the enforcement of a foreign award should only be denied if it is seen to be against public policy in extreme cases (Parsons & Whittemore Overseas Co. Inc. vs. Société Générale de l'Industrie du Papier, 1974): “the Convention’s public policy defense should be

construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice."

The German Federal Supreme Court has a similar point of view regarding this subject. That court affirmed that the award can only be considered against the country's public policy if it is completely against the foundations of the state, *ex vi* Redfern *et al* (2004) sustain: "From the viewpoint of German procedural public policy, the recognition of a foreign arbitral award can therefore only be denied if the arbitral procedure suffers from a grave defect that touches the foundation of the State and economic functions" (p. 459). Hence, only if an award severely violates the ethic of the country would there be a reason not to enforce it. Such decisions are common around the world, as the same authors mention: "These decisions, from courts in different parts of the world, show a readiness to limit (and sometimes to limit severely) the public policy defense to enforcement" (p. 459).

Finally, it is clear that the Convention approved in 1958 continues to be the most important document containing general rules about the recognition and execution of international awards.

1.3.2 United Nations Commission on International Trade Law (UNCITRAL)

Approved on June 21, 1985, in Vienna, Austria, this international agreement aims specifically to diminish discrepancies in international regulations. Thirty six countries signed this treaty and in July 2006 this document was updated so it can better serve the

needs of arbitrators nowadays. This international agreement is a model law which should be used as an example of legislation to be adopted by other countries.

From 1985 to 2006, 56 nations around the world had adopted some kind of legislation (laws, regulation, codes), based on the Uncitral model law, including six American states (California, Connecticut, Illinois, Louisiana, Oregon and Texas). After the update of 2006, six countries have enacted legislation based on the new version of this model law: New Zealand (2007), Ireland, Mauritania, Peru and Slovenia (2008).[3]

In the first article of the model law it is stated that this document applies to any international arbitration case. In an attempt to make it clear, this article defines arbitration, and the terms commercial and international. However, it is a good idea to define these terms, since their definitions are vague and can be applied to a wide range of services. By defining these terms, the Uncitral model law narrows the possibilities of use of arbitration. This happens because there is a definition of arbitration in its text and if the procedure which has been used is not exactly according to the definition found in the treaty the procedure will not be considered arbitration. Thus, the Uncitral law will not be able to be applied. Other important regulations of international law do not define these terms, such as the New York Convention, the Panama Convention and the ICSID convention.

While the New York Convention of 1958 is an international treaty that regulates mainly the recognition and enforcement of foreign awards, the Uncitral model law regulates the arbitral process thoroughly. In fact, several countries copied articles and

[3] Source:
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html
Accessed on 02.24.2009

subparts from this UN document straight into their national legislation. This document also defines international arbitration as one in which the parties have business in a different country or the procedure happens in another country.

This document represents one step further in comparison with the previous convention. For example, instead of just mentioning that the opponent party must be notified that the procedure began, the Uncitral goes further and states that it is important to have equity and that the defendant should have a complete opportunity to defend his or her case.

One more point that the Uncitral convention regulates is about the arbitration agreement. That important document must be in written form, regardless of how it is sent. It is essential that not only the arbitration agreement is sent in a written format to all the interested parties, but also every document produced concerning the case. This would not be a burden today because of electronic files and e-mails.

Regarding the written form for documents previewed on article 7, Binder (2005) concludes:

> The arbitration agreement constitutes the heart of any arbitration, and hence a detailed and satisfactory provision on this issue is vital. Because its aim is not to go beyond the limits set by the New York Convention, the Model Law's current solution meets the *minimum* requirements of modern commercial practice, and no more (p. 71).

In order to adjust to present day technology, the update of 2006 included subpart 4 in the same article stating clearly that any kind of electronic communication is acceptable.

The eighth article is also interesting because it states that the party interested in the arbitration procedure can ask a state court to stop the case and send it to an arbitration court if there is an agreement of arbitration for that matter "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration" (art. 8 model law). However, it is also mentioned that if the private jurisdiction agreement is previewed to be void or invalid, the state court should not allow the arbitration. It is important that the party interested in having the arbitration procedure request this on the first time he or she submits a statement in the process. The following cases are examples of application of this article in countries around the world: Federal Court of Canada, Iberfreight S.A. *et al* v. Ocean Start Container Line AG and J.W. Lunstedt KG; Hong Kong High Court, China State Construction Engineering v. Madiford Ltd; Harare High Court of Zimbabwe, The Eastern and Southern African Trade and Development Bank v. Elanne Ltd.

Articles 12 through 15 regulate the possibility of challenging the arbitrator. There is always the possibility that the arbitrator does not act impartially as he/she must, and if this happens the parties can challenge him/her. About this possibility, Binder (2005) writes:

> Unlike a full-time judge, an arbitrator is generally engaged in occupations in the commercial world before, during and after the arbitral proceedings, and therefore the possibility of a member of the arbitral tribunal behaving in a partial, dependent or fraudulent manner or indulging in other forms of misconduct can never be completely excluded (p. 123).

Corrupt arbitrators can jeopardize arbitration and it is very important to avoid this situation. The party intending to challenge the private jurisdiction judge shall file a memo

in the arbitral tribunal exposing the reasons why the arbitrator should be substituted and making it clear that he or she has not been honest in his functions. If it is decided by the arbitration tribunal that the arbitrator should be replaced, a new one will be pointed by that tribunal according to the rules used to choose the original arbitrator (art. 15). In international arbitration, it is good to have at least one arbitrator from a nationality unrelated to the nationalities of the parties involved. This will help to assure the neutrality of the private jurisdiction judge.

Article 17 of the Model Law states that the arbitrator can use interim measures if they are requested by any parties. This is a powerful option and in some countries, like Brazil, this is not allowed by the national legislation. Using this power can be essential to preserve the asset which is being discussed in the procedure, but this may also cause unfair situations. It is necessary that the arbitrator be extremely careful when using this power. Due to those concerns, article 17E was added in the 2006 reform of this law. The arbitrator may request the party to provide a security for the measure requested: “The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure” (article 17 Model Law).

Regarding the language which will be used to conduct the arbitration procedure, article 22 says that the parties can choose the language in which the proceedings will take place. Since English is the most used language worldwide, this is the one chosen for most of the arbitral procedures.

Article 35 is about recognition of awards in jurisdictions other than the one from where it was issued, *ex vi*: “An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent

court, shall be enforced." (article 35 Model Law). The following article asserts the possibilities of having its enforcement denied overseas. In the 2006 update it was added that, in order to have the recognition of the award overseas, it is only necessary to show the award or its copy, and the translation to the local language.

Thus, the Model Law of Uncitral is a very useful document to international arbitration. Its 2006 update made it more reliable and many other countries will continue to base their national legislation on this Model Law. That can be said because the updated Model Law is more appropriate for the resolution of modern international commerce disputes since it reflects the current practices of international arbitration.

1.3.3 European Convention on International Commercial Arbitration of 1961

Signed in Geneva, Switzerland, on April 21, 1961, this European Convention aims to organize arbitration in Europe and complement the New York Convention, which was signed three years before this European counterpart. This convention was adopted in a meeting held in Geneva April 10-21 of 1961, in which twenty-two European states attended. This international agreement applies only to the regional framework of the United Nations Economic Commission for Europe and its purpose is to promote European trade development.

There were several differences in the legislation regarding arbitration between eastern and western countries. The convention being analyzed in this subtopic proposes uniform legal standards in order to diminish those differences and make arbitration more feasible in Europe.

There are two important subjects that are not addressed by the New York convention of 1958 which the European convention addresses: the reasoning of the

award and the recognition of an award set aside. Regarding the first issue, it is clearly stated in the European convention that the award must have a reason for it. The arbitrator is obligated to explain the reason(s) which led him or her to decide that way. This is fundamental in any decision. Article VIII of this Convention also states that the reasons do not have to be given if the parties expressly declared that they do not need to be given. This rule is also found in the Uncitral Model Law of 1985.

This convention was helpful to promote the use of international arbitration within Europe. It would certainly have had a greater importance if this convention were applied to countries all over the world. Since the intention of this document never was to supplant the New York convention, it was applied only to European nations.

1.3.4 Federal Arbitration Act

This is the federal law that regulates arbitration in the United States of America. This law was approved on February 12, 1925, and is found in the United States Code 09, sections 1-16. Originally this law had only one chapter. However, on July 31, 1970, the second chapter was added. Finally, on August 15, 1990, the third chapter was added.[4] This statute regulates arbitration in the United States, but it can be related to international arbitration as well. A case of arbitration may be guided by this rule, even though the parties involved may be in different countries. As always, the parties are free to decide by what rules the arbitration will abide, and the Federal Arbitration Act (FAA) rules may be chosen.

This statute can be applied by both state and federal courts, as it was decided in the case *Southland vs. Keating,* decided by the Federal Supreme Court in 1984. It is

[4] Source: The Federal Arbitration Act, available at http://www.adr.org/sp.asp?id=29568. Accessed on 03.16.2009

stated clearly in this statute that when the parties agree to have an arbitration procedure to solve their matter, they must do so instead of going to a Court House.

There are plans to update this law, since it is outdated. For example, it is still required to have the award confirmed by a state court, *ipisis literis:*

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order (FAA, section 09).

This kind of requirement is not common anymore and definitely should be deleted from American legislation. In the proposal draft for a new FAA, this outdated requirement no longer appears.

1.3.5 Other Treaties Relevant to International Arbitration

There are several other international treaties which apply to international arbitration and are also important. For this section I analyzed the most important ones, and I will briefly mention others as well. Due to space limitations in this study, these other agreements cannot be analyzed further.

The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 were the two first important international treaties regulating arbitration. The first one was sponsored by the former League of Nations and set general rules for the use or arbitration. This convention was the first one to successfully regulate issues which had been previously regulated only by national legislation.

With the success of this convention, it was immediately realized that international arbitration would not be feasible, unless there was efficient regulation regarding the

enforcement and execution of awards abroad. With that purpose, the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards was approved on September 26, 1927, by the League of Nations. According to this treaty, the arbitral awards would be able to be enforced abroad if the procedure had been conducted according to the rules of the aforementioned convention.

Both of those Conventions ceased their effect when the New York Convention of 1958 was approved, article VII section 2:

> The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention (NY Convention).

Since the New York Convention regulated international arbitration in a much more efficient way, the two older ones ceased to exist.

Another important document regulating international arbirtation is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. This Convention was drafted and signed in Washington D.C. by the International Bank for Reconstruction and Development (IBRD) on March 18, 1965. Through this Convention the International Centre for Settlement of Investment Dispute, the ICSID, was established. The intention of the IBRD was to facilitate the resolution of disputes regarding international investment and, therefore, increase the number of international investments.

In fact, it can be said that this Convention had a very positive result. H. Smit and V. Pechota (2005) state that this Convention was ratified by the largest number of states:

> The Convention has been ratified by more states than any other major contemporary arbitration agreements, and its geographical base is broad,

> including most developing countries in Asia and Africa and countries of Central and Eastern Europe, which have embraced the principles of free market (p. 132).

One of the reasons that this Convention has more nations ratifying it than the New York Convention or the Model Law is that several small nations in Africa and Asia have signed it. When a developing nation is trying to obtain any kind of international investment, it is common for the investor to require that the nation sign this treaty. This way, if a dispute arises, it would be more easily settled.

The ICSID court decisions help to make the international environment safer regarding international debts by ruling on international investment cases. Regarding this subject, Waibel (2007) asserts that: "ICSID arbitration could upset the sovereign debt market's delicate equilibrium. In a world without a legal toolbox for sovereign insolvency, ICSID's focus on creditor protection alone would threaten resolution of future sovereign debt crises" (p. 759). I disagree with Waibel's opinion. It is important to avoid lending money to borrowers which do not pay their debts, and the ICSID helps to avoid this situation.

Other regulations are: United Nations Convention on the Carriage of Goods by Sea (1978), Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards (1979), North America Free Trade Agreement (1992) and the Uncitral Model Law on International Commercial Conciliation (2002).

1.4 International Relations Theories Relevant to Arbitration

Several political science/international relations (IR) theories can help to explain the increase in use of arbitration, especially in the international scene. Theories help

policy makers and law practitioners to better understand the new information that is received every day. Liberalism and neoliberalism are the best theories, in my opinion, to help explain the upsurge of international arbitration, but rational choice also offers an explanation. In this section I am going to briefly analyze these theories and highlight their relationship to the success of international arbitration.

The goals of the American Arbitration Association and the International Chamber of Commerce are related to the key international relations theories of liberalism and neoliberalism. Liberalism upholds that equality and individual liberties should be the base of political systems. The way to achieve these goals would be to assure the rule of law prevails, limiting the power of politicians and guaranteeing private property and transparency (Oxford manifesto, 1947). Neoliberalism is related to the Washington consensus ideas, which were the ideas supported by economic institutions like the International Monetary Fund (IMF) that there should be liberalization in international trade, freedom of market, and privatization (Williamson, 1990).

Non Governmental Organizations (NGOs) and international organizations like the IMF and the United Nations are of essential importance in the current world. These institutions help to achieve the goals of liberalism and neoliberalism, since they help to ensure that the rule of law prevails, there is transparency in society, and international trade increases. It is common to have NGOs observing elections as a way to guarantee that the laws have been followed and there is transparency in that election. Institutions like the ICC and the World Trade Organization (WTO) help to foster conditions for international trade success.

Another two IR theories related with the success of international arbitration are functionalism and neofunctionalism. According to the first, parties with common interest tend to create institutions that will help them to achieve their common goals. The cooperation that is started in this area is likely to breed additional cooperation in other arenas, and this helps to create a culture of cooperation and diminution of dispute. Neofunctionalism is related with more polemic issues, when states tend to press parties in order to achieve agreements. Both of these theories are related to neoliberalism, since parties act in order to achieve their goals and these institutions are likely to function without the interference of the state, since they are NGOs.

Another political science theory that helps to explain the success of the arbitration related institutions studied in this thesis is the rational choice theory, in which institutions are constantly looking for ways to increase their power. Both the AAA and the ICC started as simple institutions and today are very complex and powerful. Their increased importance and power is a reflection of the more connected and globalized society that relies significantly more on their services (Shaw, 2006).

1.4.1 Liberalism and Neoliberalism

The basic concept of arbitration is to allow the parties to choose someone to conduct a procedure to settle their issue. One of the essential ideas of arbitration is that parties can exercise the right to have their dispute solved according to their wish and in this procedure there is equality of opportunity. According to the rules of the AAA and ICC, both parties should have the same opportunities during the arbitration procedure (article 6, 7 and 14 of the International Center for Dispute Resolution (ICDR) rules, for

example). This is closely related to individual rights and equality of opportunity that are put forth by liberalism theory. When parties opt to use arbitration as an alternative dispute resolution method they are essentially enjoying their individual right to decide how to settle their disputes, while treating the other side as an equal.

As the general approach of arbitration, the creation of bodies like the ICDR is a reflection of the ideas associated with liberalism around the world. The ideals of individual rights and equality of opportunity that were once restricted to some countries are now more common around the world and foster arbitration. What kind of benefits would international arbitration have if parties could not exercise their individual rights and there is no equality of opportunity? In addition, the popularization of democratic governments, a key component of liberal theory compared to its realist counterpart, also paves the way for international arbitration and the activities of bodies like the ICDR.

Ideas from liberalism and political liberalism are also an efficient explanation for why the ICC/ICA had such a success and reached its goals so well. Freedom of thought and speech are individual rights essential to the success of arbitration. If these rights are not entirely respected, parties will not be able to express their thoughts and ideas in the arbitration procedure.

The rule of law is another essential condition for the success of international arbitration. It would be pointless to have an award declaring that a party must receive some money if nobody will honor that award. The law needs to recognize arbitration as a valid way of settling disputes and that law must prevail. Therefore, rule of law is also another factor that allowed international arbitration to become so popular and the ICC to

reach its goals of fostering international trade and arbitration. Another point from liberalism that is keenly related to international arbitration is the individual right to private property. On many occasions, international arbitration cases are intended to guarantee the individual right to property.

The ICC is essential for the success of international trade, contributing not only by sponsoring international arbitration cases, but through policymaking and helping to diminish protectionism in international trade. There is strong relationship between free trade and free market (neoliberalism) ideals and the ideas fostered by the ICC and international arbitration (such as freedom of thought and speech).

Besides the ideas discussed above, it is also important to mention some essentially neoliberal points related to the "Washington consensus" (Williamson, 1990) and their importance to the success of arbitration. These ideals include fiscal policy discipline, deregulation of the economic sector, and trade liberalization. The increase in fiscal policy discipline is related to the increase in arbitration. A responsible fiscal policy helps nations to be more active in international business, and as a consequence international arbitration tends to be more popular.

The deregulation of economic sectors that is also propagated by neoliberalism can also influence the increase of international arbitration. Following neoliberal ideas, regulations that would prohibit arbitration would have been cancelled. Hence, it is clear that liberalism and neoliberalism ideas are correlated with the upsurge in the use of international arbitration that occurred in the twentieth century, as well as the success of the AAA and ICC.

Perhaps the best illustration of the relationship between liberalism and arbitration is the arena of international trade. The Bretton Woods agreement is one example of how liberalism ideas were combined with trade openness, as Garret (1998) asserts: “the embedded liberalism compromise of the Bretton Woods period combined an international regime of trade openness, fixed exchange rates, and capital controls…” (p. 798). It is important to remember that the Bretton Woods agreement took place in 1944, when liberalism ideas were not yet so strong and there was still a concern about fixed exchange rates and capital controls, which is different from what happens today. Protectionism will not help to maintain balance between equity and efficiency (Garret 1998), while liberalism can help the economy to achieve positive results. This is another conclusion in which liberalism ideas are clearly seen as an explanation for the deregulation of the economy and contributes to the success of AAA and ICC.

Another interesting aspect of neoliberalism that correlates with the increase in the use of international arbitration is that neoliberalism supports the ideas that parties should seek agreement in economic topics in order to achieve their goals. If there is deregulation or minimum level of regulation in a subject, the parties will need to reach an agreement in order to reach their goals. This way, if a bank wants to lend money and there is not enough regulation setting forth the rules for bank loans, the financial institutions will have to make agreements in order to decide on basic guidelines for loans. Agreements in one area lead to agreements in other areas, and this is essential in a society without strict financial regulation.

The connection of this encouragement of agreements with arbitration is clear. If parties have the habit to seek agreements when they have a dispute, they tend to look for

arbitration. It is known that in order to start an arbitration procedure the parties need to have an arbitration agreement selecting arbitration as the method of dispute resolution to be used. Thus, if parties have constantly been involved with agreements, there is more likelihood that they will turn to arbitration when there is a dispute.

It is also important to note that foreign trade liberalization leads to more international commercial disputes. Liberalization of inward foreign direct investment also leads to an increase in international business and further necessity of international arbitration. Privatization of state enterprises and legal security being provided for property rights all generate conditions for the increase of the use of international arbitration. Disputes involving property rights can also be settled by arbitration.

It can be said that neoliberalism is a consequence of liberalism. The ideas fostered by liberalism were essential in order for economists to start propagating neoliberal ideas. While liberalism proclaimed basic rights that every human being ought to have, such as freedom of thought and speech, neoliberalism requires a society in which these rights prevail so there can be trade liberalization, deregulation of economic sectors, and tax reform.

In fact, liberalism ideas were introduced much earlier than the neoliberal ones. The first time that liberalism ideas was discussed was during the enlightenment, in the eighteenth century. With the French revolution and further development of these ideas, economists started propagating the neoliberal ideas. However, the neoliberal ideas did not start to be popular until the twentieth century. In sum, it can be said that liberalism claims for basic rights for human beings, and the state should be powerful in order to provide

those basic rights (like equality and freedom of thought). In neoliberalism, those rights should still be preserved, albeit the state must be less powerful and must not interfere in the economy, letting the market regulate itself.

International trade and peace are correlated. Since the end of the Second World War, there has not been any major international world conflict. Instead of new major conflicts in this period, there was a strong development of international organizations and international trade blocs. NGOs, like the two studied in this thesis, have played a large role in helping to achieve and maintain the international peace. It is known that one of the basic conditions for increase in the use of international relations is the increase of international trade, which requires peace in the international scenario.

Democratic international governmental organizations are considered to be important in order to help achieve and maintain peace. Jon Pevehouse and Bruce Russet reach that conclusion in an article published in 2006 that international governmental institutions are important to avoid conflicts: “We found consistent evidence to support our hypothesis that a particular kind of IGO is conflict reducing, and that those IGOs produce their effect in conjunction with the regime characteristics of their member states” (p. 994). The AAA and ICC are not governmental organizations, but they have played a large role in promoting peace, through efficiently reducing international conflicts and sponsoring conditions for the increase of international business. The ICC, which has as one of its main goals to foster the increase of international commerce, has had a significant importance as a peace maker, since it has created policy to increase the levels of international trade, besides successfully managing international arbitration cases.

One of the central tenets of liberal theory is that democratic states are less war prone than non-democratic ones. It is more common for countries where democracy prevails to look to diplomacy when there is an international dispute, rather than going to war, unless the conflict is against an undemocratic nation. William Dixon (1994) concludes that: “democratic states engage in war and violent conflict as often as other types of states and, that democracies virtually never fight each other” (p. 29). Thus, democracies are more likely to settle their disputes in a friendly manner when they are dealing with other democracies, because in democratic states the rule of law prevails. However, when the dispute is with a non-democratic nation, there is a bigger probability of war to settle the dispute.

The fact that democratic nations look for diplomatic solutions for their disputes when dealing with other democratic nations also has some correlation to arbitration. Through this alternative dispute resolution method, parties that have a disagreement look for a friendly way to settle a dispute, instead of going to a state court house. Even though there is still litigation in arbitration, it is clear that the parties involved in the arbitration procedure wish to have their issue settled the best way possible, which is why they make an arbitration agreement. The nations in which most of the arbitration cases happen are democracies. Liberalism ideas are more likely to be found in democratic societies, where there are also better conditions for international arbitration.

Another scholar who also claims democracy helps to achieve peace is Stephen Walt. In his 1998 article, he states that when economies are interrelated there is a smaller possibility of war, since this is bad for the economies. Walt goes further and claims that international institutions also help to achieve peace: “International institutions such as the

International Energy Agency and the International Monetary Fund could help overcome selfish state behavior, mainly by encouraging states to forego immediate gains for the greater benefits of enduring cooperation" (p. 30).

It is a good point that international organizations help states to overcome selfish behavior and better achieve peace. The IMF, through financial help to nations, helps to avoid international economic crisis that could impact on political spheres and lead to armed conflict. The AAA and ICC are conflict managers in the private sphere that also cooperate to maintain international peace. While the conflicts managed by these institutions are among private parties, these conflicts could develop into a worse crisis with political effects. Thus, the AAA and ICC have indirectly helped to maintain peace in the international scenario.

1.4.2 Functionalism and Neofunctionalism

In the last century there was a great integration of states around the world, especially in the economic sector. One of the main reasons that brought nations to look for further integration was the fact that states had common interests, upheld by the same neoliberal ideas. Thus, as more states started to adopt neoliberal ideas of trade liberalization, deregulation of economy, tax reform, and responsible fiscal policy international integration became larger (Rosamond, 2000).

The common interest that states had led them to create international organizations, especially in the economic sector. Thus, the European Union, North America Free Trade Agreement, and the South Common Market were created. Other international organizations not related to the economy such as the North Atlantic Treaty Organization

(NATO) and the United Nations were established in the twentieth century. They also reflect nations trying to cooperate with other ones in order to reach common interests. With this, instead of creating a super-powerful state, international organizations were established in order to help nations achieve their common goals. The creation of Non Governmental Organizations like the AAA and the ICC also helps primarily private parties to achieve common interests (settling their disputes). However, by helping private parties to successfully settle their disputes these organizations also help nations to maintain and/or achieve international peace, since private party international conflicts could reach worse levels and cause an international war among nations.

Neofunctionalism is a derivative of functionalism that appeared in the 1950s. According to neofunctionalism, states tend to put pressure on parties in order to collaborate and achieve agreements in polemic issues, as Kegley and Wittkopf (1999) sustain: “to accelerate the processes leading to new supranational communities by purposely pushing for cooperation in politically controversial areas, rather than avoiding them” (p. 537). Thus, states have been pushing parties to achieve agreements in both the private and public sphere recently, instead of avoiding these polemic issues. It is known that there is strong pressure to approve new agreements regarding international trade, like the Doha development round (an agreement that is trying to lower international trade barriers).

This pressure from several countries in order to reach an international agreement is necessary when there are polemic issues which would cause a big impact in the international order. Thus, neofunctionalism is associated with big changes, while functionalism is associated with less polemic issues where parties have more common

interests. One example for this is the EU community. When the original six countries that started this international community decided to create it in1957, there was not so much controversy and it was a relatively simple process (functionalism). However, when 10 new countries were added to the EU in 2004, there was a much larger amount of discussion and pressure of parties interested to allow these countries to enter this international community, representing a good example of neofunctionalism. The original powerful members received a lot of pressure to accept the new ones, which was a large polemic change to that community.

These two theories are related to neoliberalism because both of them are associated with parties intending to create institutions that will operate without the interference of states and will provide services to the community that otherwise would perhaps have to be provided by the state. Thus, the NGOs using the ideas of functionalism and neofunctionalism help to contribute to states having fewer responsibilities, since the NGOs assume some of that responsibility. Hence, functionalism and neofunctionalism are strongly related with neoliberalism.

1.4.3: Rational Choice

International institutions help parties to achieve their goals of dispute resolution by fostering proper conditions to solve disputes efficiently. In *An Economic Theory of Democracy*, Anthony Downs (1957) argues that "Two major hypotheses are explicitly developed in our study: the theory that parties act to maximize votes, and the postulate that citizens behave rationally in politics" (p. 300). A parallel with this can be made with parties in international arbitration. As it was discussed earlier in this thesis, parties seek

arbitration because this is generally a less expensive and faster mode to settle disputes. Thus, the decision of parties to engage in arbitration is rational.

The disputes which are typically submitted to arbitration are situations where, if both of the parties failed to agree to find a more efficient way to settle their case, both of them would end up losing. That would be due to the financial losses incurred from the longer time it would take to get the case settled. Delays in solving an issue can cause damages for both parties. As Fisher *et al* (1997) conclude: "What one party loses or concedes, the other party gains. In the real world there are no zero-sum games. It is always possible for both to lose" (p. 129). Thus, the lack of zero-sum possibilities is another stimulus for parties to look for arbitration.

1.5 The Place of Arbitration Within the Globalized Economy of Today

It is more and more clear that arbitration is increasingly important in today's globalized world. The international agreements regulating this subject continue to be signed and ratified by a growing number of states, and the arbitral tribunals are handling an increasing number of new cases.

1.5.1 Advantages of Arbitration Over Litigation

There are several points which make arbitration more advantageous to litigation. Obviously the simple fact that the parties have chosen to use arbitration to settle their issue does not mean they will not have any problems in settling the issue.

Based on several international conventions which already were analyzed in this study, arbitration awards are very well recognized and enforced in most of the countries around the globe. Generally, it is as simple to recognize and enforce an award overseas as it would be to do the same with a state court decision. If there were difficulties in having an arbitration award recognized and enforced this alternative dispute resolution method would not be so convenient and would not be useful nowadays.

The cost of arbitration is another advantage. Litigation has a very elevated cost, in both the public or private realm. Arbitration usually has a much lower cost compared to litigation in state courts. Usually there are lower attorney expenses in an arbitation procedure than there would be in a jury trial. Also, the arbitration procedure concludes in a shorter time, so this requires fewer hours of work from the legal staff which is working on the arbitration case. As for the costs related to traveling to the country where the arbitration is being held, there would always be the necessity of at least one of the parties traveling, since in international arbitration the parties are located in different places. Thus, those costs are not an extra expense related to arbitation.

Speed is other major adanvatage of arbitration over regular court houses. The regulations of arbitation always are set in a way to expedite the arbitation procedure and have it concluded in the shortest amount of time possible. Regarding this advantage, Garnett (2000) says: “Arbitration generally provides for greater speed than litigation in the resolution of disputes”(p. 12).

Finally, the fact that the parties can also choose the arbitrators, the arbitral center, and the rules which will be applied in the arbitration procedure is another big advantage for the private jurisdiction. It is possible to choose the legislation which better fits the

case and have it solved in the best way possible, instead of dealing with an inappropriate legislation for a specific kind of dispute. Two other advantages are the opportunity to choose the language in which the procedure will take place and the informal milieu which is typical in arbitation.

However, the biggest advantage that arbitration has over public juristiction is the confidentiality of the procedure. Lawsuits that occur in court houses are almost always available to the public, and this can cause damage to companies when they are dealing with industrial secrets. About this advantage, Carper and LaRocco (2008) asserted:

> The publicity that flows from court litigation may be unwanted, particularly by defendants and counterclaim-defendants who see the airing of claims against them as damaging to their reputations…while litigation is public, ADR processes are not. Arbitrations and mediations are held in private offices and conference rooms. This is a key reason that parties choose to use them (p. 54).

All these advantages are responsible for the success that international arbitration has presently achieved in the ADR arena.

1.5.2 Data Regarding the Increase in the Use of Arbitration

There are several studies and information concluding that arbitation is gaining more and more importance in the modern world as one of the most efficient ways to settle international trade related disputes. One of the most important recent studies about this ADR in the international scenario is the one from PriceWater House.

Several arbitration centers are conducting arbitation involving parties in different nations. The table below extracted from the PriceWater House sponsored 2008 study[5] summarizes the number of arbitration cases filed from 2003 to 2007:

Institution	Type	2003	2004	2005	2006	2007	TOTAL
ICC	International and Domestic	580	561	521	593	599	**2,854**
AAA/ICDR	International	646	614	580	586	621	**3,047**
LCIA	International	99	83	110	130	127	**549**
SCC	International and Domestic	169	123	100	141	170	**703**
Swiss Chambers	International	0	52	54	50	58	**214**
HKIAC	International	287	280	281	394	448	**1,690**
SIAC	International	35	48	45	65	70	**263**
CIETAC	International	422	462	427	442	429	**2,182**
DIS	International and Domestic	81	87	72	75	100	**415**
ICSID		30	27	26	24	35	**142***
ICAC (Ukraine)	International and Domestic	389	262	366	323	319	**1,659**
CICA	International	70	77	72	62	54	**335**
KCAB	International	38	46	53	47	59	**243**
VIAC	International	45	50	54	36	40	**225**
SAKIG	International	46	55	48	40	32	**221**
NAI	International	32	33	32	29	28	**154**
WIPO Arbitration and Mediation Centre	International	8	9	22	23	32	**94**
Chamber of National and International Arbitration Milan	International	15	11	18	20	23	**87**
Mongolian National Arbitration Court	International	11	13	11	22	12	**69**
JCAA	International	14	17	10	11	14	**66**
PCA	International	5	5	6	5	9	**30**
ACICA	International	1	1	2	2	1	**7**
	Total	**3,023**	**2,916**	**2,910**	**3,120**	**3,280**	**15,249**

Refer to Table of acronyms to see the explanation of all these acronyms.

[5] Available at: http://www.pwc.co.uk/eng/publications/international_arbitration_2008.html Accessed on 02.27.09

According to this table, it is clear that the number of international arbitration cases has been increasing and that there are several arbitration centers involved with international arbitation cases.

Regarding the average time to recognize, enforce, and execute the arbitral award, 43% of the companies needed between one and two years. Only 18% of them needed between two and four years and 14% of companies needed less than six months[6]. This is good evidence of how quickly arbitation works to settle disputes and have its decisions enforced.

Another interesting study is the ICC annual statistical report. The last one released was from the year 2007. According to this study[7], the new cases filed in the year of 2007 under ICC rules involved 1,611 parties from 126 countries around the world.

1.5.3 Globalization and Regionalism

Today societies are integrated and countries' borders are becoming less and less important. Globalization is a phenomenon that is highly developed and has changed the lives of most human beings. Economies are integrated, nations rely on international trade in order to sell their production and buy the supplies that are not produced in their country, people travel internationally constantly, and financial markets are integrated across the globe. Even though it may seem that globalization is a recent phenomena, this has been happening for a long time. Ancient civilizations like Rome would trade with other civilizations and people would travel to other regions. However, with the

[6] 2008 PriceWater House study
[7] Available at: http://www.iccbooks.com/Home/Bulletincategory.aspx Accessed on: 02.27.2009

continuous development of transportation and communication, the integration of the world has grown exponentially and today there is a highly connected international society.

With the current level of globalization there are pros and cons. While companies outsource their production to other nations where there is cheaper labor and cause unemployment in some countries, poorer nations have more help from rich ones due to globalization. NGOs allow people in developed nations to make donations that help undeveloped nations in Africa and international institutions like the United Nations have been able to further help poor countries more than in the past.

The increased use of international arbitration as an efficient way to settle international disputes is also related with globalization. The increase in international trade has caused an increase of international disputes and this has led to the increase of institutions that deal with international arbitration. Institutions like the AAA and the ICC aim to solve disputes originating from parties anywhere on the planet. However, more and more regional arbitration institutions have been created and this implies that parties are seeking to have a regional institution supervising their arbitration rather than a more global institution like the AAA or the ICC.

Nations have been grouping in regional institutions that aim to make their regional group stronger in the international scenario. This way, institutions like the EU and North America Free Trade Area (NAFTA) represent nations that are linked by a geographical relationship and have some level of interdependence. On the other hand,

institutions like the UN and the WTO represent countries around the globe not affiliated with the same geographical area.

Arbitration institutions like the AAA and the ICC are more global and conduct arbitration cases from parties all over the world. However, in the recent years there have been a growing number of new arbitration institutions that focus primarily in supervising international arbitration cases of parties affiliated with their geographical area. Examples of new regional arbitration institutions are: Hong Kong International Arbitration Center (HKIAC), Japan Commercial Arbitration Association (JCAA) and Netherlands Arbitration Institute (NAI). These institutions have been gaining importance in the international arbitration scenario and are evidence that parties look for regional institutions when seeking arbitration, rather than looking only for more global institutions like the AAA and the ICC.

This regionalism process is still part of globalization, since parties from one country are relating to parties in other nations. What leads parties to look for regional institutions is the desire to have an institution that reflects similar values, culture, and tradition supervising their arbitration case. When parties look for an institution that deals mainly with parties of a regional group that shares common values, they are trying to assure that they will be equally treated, since there will be no parties from another region that could be given any kind of preference. This reflects liberalism ideas upholding regional institutions.

1.6 Conclusion to Part I

After analyzing the concept of arbitration and the reasons why this method is better than litigation in state courts, it can be concluded that arbitration is a very efficient way to settle international disputes and it will only continue to be more frequently used. As world history was briefly analyzed during the historical explanation of this method, it became clear that arbitration always seemed more attractive when the state had no institution in place to adequately settle disputes that arose in society. This is the case today when it comes to international commercial disputes.

The judicial power of most countries does not meet the minimum standards to efficiently solve international trade related disputes. This is another good reason why international arbitration has been increasing. In sum, arbiration already has a very important presence in today's society, and all the trends point to a bigger presence in the future.

PART II - AMERICAN ARBITRATION ASSOCIATION

This part will examine the American Arbitration Association (AAA), the institution that handles the biggest number of international arbitration cases. I will analyze the AAA rules, especially the ones that can be related to international arbitration cases. In a follow up, three international arbitration cases will be analyzed. Initially, an explanation about the history of this institution, as well as its goals, will be given.

2.1 American Arbitration Association

The history and goals of the AAA will be examined in this first section. It is important to understand the global setting when the AAA was created in 1926, as well as its initial goals. In a follow up, its rules and some cases will be analyzed.

2.1.1 History

The state of New York is associated with the beginning of commercial arbitration in the USA. In 1786 one of the first arbitration cases in this country occurred in the state of New York, when the Chamber of Commerce of New York settled a dispute involving the wages of seamen. Moreover, other arbitration cases were decided by the New Haven (1794) and Philadelphia (1801) chambers of commerce (Kellor, 1948). In the nineteenth century there was a strong development of state courts that contributed to the decrease of arbitration use. Americans were not aware at that time of the benefits of arbitration.

However, in the beginning of the twentieth century this started to change. After the end of World War I there was the desire to avoid new wars, and public courts were flooded with suits. In New York state, the first modern American law regarding

arbitration was approved in 1920. The book 'Commercial Arbitration and the Law', published by Julius Cohen in 1918, had a big influence in adopting a new modern legislation regarding arbitration. Cohen (1918) claimed in his book that arbitration should be encouraged, *as is*:

> So that way we conclude upon this examination of the subject that, just as it is the duty of the Bar to dispose of controversy amicably without resort to the courts, it is at this date an accepted doctrine of the common law that efforts, honestly made, by parties seeking to settle their differences out of court, are to be encouraged and enforced by the court; and that whatever may have been the influences affecting a different procedure in the past, in this day there is no disposition to guard with any jealousy 'the jurisdiction of the courts' (p. 15).

The New York State Bar and the Chamber of Commerce of the state of New York supported legislative activity toward the new arbitration law, which was approved in 1920. Regarding this law, Stone (2003) asserted, *ipisis literis*: "In 1919, the New York Chamber of Commerce joined with the New York Bar Association to draft a statute for the New York legislature changing the common law rule…In 1920, Cohen's bill passed the New York legislature and became the New York Arbitration Act" (p. 9). Following this event, other states also passed bills enacting legislation regarding arbitration. [1] In 1925 the Federal Arbitration Act was finally enacted.

With this new wave of legislation recognizing arbitration, the first permanent institution of arbitration in the USA was created, named the Arbitration Society of America (ASA). This first institution devoted exclusively to arbitration in the USA made

[1] The following states passed legislation regarding arbitration: Arizona, California, Connecticut, Louisiana, Massachusetts, Michigan, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Washington and Wisconsin.

headlines in the press and led to the appearance of the first publication specializing in arbitration, the *Arbitration News*.

The second association devoted to arbitration in the USA was the Arbitration Foundation (AF), founded in 1925 by Charles L. Bernheimer, then chairman of the Arbitration Committee of the Chamber of Commerce of New York. (Kellor, 1948; Stone, 2003) These two institutions had different approaches to strengthening arbitration in America. The Arbitration Foundation claimed that the Arbitration Society lacked a democratic approach to the issues regarding arbitration (Public Service at the AAA, 2004).

Recognizing their differences, the two institutions decided to create a committee to work towards unification. Both associations acknowledged that as separate entities, they could not achieve their goals to adequately supervise arbitration cases. Both of the institutions appointed three representatives to serve on this committee and on January 29, 1926, the American Arbitration Association was created. Regarding this, Kellor (1948) writes:

> The new association was authorized by order of the Supreme Court of the State of New York, under the Membership Corporation Law, on January 29, 1926, upon foundation of the combined charters. The members of the Committee became its first Board of Directors, with Anson W. Burchard, then President of the International General Electric Corporation, as the first President of the Association (p. 17).

The foundation of the AAA happened one year after the American Arbitration Act was enacted. After this act was approved, arbitration had a big upsurge in American society. At this time people came to better understand arbitration and become more aware

of this method of Alternative Dispute Resolution (ADR). Today this not-for-profit institution is the world's leading supervisor of arbitration and has 29 offices in the United States. This institution is based in New York City and is well known across the country as the leading arbitration institution in the United States. [2]

The United States Chamber of Commerce was another institution involved with arbitration in the early twentieth century. This chamber, created in 1913, had as goals to encourage trade and commercial relations between the USA and other nations. In fact, this institution created a plan to foster international commercial arbitration between the USA and Argentina, as it is explained in the yearbook on commercial arbitration in the US (AAA, 1927):

> At the first Pan-American Financial Congress, held at Washington, D.C., in 1915, a plan for the arbitration of disputes in trade between the United States and the Argentine Republic was prepared. Under this plan the *Bolsa de Commercio* of Buenos Aires and the United States Chamber of Commerce each established a Committee on Arbitration and an official list of arbitrators, with bi-national participation in both, and they agree to urge the insertion of a standard arbitration clause in contracts between merchants of the Argentine Republic and the United States of America (p. 824).

Thus, this institution created one of the first agreements for international arbitration.

In order to ensure that the same high-quality services that the AAA provides to parties based in the USA are also provided to parties located outside the USA, a division for international cases was created. The International Centre for Dispute Resolution (ICDR) was created in 1996, and today it has agreements with 62 arbitral institutions in

[2] Source: http://www.adr.org/about_aaa. Accessed on 03.15 2009

43 countries around the world. [3] This allows parties to file cases and have them conducted anywhere. This centre employs case managers fluent in thirteen languages and more than 400 arbitrators and mediators throughout the world. There are three ICDR offices outside the USA. The first office opened in Dublin, Ireland, in May 2001 to deal with cases in Europe, Africa, and the Middle East. The second one opened in Mexico City in February 2006 in a joint venture with the Mexico City National Chamber of Commerce. In October 2007, the Singapore regional office was opened in association with the Singapore International Arbitration Centre. The headquarter office is located in New York City. [4]

2.1.2 Goals of the AAA/ICDR

It is important to understand that the main goal of the AAA/ICDR is not to realize the arbitration procedure, but to supervise its cases. The parties that have a dispute and decide to submit it to an arbitration agreement in order to settle their issues decide which arbitration rules they will follow. If the AAA is the organization chosen, it will not perform the arbitration, it will merely supervise it. An arbitration court is chosen for each case and the arbitrator (or arbitrators) will be the ones conducting the case. The arbitrators may be chosen by the parties or by the AAA.

The New York-based institution uses ADR methods, especially arbitration, to settle disputes. These are the words of American Arbitration Association in their mission statement:

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[3] Source: http://www.adr.org/about_icdr. Accessed on 03.15.2009
[4] Source: http://www.adr.org/si.asp?id=5278 Accessed on 03.16.2009

> The American Arbitration Association is dedicated to the development and widespread use of prompt, effective and economical methods of dispute resolution. As a not-for-profit organization, our mission is one of service and education. We are committed to providing exceptional neutrals, proficient case management, dedicated personnel, advanced education and training, and innovative process knowledge to meet the conflict management and dispute resolution needs of the public now and in the future.

Thus, the AAA attempts to avoid disputes through education but when disputes occur, the AAA provides the necessary structure in order to solve them the best way possible.

This non-governmental organization was created with a vision of being an international leader of dispute resolution, according to its mission statement (American Arbitration Association): “The American Arbitration Association will be the global leader in conflict management—built on integrity, committed to innovation and embracing the highest standards of client services in every undertaking.” This NGO was created so it could reach goals that the previous institutions could not reach alone, and its mission statement reflects this. The AAA’s goals were very ambitious, especially for the beginning of the twentieth century, when arbitration was not so well developed.
Most international arbitration cases today follow the AAA rules or the ICC ones, according to Offenkrantz (1997): “For agreements that are international in scope or are between citizens of different countries, administration of arbitration will often be had under the AAA's Commercial or International Rules or those of the International Chamber of Commerce ("ICC")” (p. 63).

The success of the AAA in international arbitration has been so great that international arbitration cases have been undergoing an Americanization process. International arbitration has been following the practices of US court houses in several

respects, as Paulson (2008) explains: “Most claims of Americanization focus on the procedural aspects of arbitration—large teams of lawyers, procedural disputes, extensive motion practice, jurisdictional objections, evidentiary objections, broadening discovery, aggressive cross examinations, and witness preparations”(p. 367). Despite these changes in arbitration procedure that can lengthen the time to settlement, this method of dispute resolution is still faster than state court houses.

2.2 AAA Rules

The general arbitration rules of the American Arbitration Association are set forth in the ‘Commercial Arbitration Rules and Mediation Procedures’, available at www.adr.org. These rules were amended and became effective on September 1, 2007. The ICDR rules are specifically for international arbitration procedure and were amended on March 1, 2008. These are the ones which will be discussed in this section. Both organizations’ rules are quite up to date and ready to be used in the globalized modern environment of international business.

2.2.1 Initiation of International Arbitration Procedure

The party which starts the arbitration procedure is referred to as the claimant. This party needs to provide a written notice to both the administrator of the arbitration case (the institution which will supervise the case) as well as the opposing party, called the respondent. This point is a difference in comparison with the ICC and other major international arbitration institutions, which require the claimant to notify only the arbitration supervising institution at first, as Paisley (1998) claims: “The arbitration is

commenced by the Claimant transmitting a Request for Arbitration (the 'Request') to the Center and to the Respondent. Unlike the ICC and LCIA Rules, for example, where the Request is sent first only to the ICC Secretariat" (p. 108).

The arbitration will officially begin when the administrator receives his/her notice of arbitration. It is acceptable to have the arbitration considered commenced when the claimant notifies the AAA of the case, however, it would be more fair to start the deadline for filing the response after the respondent has received the arbitration notice, not after the beginning of the procedure. This change, reflecting liberalism ideas, would further enhance the due process of law and treaty parties with more equality. If the deadline to file the defense starts to count down without the knowledge of the defendant (respondent), his or her defense could be compromised, since without notification no defense work can begin. It is true that this could slow down the procedures of arbitration, but it would guarantee more fairness to both parties and ensure the due process of law.

In addition, the respondent has a deadline of 30 days to submit a written response to the claim proposed. According to article 4, the parties involved in the arbitration can, at any time, counterclaim or amend it. This is a significant article; however, it could lead to some undue delay in the arbitration procedure. Article 4 says, *ipisis literis:* "any party may amend or supplement its claim, counterclaim or defense, unless the tribunal consider it inappropriate to allow such amendment or supplement because of the party's delay in making it, prejudice to the other parties or any other circumstances."

Therefore, the possibility of amending the claim is clearly recognized by the procedures, and at the same time is also limited by the ICDR/AAA rules. The limitation

imposed (the amendment must be within the arbitration agreement scope) is definitely necessary so that topics which are not related to the main point being discussed in the arbitration are not inserted into the arbitration procedure. Thus, article 04 is appropriate for the arbitration procedure.

It is my opinion, however, that the arbitration procedure should be amended preferentially in the initial phase. The rule should be that the case can be amended, but only until a response is filed, not at any later time. The possibility of having an amendment at any time, even after the discovery, can cause delays in the procedure. It could be argued that the procedure should not be amended at any time, and any issue that was not originally proposed cannot be discussed. This would cause several new cases to be filed to discuss issues related to the original arbitration procedure. Another possibility is that the case can be amended after the end of discovery when this would not cause the necessity of further evidence to be introduced. Therefore, article 4 is important for the success of arbitration, but it would be even more effective and according to rationalism if it limited the time that the case can be amended.

2.2.2 Arbitrators

Articles 5 to 11 are concerned with the appointment of arbitrators. This is an important issue that can lead to severe disagreements among the parties participating in the arbitration procedure. The arbitrator(s) is (are) the one(s) that will settle the dispute, so the parties tend to be determined to choose a good arbitrator. A list of available arbitrators is provided by the AAA so the parties can select their arbitrator if they do not yet have one. Regarding this selection, Robert Coulson (1982) wrote in 1982: “The AAA’s list system also provides parties with maximum opportunity to select their

arbitrators" (p. 177). This list is a good service from the AAA, since it will allow all the parties to choose an arbitrator who meets the standards of this organization.

Article 5 states that the parties can choose the arbitrator, but if they fail to do so, an arbitrator will be appointed by the administrator. There is also the possibility of appointing three arbitrators to the case, as it is stated in article 5: "If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the administrator determines in its discretion that three arbitrators are appropriate because of the large size, complexity or other circumstances of the case."

I believe that three arbitrators will make the arbitration procedure lengthier and more complex. However, due to the complexity of some cases, it is a good idea to have three arbitrators instead of only one. The cases which involve large amounts of money may also be better with three arbitrators. This would make it more unlikely to have a corrupt arbitrator who could be bribed to decide unfairly. One advantage of the possibility of having three arbitrators is that each party can indicate an arbitrator of his/her nationality and this arbitrator can act as a translator for the preferred language of the party. According to this, Lee states (2008):

> In many arbitration matters involving three-member tribunals, each party is likely to select an arbitrator of the same nationality**,** with the understanding that the party-appointed arbitrator will inform the tribunal of the appointing party's legal and business culture. Ideally, the party-appointed arbitrator serves as a cultural intermediary and translator (pages 603-4).

Corroborating with this thought, McLean and Wilson (2008) state:

> Typically each party to the arbitration agrees to appoint one arbitrator**,** the 'party-appointed arbitrator**,**' and the two party-appointed arbitrators then select a third arbitrator**,** most often referred to as the 'umpire,' or sometimes the 'chair' or the 'neutral.' In the event the two party-appointed arbitrators cannot agree on a third arbitrator**,** a dispute resolution provider or a court will be called upon to appoint the neutral (p. 167).

Even though the arbitrator of the same nationality can act unfairly trying to help the party of his nationality, it is still clearly an advantage to have an arbitrator with the same nationality. Since there will be three arbitrators, if one of them tries to act with bias, there will be the other ones of different nationalities to ensure that the award is fair and impartial. Furthermore, the fact that the same nationality arbitrator can make translations for the party and help with any cultural issues is an important advantage. It would not be acceptable to have the third arbitrator of the same nationality of the parties, but if each party indicates one arbitrator with the same nationality and the third one is of a different nationality the arbitration procedure will be fair. Three arbitrators will ultimately help to guarantee that there will be no corruption and parties will be treated equally, therefore this suggestion follows liberalism ideas.

When the arbitration procedure is officially started (the administrator is notified by the claimant), there is a deadline of forty-five days to select the arbitrator (s). After this deadline has passed, the administrator can appoint an arbitrator, but this will only happen after a written request is sent by one of the parties.

The requirements that the arbitrator be impartial and independent are also clearly stated in the rules of article 7. This is essential for the success of the arbitration. An arbitrator acting without these characteristics is a significant threat to the success of arbitration and can cause severe damages to the parties. This kind of situation would be compared to a judge of a state court acting to help a party in a procedure. In order to help ensure the impartiality of the arbitrators, it is mandated that the parties can not have any communication with the arbitrators or with a candidate for appointment for arbitration, unless it is an official act of the procedure or to advise him or her about the nature of the

case (article 7, subpart 2). I believe that this is an important rule to help ensure the impartiality of the arbitrators. If parties could contact the potential arbitrators before the beginning of the arbitration or during this procedure, there would be the possibility of attempted bribery.

Articles 8 to 11 discuss the procedure for challenging an arbitrator and replacing him/her. Up to fifteen days after the arbitrator is appointed, any party can challenge the appointment by sending a written notice to the administrator. This can also happen at any other time during the procedure, if a party has a justifiable reason to doubt the impartiality or independence of the arbitrator.

The administrator shall rule on the challenge of the arbitrator (article 9). In the international arbitration scenario, there could be extra reasons for doubting the impartiality of the arbitrator. For example, if the arbitration is between a company of country A and another company of country B and the arbitrator is from country C, there could be collusion between countries C and A. This could lead the company from country B to challenge the arbitrator.

There are four occasions when an arbitrator will need to be replaced: the death of the arbitrator, the original arbitrator withdraws after a challenge, a sustained challenge, or the accepted resignation of an arbitrator. In any of the above cases, a substitute arbitrator will be appointed following the same procedure that was used to appoint the original arbitrator, unless the parties mutually agree to follow a different procedure.

2.2.3 Place of the Arbitration

Once the arbitrator is selected, other important points need to be addressed in order for the procedure to move forward, such as the location of the arbitration and the

language in which the arbitration will be conducted. In international arbitration cases those issues are even more important, considering that the parties are located in different countries and speak different languages.

The arbitration procedure can take place anywhere the parties agree. If the parties cannot agree on the location of the arbitration, the ICDR/AAA may suggest where the arbitration shall be held and the arbitrator will confirm it or choose some other place. It is important to choose a neutral place for the procedure, since the location could influence the results.

A country could be hostile to either the arbitrator or one of the parties involved in the procedure, so it is important to have an international arbitration occurring in a neutral place. One more important point to be observed when selecting the place where the arbitration will be held is that the national laws support the arbitration, as Mistelis (2006) writes: "The most likely reason that arbitrators choose the *lex loci arbitri* more often than another law would seem to be that the place of arbitration is the most likely forum for court proceedings in support of the arbitration" (p. 169).

Arbitrators can hold conferences and hear witnesses in any place that is considered appropriate. This is important in an international procedure, since witnesses may be distant from the location of the arbitration and it may be difficult for them to attend the hearings. Also important is the second part of subpart 2, article 13, which says that the parties must be given sufficient written notice to enable them to be present at any of the proceedings. Thus, the arbitrator cannot arbitrarily decide to hold a deposition in Zimbabwe unless all the parties are served with written notice so they can travel there and have enough time to arrange the trip.

The issue of costs is an interesting one. The parties have the freedom to decide which party will have to pay them or how their payment will be shared. It is a good idea that parties do not pay the expenses up front since the arbitrator does have latitude in determining how costs should be paid, as Drahozal (2009) asserts:

> Arbitrators can direct that fees be borne 'as incurred,' specify that fees be shared equally by the parties, or require one party to bear most or all of the fees. The arbitrator can allocate administrative fees in the same or in a different manner from the arbitrator's fees (p. 38).

Thus, there is freedom for the arbitrator to decide who will pay the expenses if the parties did not agree on this.

2.2.4 Language of the Arbitration

Regarding the language, the provisions of article 14 are very clear to international arbitration. It is stated: "the language of the arbitration shall be that of the documents containing the arbitration agreement, subject to the power of the tribunal to determine otherwise based upon the contentions of the parties and the circumstances of the arbitration." In other words, it is better to have the procedure happening in the same language as that of the arbitration agreement. If Mandarin was the language chosen to be used in the arbitration agreement, it makes sense to use this language in the procedure. However, Haydock and Fischer stated (1996): "The parties may select one language to govern the arbitration process, pleading, and hearing. If the parties do not address this issue and fail to agree, institutional arbitration rules typically provide for a decision of language by the arbitral tribunal" (p. 968).

2.2.5 Hearings and Interim Measures

It is stated in article 19 that the tribunal should notify the parties at least thirty days in advance regarding the initial oral hearing. This thirty day period remains in place for subsequent hearings and is important so parties can get prepared for the hearings.

Article 21 recognizes the possibility of interim measures. These should be taken only to protect or conserve the property which is being discussed in the procedure. Interim measures are extremely important in some cases. For example, if company A in country X is disposing of assets that belong to company B in country Y and the arbitration procedure is still in the initial stages, an interim measure may be necessary to preserve the object of the litigation. Regarding this possibility, Marchac (1999) states: “According to the general trend, arbitral tribunals have the power to order interim measures in international commercial arbitration, under international conventions, domestic laws influenced by the Uncitral Model Law, and the set of rules selected by the parties” (p. 138). Also, the law named in the arbitration agreement will not always be the one used by the parties in the arbitration procedure, as Heiskanen (2009) affirms: “the law governing the arbitration agreement is often considered to be the same as the law governing the contract of which it forms a part. However, this is not necessarily always the case, in particular when the arbitration agreement is concluded in a separate "submission agreement” (p. 376). Thus, the contract may be ruled by the law of one country and the arbitration based on it can use other nation’s law.

In international arbitration this is a more complex issue, since it is harder for both parties to know what is happening with the object of the dispute. Also, it may be necessary to have a state court enforce this rule overseas, and it may require more time to

implement the interim measure. Thus, the arbitrator needs to act quickly in order to ensure that the object of the dispute will be safe. It could be argued that interim measures should not be taken in international arbitration because it may not be allowed in the nation where the parties reside. However, this does not make sense, since the judiciary is usually allowed to use these measures.

Article 37 also pertains to this theme, regulating emergency measures of protection. Daniel Tan (2007) recognizes the importance of interim measures as arbitration procedures have become more and more complex: "As international commercial litigation becomes increasingly complex, the courts can no longer rely solely on the statutory remedies to meet out suitable relief; instead, they must enlist the help of their wider common law and equitable remedial powers". Sugg (2008) also recognizes the importance of interim measures:

> The AAA International Dispute Resolution Procedures provides for 'Emergency Measures of Protection.' These are mandatory rules that will apply unless the parties agree otherwise. Under the rules, a party in need of 'emergency' relief prior to constitution of the arbitral tribunal must notify an 'administrator' who will then appoint an 'emergency arbitrator' from a particular panel of arbitrators designated for such a purpose. This special arbitrator is limited to providing 'any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property' (p. 401).

The second subpart of this article recognizes that in the case of an emergency measure the notifications between the party and the tribunal can happen through e-mail, facsimile or other reliable measure. This is essential when parties are located in different countries and need to have a fast, reliable form of written communication.

2.2.6 Default Procedure

Article 23 regards default procedure. It claims that if a party fails to appear in a hearing or to file a written motion of defense, the tribunal may proceed with the arbitration, unless the party duly explains the absence and provides acceptable explanations. The occasions of not appearing for a hearing or not filing a statement of defense in an international case need to be examined with extra caution. Miscommunications can happen in international procedure and this is why 'no shows' need to be examined with more caution than in a domestic procedure.

2.2.7 Award

Arbitration awards need to state the reasons upon which the decision is based, according to article 27, subpart 2. The same subpart also recognizes the possibility that, if the parties agree, it is not necessary to provide reasons for the decision in the award. I do not believe that this is a good idea, since some countries may not recognize an international award if there are not reasons given for it. The Brazilian arbitration law (federal law n. 9.307, article 26, subparts II and III), for example, states that if the award does not give the reasons considered for the decision, this decision is not valid, *ex vi:* "General requisites for the arbitration award: the reasons for the decision (subpart two) and the law in which the decision was based (subpart 3)"[5].

Article 28 recognizes that the arbitral tribunal may apply the substantive law chosen by the parties. If the parties do not choose a law, the tribunal may apply the law that it considers most appropriate. This is very important, because some substantive laws

[5] Translated by the author from the original in Portuguese: "Art. 26. São requisitos obrigatórios da sentença arbitral: (2) os fundamentos da decisão, onde serão analisadas as questões de fato e de direito e (3) o dispositivo

may be more pertinent than other ones and if the proper law is chosen, the arbitration may flow much better. It could be argued that the fact that the parties can select the substantive law can be unfair, since a substantive law could benefit one of the parties. However, this is not a valid point because the parties have to agree in the selection of the substantive law that will be used, and this usually happens when the parties sign the arbitration agreement. Thus, they can choose the substantive law that best fits for both claimant and respondent.

Still regarding this subject, Kirchner (2007) argues that more and more parties are selecting substantive laws of other nations in order to better serve their arbitration:

> The large number of arbitral awards based on non-national or transnational law and the high degree of compliance with such awards indicate that non-national laws are applied by arbitral tribunals in case no national law has been chosen by the parties and are applied so to the satisfaction of the parties, which, after all, can be said to be the tribunals' customers (p. 7).

Thus, it is a good point that the AAA allows the parties to select the substantive law that will be used. One example of this is the 'Bay Hotel case', in which the arbitration procedure happened in Miami, FL and the parties used laws from Caribbean nations, according to Gaffney and Rosenblum (2002): "the panel respected the parties' express wishes by affirming Turks and Caicos law as the governing law" (p. 5).

The International Institute for the Unification of Private Law (Unidroit) was created in 1926 as an auxiliary organ of the League of Nations and was reestablished in 1940 in Rome, Italy. This institute studies the need for modernizing and harmonizing international law and also drafts international agreements in order to meet those goals. The principles of Unidroit may be used as a law in international arbitration cases, as it is explained by Fabrizio Marrella (2003) in his article, *as is:*

> For international arbitrators, there is no foreign law since they do not have a forum law. For them everything is transnational. The UNIDROIT Principles (with *lex mercatoria)* may now be considered as a sort of default law. While domestic courts shall have a natural inclination to resort to national law, the arbitrator can apply the UNIDROIT Principles and this increases the predictability of legal solutions (p. 1156).

2.2.8 Confidentiality

Article 34 makes a strong claim that all the matters submitted to the arbitration should be kept confidential: "unless otherwise agreed by the parties, or required by the applicable law, the members of the tribunal and the administrator shall keep confidential all mattes relation to the arbitration or the award." The issue of confidentiality is a critical advantage of arbitration over litigation.

As discussed earlier (section 1.5.1), the confidentiality of arbitration is the biggest advantage of this dispute resolution method over litigation in state courts. Since the matters discussed in the arbitration procedure do not become public, companies do not need to be concerned about industrial secrets and sensitive information being disclosed to the public and eventually becoming the knowledge of their competitors.

While confidentiality is an important advantage of arbitration, it also has a negative side. When there is no transparency in a procedure, there is no way to guarantee that a system is not corrupt. If a dispute resolution method is highly corrupt it would not be efficient. A good indicator that there is no corruption in arbitration cases conducted under the AAA supervision is the fact that this institution supervises a large number of cases and continues to be respected in the international community. If there was corruption, parties would not request that the AAA supervise their arbitration cases.

Hence, I suggest the AAA change article 34 in order to foster conditions for more transparency in their procedures. There was a large difficulty in gathering data to conduct

the case study of the AAA. There are very few awards published and the ones available disclose very little information. The ICC has a larger number of awards published and with more data available. It is possible to disclose more information about the procedures without disclosing sensitive information regarding the parties. Thus, it is important that the AAA change its rule so there is more transparency in their procedure and parties have a better access to information regarding arbitration procedure. The trade-off between transparency and confidentiality should still prioritize confidentiality, since this is one of the main advantages of arbitration, but it is important to focus more on transparency as a way to guarantee that there is no corruption in AAA sponsored procedures.

Corruption is essentially related to not treating the parties equally, which leads to one of the parties being improperly benefited. Thus, if there is a change in the rules of the AAA in order to guarantee more transparency this will be according to the tenets of liberalism, since there will be conditions for more equal treatment of parties and a fairer procedure.

2.3 AAA Case Study

After analyzing the procedure of the ICDR/AAA for international arbitration, I will now examine three international arbitration cases which were conducted according to these rules. I will look at how these rules were essential to concluded these cases in a satisfactory way. The cases which I will examine were arbitrated in 2004 and 2005 and were extracted from the WestLaw data bank. This data bank is the only known source for cases administered by the ICDR/AAA. Although the current regulations were updated

and amended in 2007/8, most of the rules are the same since 2003 and the changes that took place in the last two years were minor.

Despite being published in the WestLaw data bank, the arbitration cases analyzed in this thesis are still confidential because the names of the parties involved were not published. According to AAA executives, more cases have been prepared for publication and should be available for scholars soon, but as of now, this information has not been released. Because there are very few international arbitration cases published, there were only a limited number of cases available for analysis in this research.

2.3.1 Case Number 3419738

In this claim, a contractor from Canada traveled to Russia so he could work for a local company. Upon his arrival there, his working contract was terminated by the Russians, and the Canadian expert asked for compensation for his travel expenses and for having his work contract abruptly rescinded. The procedure started in July 2003, and the award was issued in June 2004 in Oxnard, California.

The two parties in this case signed a working agreement (containing an arbitration agreement) in February 2003 stating that the contractor would move from his home in Canada to work for a company in Moscow, Russia. The Canadian contractor then moved to Moscow in March, and upon his arrival there, he inquired at the local office of the company for his assignments. The local staff told him there was no assignment for him. The independent contractor then contacted the supervisors of that company and remained in Moscow from March until June 2003, when he returned to Canada.

According to the working contract, the claimant had the right to receive payment for twenty working days as well as travel expenses in case the contract would be

terminated. The respondent sent a notice of termination a day after the newly contracted arrived in Moscow. The contractor wanted to be remunerated for the three months he remained there and also claimed that he did not receive a notice of termination of the agreement.

The claimant then filed the arbitration case in October 2003 asking for his reimbursement. The respondent was properly notified and replied to the claimant request in February 2004. The hearing was set to happen via telephone in June 2004 and this date was set in October 2003. Declarations and exhibits were sent to the arbitral tribunal in California by April 2004, and in June the hearing took place and testimony was received from both the parties. After the telephone hearing, the case was submitted for decision in the same month and the award was issue within a few weeks.

The rules of the ICDR/AAA were helpful in having this case resolved in only nine months. There was no bureaucracy to slow the procedure. Following the rules, the telephone hearing was set more than thirty days in advance and notice of it was given to all the parties according to article 20 which requires the hearing to be scheduled at least thirty days in advance.

All the issues discussed in this procedure were covered in the scope of the agreement to arbitrate, which was written into the working contract between the Canadian contractor and the Russian company. Article four of ICDR claims that the arbitration must remain within the scope of the arbitration agreement, just as happened in this case. The impartiality of the arbitrator also seemed very clear in the case being analyzed, since the arbitrator was located in a different country than the nationalities of

the two parties and acted completely independently and impartially, according to article seven of the rules.

It was clear in the case being analyzed that the tribunal also treated the parties equally by giving them equal opportunities for them to present evidence according to liberalism ideas. Article 16 of the ICDR rules prescribes that parties should be "treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case." This seemed clear in this case, since the parties could present all the evidence they deemed necessary and were given equal opportunities to present their case.

Thus, the case analyzed was carried out according to the rules and is a successful example of a resolution of an international dispute. Had this issue been taken to a state court, it would have taken a much longer time to be resolved. Furthermore, this award could be enforced right away and was according to the New York Convention.

2.3.2 Case Number 833875

In this case, a bank based in the United Kingdom had a contract with a multinational corporate barter company that has business in several countries. This case is another example of how the ICDR/AAA rules can be used to solve complex international legal cases. The barter company would purchase underperforming assets from its clients and would exchange them for trade credits. In December 1997, there was a deal between those parties regulating the terms of these transactions and containing an arbitration agreement. A couple of amendments were made in the following year.

The barter company was buying those assets for a lower price than expected by the British bank, and the bank was losing money in the dealings that were regulated by the 1997 contracts. Therefore, the bank started an arbitration procedure against the barter

company. This procedure was conducted by three arbitrators and took place in New York City.

The claimant bank asked for damages stemming from the profits lost in their contract with the barter company. This was a complex case, with a vast amount of evidence being submitted to the tribunal. The amounts involved were of millions of dollars, and the agreements were very complex. This level of complexity explains why it was necessary to use three arbitrators instead of just one (article 5 ICDR rules). Having three arbitrators is one suggestion that should be adopted for all arbitration cases, since three arbitrators working together have better conditions to properly handle a case. Besides having a large number of complex contracts, several witnesses were deposed and there was cross examination in this case.

Finally, the arbitrators denied all the claims of the claimant. The arbitrators issued a long detailed award giving explanations why the claims of the British bank should not proceed (according to article 27, subpart 2 ICDR rules). The award was issued in 2005 and could be enforced in any country that ratified the 1958 New York Convention. This is essential, since the companies involved in this case have offices in several countries.

2.3.3 Case Number 3250897

This case is an interesting example of how international arbitration is well-suited to solve complex international disputes. An Israel-based industry had a contract with a Brazilian company according to which the Brazilian company would buy up to 30,000 “points of sales” from that middle-east company. The business was executed; however, disagreements arose regarding the payment of two taxes in Brazil: Imposto sobre Circulação de Mercadorias e Serviços (ICMS - equivalent to sales taxes) and Imposto

sobre Produtos Industrializados (IPI - taxes on industrialized products). The Israeli company claimed that the payment of the taxes was the responsibility of the Brazilian importing company and started the arbitration procedure.

In the distribution agreement signed in August 2003 between the parties, there was an arbitration clause regulating several aspects of the arbitration procedure. The parties stipulated that each one of the companies signing the contract would select one arbitrator for any eventual arbitration procedure and that those two arbitrators would decide on a third one, who would preside over the arbitral tribunal (ICDR Case, 2004):

> The two arbitrators shall jointly deliberate and appoint, within the term of thirty days, a third arbitrator who shall preside over arbitration. If any of the parties fail to elect one arbitrator, or if the arbitrators do not elect a third one, then the said arbitrator shall be appointed by the President of the American Arbitration Association.

This is according to article 6 of the ICDR rules, which states that parties may agree on how to appoint the arbitrators or inform the administrator how to proceed regarding this.

Other aspects decided by the parties regarding this procedure were that the procedure should take place in São Paulo, SP Brazil (article 13 ICDR), and it should happen in Portuguese and English simultaneously (article 14 ICDR). Furthermore, in the arbitration agreement it was also stated that the decision should be made within sixty days of the arbitral tribunal being selected and the substantive law used should be the one of the state of New York (article 28 ICDR). The fact that the parties decided all these aspects of how the arbitration procedure should happen – according to articles of the ICDR/AAA – was essential for the success of this dispute resolution case. If the parties agreed to solve their dispute using these rules, it is because these were the best conditions with which to solve this issue. As in the previously analyzed case, using three arbitrators

was an advantage to solve this case, due to the complexity of the case and the values involved.

In January 2004, the Israeli company notified the Brazilian company that it was starting an arbitration procedure and selected its arbitrator. In the same year the party-appointed arbitrators selected the president arbitrator and notified the ICDR. The hearings were then scheduled to happen in August of the same year in São Paulo, according to article 20 of ICDR (hearings should be announced to the parties at least 30 days before the date they will happen).

The tribunal requested the parties to reduce the time they would have available to present their case to two hours so the work could be finished within the 60 day deadline of the arbitration agreement. This is an example of article 16 ICDR, which states that the tribunal may conduct the arbitration in whichever way it considers appropriate, assuming that the parties are equally treated and given the same opportunities to present their case, according to liberalism ideas.

The tribunal requested that the parties clarify the exact exchange rate from the US Dollar to the Brazilian currency, the Real. The parties did not respond to that request of the tribunal, so the value of one Real was decided based on the average value according to the exhibits presented. This request is an example of article 19, subpart 3 of ICDR rules (the tribunal can ask the parties to produce documents that may be necessary to clarify the issue being disputed).

Finally, it was decided in the award that the Brazilian company was obligated to pay the taxes which the claimant asked. Furthermore, the time it took to complete this procedure was less than one year. If this case had been taken to state courts, it would

have taken a much longer time, considering that the parties are located in different countries. Another positive aspect of this case is that the parties selected the substantive law which best suited their case. Thus, arbitration solved this dispute in an efficient manner.

2.3.4 Other Cases and Further Aspects

A total of six cases from the AAA were analyzed in this research. In the table below there is a summary of these cases. The cases in which there was only document analysis and no further evidence were coded as ‘doc’. The cases in which there were hearings, and documents were offered in evidence were coded as ‘hearing’. The field “award value” includes only the value of the decision, if there was any. The cost of arbitrators’ honoraria and AAA fees is not included in the award value. ‘Claim’ means claimant, ‘res’ stands for respondent and ‘unknown’ was used to represent not known values. Unfortunately, the awards analyzed do not provide a larger amount of information. The values shown are in US dollars.

Case N.	**Idiom**	**Discovery**	**Place**	**Law**	**N. of Arb.**	**Winner**	**Award Value**
3250894	English	Doc	Unknown	Unknown	01	Claim	$53,450.55
3250896	English	Doc	Unknown	UNCITRAL	03	Res	$9,241,718
3457619	English	Hearing	Unknown	NY	01	Claim	$359,459
833875	English	Hearing	NY	NY	03	Res	0
3250897	English and Port.	Hearing	São Paulo	NY	03	Claim	$156,929.9
3419738	English	Hearing	CA	Unknown	01	Claim	$15,750

In case n. 3250896, the respondent was awarded money because he amended the original request and was the winner of his counterclaim. In Case n. 3250894 the respondent was the only one who had to pay the costs. In all the other cases both the parties divided the costs of the arbitration.

2.4 Conclusion to Part II

This part began with a discussion of the historic scenario that led to the creation of the American Arbitration Association followed by an analysis of its goals. The AAA is a very successful institution which has been doing an admirable job in administrating arbitration cases and which has a leading role in international arbitration in the world. The rules of the ICDR/AAA are current and allow parties in different countries to solve their legal disputes in an efficient manner, with the possibility of having the award enforced immediately in most of the world.

Even though the ICDR/AAA rules are very efficient for international arbitration issues; some suggestions to make them even more effective were made. These suggestions would make international arbitration even more efficient: the deadline to file a response should only begin when all the parties receive the arbitration notice, not when the administrator receives the notification; the timeline for amending the arbitration request should be until the response is filed or when there is no necessity to produce further evidence; three arbitrators should be mandatory, instead of optional; the award should mandatorily state the reasons for the decision; and there should be more transparency in the procedure.

These suggestions would contribute to making international commercial arbitration under the AAA/ICDR rules more attractive. Even though there would be less freedom for the parties to decide procedural aspects of their case, arbitration would be more efficient, since the procedure would be faster and fairer. These suggestions are especially related to two political science theories, liberalism and neoliberalism. The proposed changes would make the procedure fairer and the parties would have more equal conditions during the arbitration.

The aforementioned cases are good examples of how the AAA is essential to efficiently solve international disputes, especially commercial ones. The three cases studied in this part were resolved in a short period of time using the most appropriate substantive law. Furthermore, the fact that the parties can choose their arbitrators, the location of the arbitration, and the language in which the procedure will happen make this ADR method an excellent way to solve disputes, since the parties can adjust the procedure to their specific needs.

PART III - INTERNATIONAL CHAMBER OF COMMERCE

The International Chamber of Commerce (ICC) will be the focus of this part. Initially I will explain the historical origins of this organization, and then I will analyze its rules. Finally, some awards issued according to ICC rules will be analyzed and comments will be made regarding the effectiveness of ICC rules.

3.1 International Chamber of Commerce

I will at first explain the history of the International Chamber of Commerce, which is based in Paris and was created in 1919. In sequence, I will analyze its regulations and selected awards of international arbitration. Some suggestions regarding alteration of rules will be made and this information will be used to compare and contrast the ICC with the AAA.

3.1.1 History

After the end of the First World War, Europe was traumatized by the horrors of war and its economy was destroyed. There was a general intention of fostering trade within European nations and improving the economic conditions of these countries. These nations were looking for ways to improve international trade and relations between them. In addition, the business class was the one calling for better commercial conditions.

Businessmen have been trying to foster better trade conditions since before the beginning of World War One. In June 1914, a congress was held in Paris aiming to create better conditions for international trade. Businessmen from most of Western Europe participated in this event. This congress planned to create the international chamber of

commerce. However, the plans which originated in this event were interrupted by the beginning of the First World War in August of that same year.

After the end of the war there was an even stronger desire to create an international institution to help increase the amount of international business. Both American and European businesses were interested in creating better conditions for international trade at the end of the decade. Thus, businessmen from the USA, Belgium, Great Britain, France and Italy devised the creation of an international trade organization. This group of businessmen also aimed to create better conditions for peace, and they knew that with stronger international trade, wars would be less likely to happen. Because of their intention to promote peace through trade, this group of businessmen was called "the merchants of peace" (Ridgeway, 1959).

The creation of the International Chamber of Commerce was a result of a meeting that happened in Atlantic City, New Jersey. European businessmen joined their American counterparts on October 20-24, 1919 with the intention of creating an organization which had been discussed in the International Congress of Chambers of Commerce that was held in Paris in the spring of that year (Ridgeway, 1959).

The ICC was founded in 1919 in Paris by Etienne Clémentel. He was the first president of this institution and the former Minister of Commerce of France. Clémentel was very knowledgeable about business and was trying to create better ways to foster commerce, investment, flow of capital, and open markets. With this intention he created the ICC, headquartered in Paris, France.

The postwar scenario played a large role in the creation of the ICC. Regarding this, Ridgeway (1959) writes: “The International Trade Conference, which met in Atlantic City…, was called with a view to supplying an initiative for restarting the privately operated peacetime machinery of world industry and commerce” (p. 30). Therefore, during its first decade the ICC focused mainly on reparations of war debts from the first big war.

During the depression years of the 1930s, the ICC played an important role in helping to diminish the protectionism that appeared during that crisis. After the Second World War, the Paris-based institution remained important on the international scene, continuing to foster international trade. Accordingly, it is stated on ICC United Kingdom web site (Internnational Chamber of Commerce UK, 2004):

> ICC’s reach—and the complexity of its work—have kept pace with the globalization of business and technology. In the 1920s ICC focused on reparations and war debts. A decade later, it helped hold back the tide of protectionism and economic nationalism during the depression years. When the war came in 1939, ICC assured continuity by transferring its operations to neutral Sweden, and remained a diligent defender of the liberal multilateral trading system in the post-war years.

A short time after its creation, the leaders of this institution realized that a major obstacle to international trade’s further development was the lack of an efficient way to solve international disputes that may arise from international trade cases. In the early twentieth century there was not a major institution dealing with international arbitration. In order for international trade to further develop, international arbitration needed to have better conditions. Thereafter, the International Court of Arbitration (ICA) of the ICC was

established in Paris on January 19, 1923. This institution was chaired by Etienne Clémentel and was made up by 120 successful businessmen (Eisemann, 1983).

Since the inception of ICC, there was already a plan to create an institution responsible for dealing with international arbitration, as Eisemann (1983) sustains: "Certainly, ever since it foundation, the International Chamber of Commerce considered that one of its main priorities was the setting up of a centre of international commercial arbitration within the framework of the organization" (p.391). This materialized four years after its foundation.

With time the number of cases administered by the ICA/ICC grew, and today this institution is one of the two major international arbitration associations in the world. Today the ICC is a global organization with national committees in 90 countries in the five continents and representatives in 30 other countries. The ICA received 599 new cases of arbitration in 2007, compared with 593 in 2006. In order to deal with this volume of cases, the ICA has a staff of 126 lawyers, academics and professionals related to business from 88 countries around the world (International Court of Arbitration, 2008).

3.1.2 Goals

Just like its American counterpart, the ICA was not created with the intention of realizing international arbitration. The main intention of the ICC's arbitration court was to supervise, organize and help with the arbitration procedures. Helping to solve international disputes in the commercial area fosters favorable conditions for international trade, one of the main goals of ICC. In the 2008 report of the ICC the main mission of that institution is clearly stated: (International Chamber of Commerce, 2008)

> The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century.

The ICA/ICC will help parties to form their arbitration body and supervise the arbitration procedure. There is a roster of arbitrators approved by the ICA to conduct cases and the parties will count on the supervision of the ICA to guarantee that the arbitration procedure is followed properly. As with the AAA, the European institution will not analyze the merit of any case. That function is for the arbitrators themselves.

Three main activities are performed by the ICC: rules-setting, arbitration and policy. The rules and policies that the International Chamber of Commerce makes are related to international trade and are widely used in the international trade scenario. The ICC issues policy in the area of international business, but it is important to remind that these rules are not law, and thus are not mandatory. Yet, companies throughout the world use them. One example of these rules is the Inter Commerce Terms, Intercoms. These terms regulate who has to pay for the transportation expenses and who is responsible for the merchandise while it is being transported.

3.2 ICC Rules

In this section the rules for international arbitration procedures from the International Court of Arbitration of the International Chamber of Commerce will be

analyzed. These rules are available on line at www.iccwbo.org. These rules were amended and are valid since January 1, 1998; however, the cost scales were updated on January 1, 2008. A task force was created in October 2008 in order to update the rules of this institution. The intention of this task force is to study and revise suggestions that have been made regarding changes in the rules of the ICC. Based on their study recommendations will be made to update the rules of this institution. There are 175 members from 41 different countries in this task force and their first meeting was held in March 2009 (International Chamber of Commerce web site, 2009).

3.2.1 Beginning of International Arbitration Procedure

According to the ICC/ICA rules, the party interested in starting the arbitration procedure needs to notify the secretariat. The secretariat is the administrative body of the ICC/ICA which will supervise the arbitration procedure. It will be the responsibility of the secretariat to notify both the claimant and the respondent of the request for the beginning of the arbitration procedure. Article 4, subpart 2 states that the date of the beginning of the arbitration will be the date that the secretariat received the written request, the same criteria used by the AAA.

The same article contains several requirements of what the written request for the beginning of the arbitration procedure should contain: the description of the nature of the circumstances and the dispute, the arbitration agreement, choice of arbitrators and the language and location where the procedure will take place. This is a positive aspect of the ICC rules, since in the very first act the party requesting the beginning of the arbitration procedure should already indicates all these preferences. (In the American Arbitration

Association there is a deadline of forty-five days for the parties to decide who the arbitrator is. Only then the administrator can appoint the arbitrator. In the European institution the claimant must express who his /her choice of arbitrator is in the beginning notice.)

It is then the responsibility of the secretariat to send a notice to the respondent so s/he can reply to the case. This is important, since the secretariat is completely neutral and it will be the one in charge of notifying the opposing party. In the reply, the respondent must express his answer to the claims: if he agrees or not with the arbitrator indicated by the claimant, his indication of arbitrator if he disagrees with the one appointed by the claimant, the place of arbitration, the language used and the rules which will be used in the procedure (article 5). Therefore, the claimant expresses his opinion about all these important issues in the initial communication and the respondent must reply about these issues in his answers. I believe that this is a positive aspect of ICC/ICA arbitration, since the parties must make these choices at the first opportunity they can, instead of waiting up to forty-five days in order to do so. The respondent must be very careful when filing an answer, because it is also necessary to file the counterclaim together with the answer.

Article 6 deserves commentaries because it regards the validity of the contract. According to subpart 4 of this article, the arbitration procedure will continue to exist even if the contract is void, *as is:* "the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent, provided that the Arbitral Tribunal upholds the validity of the arbitration agreement." In an article about this question, Bergeron (2004) highlights the importance of this topic:

"The answer to the void contract question will carry wide- reaching implications for arbitration doctrine, as well as in the broader context of the federalism debate" (p. 424). This is important, because otherwise a state court could rule that the contract is null and this could make impossible any arbitration regarding that contract.

3.2.2 Arbitrators

Articles 7 through 12 have the rules regarding the selection of arbitrators. The general rule is the one previously discussed that the claimant must indicate his arbitrator, the respondent must indicate his, and the secretariat will confirm it. The number of arbitrator(s) will be one or three. If the number is only one, the parties need to agree on who the arbitrator will be and will nominate him/her. In the cases that three arbitrators will compose the arbitration tribunal, each one of the parties will appoint his arbitrator and the secretariat will point the third one. Although having three arbitrators may make the procedure slower, it is a good option overall. Three people deciding the case will make the decision more reliable: there will be fewer possibilities of fraud and the parties will be better represented, since each one of them will have the chance to name an arbitrator. This will make the procedure more equal and fair, in accordance to liberalism ideas.

The ICC case n. 1110 of 1963 is an example of an arbitration case that has been shown to have been corrupted. In such case, there was only one arbitrator, Judge Lagergren and the dispute was between one French and one Argentinean company. This award has been constantly studied in the arbitration literature and in 1993 the complete copy of the award was published. These are the words that Sayed (2004) uses to refer to

this case : “The full publication of the award has also revealed the facets of the case, which make the award so filled with conspicuous claims, vivid arguments and emotive arbitral decision-making” (p. 59).

It is important to consider the nationality of the arbitrator before appointing him, because this can greatly influence the neutrality of the arbitration. In order to ensure neutrality, the arbitrator has to sign a neutrality agreement. This is a proof of the concern of the ICC/ICA with neutrality of arbitrators. That is essential for the success of an arbitration procedure. Another rule that I classify as important to guarantee the neutrality of the chair arbitrator (or the sole arbitrator) is that he should be of a different nationality from the parties involved, *ipisis literis:* “The sole arbitrator of the chairman or the Arbitral Tribunal shall be of a nationality other than those of the parties.” (article 9, subpart 5). This way, the arbitrators pointed by the parties can have the same nationalities of the party appointing them, but the chair needs to be of a different nationality. This will help ensure the neutrality of the case.

One point on which the ICA rules differ from those of ICDR is that there is one extra possibility for the replacement of an arbitrator. This professional can also be replaced if all the parties involved in the arbitration procedure request it. This is a positive point, since if all the parties request the replacement, it is a sign that he is not doing a satisfactory job and everybody is displeased with the progress of the arbitration.

3.2.3 Place of Proceedings

The parties should agree on the place where the procedure will be held. If they fail to do so, the arbitrators will make this decision. However, the official place where the

arbitration will be held is not so important in the ICC/ICA arbitrations because the arbitrators have the freedom to conduct hearings at any location they believe is appropriate. It is not clear in the ICC/ICA procedures if the arbitrators need to notify the parties with enough time so they can make their traveling arrangements to the place specified by the arbitrator, whereas the AAA/ICDR rules are very clear in this aspect. One point of vital importance is that the place where the procedure will happen is neutral and will not interfere with the results. Therefore, when the secretariat of the ICA chooses the place of the arbitration, legal, cultural, and geographic aspects will be taken into account. According to this, Weisman (2007) writes: "The court wants to ensure that the place of arbitration does not favor one party over the other in geographic, cultural or legal aspects" (p. 8). It is important to guarantee that there is an adequate notice of the hearings that are scheduled, as Inoue (2000) concludes:

> American standards of due process as applied to foreign arbitral awards, therefore, can be interpreted to require ultimately 'minimal requirements of fairness.' Elements of 'adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator' should be the necessary minimum requirements of fairness (p. 260).

3.2.4 Procedure Rules and Language

Regarding the procedure rules, article 15, subpart 1 states that the procedure rules to be followed are the ones issued by the ICA/ICC. However, parties can select whichever other rule should be applied: "where these rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not references is thereby made to the rules of procedure of a national law to be applied to the arbitration." It is important that the procedure laws are carefully selected to be used in

international arbitration. Using countries' substantive laws in international arbitration may be a good option, because in many occasions the law of a specific country will be the most appropriate one to settle the issue. The procedure law can also be essential for the success of the arbitration, so it should be carefully selected. Regarding this issue, Zhang (2006) writes:

> In the last few decades, many efforts have been made to regulate contractual choice of law internationally. The preference has been to formulate "multilateral rules of the conflict of laws based on connecting factors which give foreign law and the lex fori [forum law] an equal standing to be applied (p. 546).

The rules regarding language selection are simpler in the ICC/ICA than in its American counterpart. There is no preferred language; however, since the ICC is a French institution, French is used in a large number of procedures. The only specification regarding language is that if the parties do not choose the language, the court will decide this considering all the relevant circumstances, especially the language of the contract which the arbitration is related with: "In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract" (article 16). It is important to have the procedure carried out in the same language used by the parties in the arbitration agreement (like in the AAA/ICDR rules), because if this was the language chosen to be used in the arbitration contract, it should be the one in the arbitration procedure.

One important issue is that the working languages of the court and its secretariat are French and English. Thus, if arbitration is happening in Italian and the secretariat has any administrative input in this procedure, the language used by the administrative body

will be either one of its two official languages, English or French. The professionals that work for the ICA are fluent in numerous languages, but they are only obligated to use their two professional languages in their communication with the arbitrators and parties. This could be burdensome, since the parties may not speak these languages.

3.2.5 Term of Reference

One bureaucratic requirement that is present in the ICC and is not in the AAA is the term of reference that is regulated in article 18. The arbitrators will draft a document based on the initial claim and the reply that states the issues to be considered, addresses to which the notifications should be sent, place of the arbitration, name of the arbitrators and reference to the substantive law that will be used in the procedure. This document is to be signed by all the parties. If any of them refuses to sign it, the secretariat of the ICA must approve it and only after this can the arbitration proceed.

This is a bureaucratic act that can cause the arbitration to last longer; however, in my opinion, the term of reference is an important document, since it will clarify which issues should be resolved and have the names of all the parties. After this document is approved, the arbitrators should provide a timetable that the arbitration procedure must follow. This is another requirement not found in the AAA rules which is positive, because it lists all the polemic points to be discussed in the award. This document will be useful to parties, as they will have a complete schedule of the arbitration proceedings. Supporting my view, Brown (2008) writes:

> They are distinguished by their requirement that the parties prepare a detailed 'Terms of Reference', which is similar to a pretrial order and summarizes the claims of the parties and the issues to be settled as part of the arbitration proceedings. While the Terms of Reference can greatly assist the parties in

> framing the issues, and may even facilitate an early settlement of the dispute, the exercise can be somewhat time consuming and expensive (p. 137).

Following the same thought, Gwyn and Tayloe (1999) assert: “In practice, preparation of the ICC terms of reference can lead to significant delays beyond the two-month deadline under the ICC rules, as parties inevitably seek to shape them to their own advantage” (p. 4).

Even though the parties will try to shape this term of reference to their advantage, both the parties and the arbitrators will clearly know the fundamental issues to be settled in the arbitration procedure. It is also important to note that this document does not replace the arbitration agreement.

3.2.6 Hearing

It is known that the arbitration procedure is confidential, unlike a trial in a state court. In recent years, doubts regarding the privacy of arbitration arose in the international scenario. There were court decisions affirming that if it was not clearly stated in the arbitration procedure that the award is confidential, the parties could disclose information of the procedure (Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc – Swedish Supreme Court 2000 and Ali shipping v. Shipyard Trogir – High Court of Australia 2001). In order to avoid this, the ICC inserted a clause in its rules claiming that information related with the arbitration procedure should not be disclosed. The words of Hans Smit (1998) regarding this issue are very wise:

> Confidentiality has long been touted as one of the advantages of arbitration. However, until recently, institutional rules generally did not provide for confidentiality. The ICC Rules were the exception. They provided, and in Article

> 6 of Appendix I and Article 1 of Appendix II, continue to provide, for confidentiality, but only for the proceedings before the Court itself, not for the proceedings before the arbitral tribunals. This situation changed as the result of amendments to the ICC Rules and those of the London Court of International Arbitration that entered into effect on January 1, 1998 (p. 233).

Article 20, subpart 7 claims that the arbitrator can take measures to protect the trade secrets and confidential information disclosed in the arbitration. This is one of the main advantages of arbitration, and it is important that there is an article referring to those issues. Ragavan (2001) argues that trade secrets could be any information that gives competitive advantage:

> A trade secret can consist of any pattern, device, compilation, method, technique, or process that gives a competitive advantage. In corporate terms, even items or data such as customer lists, financial information, recipes for food or beverage products, technical subject matter of a patent, marketing procedures, or a professional questionnaire can be protected by trade secret (21).

It is interesting to notice that although both the institutions analyzed in this thesis have this concern, the ICC discloses more information and still preserves trade secrets related to the arbitration procedure.

Article 21 complements articles 6 and 18 (default procedure). If a party is properly notified and decides not to appear without a reasonable excuse, the procedure must continue. Accordingly, Derains and Schwartz (2005) write: “This provision, confirms the right of the Arbitral Tribunal to proceed with a hearing in the absence of one of the parties. It, thus, supplements the general provision on this subject” (p. 288).

Subpart 4 of article 21 states that the parties can be assisted by advisors in the hearings: “The parties may appear in person or through duly authorized representatives.

In addition, they may be assisted by adviser." Thus, according to ICC rules any person can be an advisor, since the rules only state that an advisor can assist the party. Around the world it is more common to have a lawyer doing so.

Finally, it is important to consider that it is not necessary that there will be a hearing in an arbitration case and that whenever it is possible to decide the case based on documents, this should happen. This suggestion is in the report 'Techniques for controlling time and costs', authored by the ICC and available in its web site: "If it is possible for the arbitral tribunal to decide the case on documents alone, this will save significant costs and time" (p. 12). It is also a good idea to use teleconferences when this will not cause problems to the parties.

3.2.7 Interim Measures

Article 23 regards interim measures. Anytime before the arbitrator has received the case, the parties may ask a state judge to impose interim measures. If the confirmed arbitrator has already received the case, the parties will have to ask him for an interim measure. This is an important feature for the success of arbitration, since parties are located in different countries in an international arbitration case, and it is important that measures are quickly taken in order to guarantee the conservation of the asset being discussed. Regarding the importance of these measures, William Wang (2003) wrote in an article about this subject:

> Interim measures are an absolute necessity to protect what is at stake in the arbitration. Regardless of whether evidence, real property, personal property, or financial assets needs to be preserved, there must be an effective procedure for maintaining the status quo. Without the protection of such provisional remedies, the outcome of the arbitration could become meaningless to the winning party (p. 1059).

Although this kind of measure is so important for the success of arbitration, in some countries this is not possible, because the national law only allows state judges to issue an interim order. That is the case in Italy. In Switzerland, a place where a large number of arbitration procedures are realized, until 1989 interim measures could not be authorized by arbitrators (Derains and Schwartz, 2005). There is a great variety of rules regarding interim measures in international arbitration, and it is important that the ICC allows the arbitrator to order interim measures (Gaitis, 2005).

According to article 23, subpart 1, the arbitrator can order interim measures as soon as he is confirmed. This means that it is not necessary to have the terms of reference ready before this kind of measure can be taken. However, if the case has not been received yet by the arbitration tribunal or the arbitrator has not been selected, there is no possibility of having an interim measure. The parties will have to ask this from a state judge if it is an emergency that cannot wait until an arbitrator is selected and receives the case.

One point that is not efficient in the ICC rules is that there is no provision of punishment for a party that does not comply with interim measures. If there is no compliance with these measures, they become pointless. This is a complex issue because the right to punish is exclusive to the judiciary power. However, the party that does not comply with interim measures could receive a fine from the ICC. This can be enforced all over the world, just as an arbitration award. Accordingly, Marchac (1999) states:

> The authority of arbitrators is nevertheless limited by nature, as arbitration remains a private way of solving dispute without executor force. Therefore, the need of the parties for quick effective interim measures may only be satisfied by

> local courts, which have an increasing complementary and supportive role (p. 138).

3.2.8. Award and Further Procedure

The decision of the arbitrator is stated in the award. According to the ICC regulation, the award must be issued in six months counted from the signature of the terms of reference. This is not a fair way to measure the time. The ICC rule is not satisfactory and needs to be changed. It is important to have a deadline for the award so the arbitrator does not take a long time to complete his award; however, counting this time from the beginning of the procedure is a bad idea. The discovery can be longer than expected, or shorter, and this is not controlled by the arbitrators. It is not possible to know for sure how many hearings will be necessary, nor how many witness will be requested. Thus, the end of the last hearing is the best time to start counting a deadline for the issuance of the award. It could be argued that the six month-deadline previewed on article 24 of the ICC rules is the ideal time for the completion of the arbitration procedure; however, the factors previously discussed can be a legitimate reason for the arbitrator to take longer to complete his task. This would be a more rational attitude.

The arbitration court has the power to extend this deadline, either pursuant to a request from one of the parties or due to its own initiative (article 24, subpart 2). This has happened frequently and is causing parties to criticize the court (Derains and Schwartz, 2005). Thus, it would be a good idea not to have a deadline counting from the beginning of the procedure, but from the end of the discovery in order to meet these deadlines.

One point in the ICC rules which was added in 1998 claims that the award should include the reasons for the decision: “The award shall state the reasons upon which is based” (article 25, subpart 2). This is important so the award can be enforced in other countries. However, article 17 recognizes the possibility of the award be decided *ex aequo et bono* (according to the right and good). Another possibility for the arbitrator according to the same article is to decide *amiable compositeur*. That means the arbitrator can decide according to the legal principles that he believes are fair, without being affiliated with any national law. This is not a good option, and ICC/ICA could change this, because an award might not be enforceable in another country if it was decided only according to the right and good, without considering any national law.

However, in order for the arbitration tribunal to decide using these equity possibilities, the parties need to agree that the arbitrators may decide based on equity. In my opinion, it would be better if this was not a possibility at all, since a party may not know that an award based on equity may not be enforced in some nations. In some countries there is national legislation claiming that the arbitrator can decide the case according to whichever law he considers appropriate (Article 1496 of the French Civil Procedure Code and Article 1054(2) of the Dutch Code of Civil Procedure). In agreement to this, Derains and Schwartz (2005) state: “Apart from being required by the law in most jurisdictions today, the reasons set forth in the Award should demonstrate that the Arbitral Tribunal has given full consideration to the parties’ respective submissions” (p. 309). If the arbitration has to decide according to a law, deciding based on *ex aequo et bono* is not allowed. Symeonides (2006) also recognizes that arbitration is not immune to state law:

> Of course, much of the enthusiasm surrounding non-state norms - the new lex mercatoria - centers around arbitration. However, contracts submitted to arbitration are not immune to state law, even when the parties expressly grant arbitrators the authority to decide as amiable compositeurs or ex aequo et bono (p. 210).

Thus, it is not a good idea to allow the arbitrators to decide according 'to the right and good' and it would be more fair and equal to decide without this clause (liberalism principle ideas), since the arbitrator would have to state the specific reason for the decision and this helps to treat parties equally and fair.

Finally, article 28 subpart 6 states that the award is binding to the parties. It is interesting to note that before the 1998 update in the rules this article claimed that the award was final, and now it says it is binding. One reason for this is that interim awards are not the last award in the arbitration procedure, since there will be another award later on. Another reason is because there is the possibility that the award may need to be corrected, thus, it should not be considered final but binding, as it states in the rules. Furthermore, some arbitration procedures may accept an appeal to a state court house (depending of the arbitration agreement), thus they are not final.

Still regarding this subject, Ginkel (2003) wrote:

> In the case of an arbitration held under the Rules of the International Chamber of Commerce (ICC), the right to assert the defenses to enforcement of awards in the New York Convention under Article V(1) were held to remain available to parties who are unsuccessful in arbitration proceedings, in spite of language of Article 28(6) of the ICC Rules of Arbitration.

Thus, the parties can still appeal an award, despite article 28 of the ICC. The Swiss Private International Law Act is one example of legislation that allows parties to appeal

an award. The case LaPine Technology Corporation v. Kyocera Corp. was taken to the San Francisco Court House in California as an appeal of an ICC award in which the parties decided previously that the award could be discussed in a court house. In my opinion, the possibility of having the award discussed by a state court house should not be allowed at all in arbitration. If the parties prefer to have a state judge ruling on their issue, they simply should not decide to use arbitration. Thus, I believe that the ICC rule should completely ban the possibility of judicial review of an award. If some awards in some cases can have an appeal for a state court and others cannot, parties that seek arbitration are not having the same treatment. If none of the parties can appeal an arbitration award to a state court, there will be more equality and fairness in the procedure, akin with liberalism ideas.

3.2.9 Correction of the Award and Costs

Article 29 is about the possibility of correcting the award. This article claims that typographical errors can be corrected and the edited document will be considered an addendum, not a new award. However, it is not clearly stated that the arbitrators cannot, in the addendum of the award, alter the merit of the decision. In the AAA rules this is very clear. It is my opinion that the ICC should clarify its rule to make clear that the arbitrator cannot alter the merit in the correction of the award. Otherwise an arbitrator could use the addendum to change his merit position and this is not the intention of the ICC rules.

Articles 30 and 31 regard the payment of arbitration costs. The claimant is obligated to pay the initial costs when he/she files the request to start the arbitration. The

defendant does not have to pay anything until the Terms of Reference have been signed. In my opinion this is not fair at all, since the claimant may not be the party that will lose the case, and it is not fair that this party needs to pay advance costs in order to begin the procedure. The final award should set the costs and decide who should pay for them: "The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties." (article 31, subpart 3). Thus, I believe that no party should be obligated to pay costs in order to start the procedure, since these could be paid in the end and that would ensure more fairness and equality for the parties. In order to make sure that the costs will be paid, the parties should provide some kind of guarantee to the ICC. This way, an asset that belongs to each of the parties with the value of the expected costs should be offered by both the litigating parties in order to guarantee the payment. This asset would remain in the possession of the party, but would be noted as a guarantee for a debt favoring ICC. This would ensure the ICC can collect its costs.

One interesting suggestion in the report 'Techniques for controlling time and costs', is that the arbitrator can censure unreasonable conduct of parties during the procedure (such as excessive document request). This way, if any of the parties request too much evidence without necessity or try to delay the procedure and, indirectly cause the arbitrator to spend more time than necessary on the case, that party can be monetarily penalized. Also, it is interesting that the ICC has issued a report with suggestions on how to reduce costs. This expresses the concern of this institution with making arbitration more affordable:

> The ICC recently reiterated its commitment to reducing the cost of the dispute resolution process with its creation of the ICC Task Force on Reducing Time and Costs in Arbitration, which resulted in the recent report of the ICC Commission on Arbitration on Techniques for Controlling Time and Costs in Arbitration (August 2007). The dedication of the ICC to reducing costs in arbitration could have the effect of encouraging secretarial appointments (New York City Bar report, 2006, p. 590).

3.3 ICC Case Studies

After conducting an analysis of the main rules that regulate the ICC arbitration cases, I will now analyze some of its awards. These awards are available in the Yearbook of Commercial Arbitration, published by Kluwer Law, the main source for awards issued annually. Since there was the possibility of examining only six cases of arbitration in the AAA case study, I will select the same number of ICC cases to do this research.

Despite being published in this book, the awards analyzed herein are still confidential. As in the AAA awards, the names of the parties and all the details which would allow the case to be recognized by the public have been removed from the awards.

3.3.1 Case Number 11.307

In this case, corporation X, owned by a Sub-Saharan African country government, signed in 1994 a maintenance agreement with company Y in another Southern African country. Company Y would have to provide regular maintenance for airplanes owned by company X. Company Y hired a third company to provide information and assistance in its task with company X.

In the year of 2000 disputes arose regarding these contracts. Corporation X claimed that the contract with company Y and the third company that joined the contract later was null and invalid because members of company Y bribed the officials of the government that owned company X in order to sign this contract. Thus, X claimed that all the sum of 55 million dollars should be returned. The arbitration request was filed in November 2000. Respondent Y filed a counterclaim asking for a declaration that it was entitled to keep the entire amount of the contract.

According to articles 8, 14 and 17 of the ICA rules, the parties decided that this dispute would be settled by a panel of three arbitrators in London applying the law of South Africa. The Sub-Saharan claimant applied for a summary award in April 2002; however, the arbitration tribunal decided that this case had to be submitted to a full hearing. The reasons for this were that the arbitrators decided that it would be necessary to have a detailed discovery procedure in which witnesses needed to be heard and facts needed to be clarified.

The international aspects of this case are present. The parties are companies located in different nations. The procedure happened in a third country (United Kingdom) and the substantive law used was from one of the countries where the parties the parties had business. Thus, this arbitration case is international and the ICC/ICA offers proper conditions to resolve it.

After listening to several witnesses and analyzing several documents, the arbitration tribunal decided that this was not yet sufficient to satisfactorily settle the matter (International Chamber of Commerce, 2003):

> The written and oral evidence before the Tribunal is abundant, but not all of it is relevant to the issues raised by this case. Accordingly, the Tribunal will first set out its views of the relevant principles of South African law, in order to focus more sharply its discussion and consideration of the evidence before it.

This practice is according to the modern practice of arbitration, since the parties will not always provide enough evidence to the arbitrators. Articles 20, subpart 5 states that the arbitrator may, at any moment, summon the parties to provide additional evidence. After having enough evidence to allow a fair decision, the tribunal decided that employees of the respondent bribed officials of the state-owned corporation and that the contract was tainted with corruption, reason to have it declared void.

In the award, claimant X was partially victorious. The arbitration court concluded that the agreement it had with company Y was null since it was tainted by bribery. However, based on the South African law, it was accorded by the arbitration tribunal that not all the money paid by the respondent to the claimant should be returned. The reason for this was that, according to South African law and equity principles, the money paid for services already rendered should not be returned, even if the contract is declared void. The use of South African law in this case shows how this national law was helpful in order to appropriately resolve this case. Had this case been decided based only on *ex aequo et bono* it would have been confusing and harder to reach a fair decision, since it was so complex and involved parties in different nations.

However, according to the documents and testimony the arbitrators concluded that the corrupt company received an extra $8,421,765. The fair price that the government owned company should have paid for the maintenance contract was the sum that it paid minus the amount mentioned in this paragraph. Therefore, it was ordered by

the arbitration tribunal that this amount should be returned from company Y to company X, since this value was paid in excess. This way, the final award issued in 2003 ordered a partial reimbursement for the claimant company. After the arbitration tribunal listened to several experts in airplane maintenance, it set the proper price per hour for this work that the claimant should have paid to the respondent. All the restitution owed by the claimant to the respondent was the above mentioned value. It was also decided by the tribunal that parties should equally share the costs of the arbitration.

Thus, this case stands as a good example of how international arbitration under the rules of the ICC helped to solve a complex international commercial dispute. Were it not for the efficiency of arbitration rules, this case would have taken years to be resolved by state courts. Instead, the matter got resolved in less than three years, a reasonable time considering the complexity of the case.

3.3.2 Case Number 13.278

This was a highly sophisticated dispute among several parties in different nations. A tobacco company and a corporation from Luxemburg that is related to this company signed a sponsorship contract with a professional motorbike racer and his agent from the Netherlands. The sponsorship contract would be valid for two consecutive seasons and the motorbike racer would have to race for the team indicated by the tobacco company. After the end of the first season if the tobacco company wanted to terminate the contract, it would have to pay the biker his entire wage for the second season. If the biker wanted to terminate the contract early, then he would have to pay his sponsoring company the equivalent of his wage for the entire second season.

At the end of the first season the motorbike racer was unhappy with his team and signed a contract to race with another team for the following season. His position was below fifth place in the championship, and his contract claimed that if he finished below that position he would earn a smaller wage. He refused to pay the termination fine stated in the contract because, according to his lawyer, that fine was illegal.

Therefore, in May of the second season the tobacco company filed an arbitration case according to ICC rules claiming the payment of the contractual penalty of one year of salary. Furthermore, the sponsoring tobacco company also asked for punitive damages, since the racer announced late in the first season that he was changing teams, and there was not enough time for the tobacco sponsored team to find another competitive racer.

The parties had an arbitration clause in the contract selecting language, place, and law to be used in case of arbitration: (International Chamber of Commerce)

> Any controversy or dispute between the parties arising out of or relating to this agreement, or a breach thereof, which cannot be resolved by mutual agreement, shall be settled by binding arbitration conducted by triple arbitrator in accordance with the rules of the International Chamber of Commerce, in English language, in the venue of Paris, by one or more arbitrators, who shall be fluent in English and will be appointed in accordance with such Rules of Arbitration.

Thus, the parties selected number of arbitrators, where the procedure will happen, and in which language, according to articles to articles 8, 14 and 16 of the ICA rules.

In this case, besides deciding that the procedure would happen in English, it was determined that documents could also be submitted in Spanish or French without translations. This is further evidence of how the freedom of language selections helps to resolve the matter efficiently. In this case English is not the primary language of any of

the parties involved, and the procedure did not take place in an English speaking nation, yet English was chosen as the language of the procedure.

The case was conducted by only one arbitrator which followed Spanish law (International Chamber of Commerce, unknown year) “The arbitrator first concluded from the agreement, which she interpreted under Spanish law principles of contract interpretation.” The parties also selected the law to be used in an eventual arbitration. The parties preferred Spanish substantive law (Spanish Civil Code), since one of them is from Spain and the racing championship would take place in Spain. Also, this law seemed adequate in a case like this, since it did not create any obstacle for the resolution of this case. (article 17, subpart 1 of the ICC rules). This is one more example of how the flexibility of the ICC rules made it possible for this case to be resolved efficiently. Spanish procedure law was appropriate for this case, helping the parties to achieve a fast resolution.

It is my opinion that in complex cases like this three arbitrators would be more efficient than one, despite the added cost and potential increase in time. The advantages of having each party nominating an arbitrator and having a third neutral chair are clear in cases like this: each party would have their ‘advocate’ in the tribunal and they could help with translation and cultural issues that could arise during the procedure. The advantages surpass the disadvantages and help to ensure the fairness of the procedure.

The arbitrator decided that the racer broke his contract by signing a new contract with another team at the end of the first season and had to pay the early termination penalty. However, the claimant did not win punitive damages in this case, thus having a

partial victory. In order to come to this conclusion, several documents were analyzed and hearings were conducted. Witnesses were heard and the discovery phase satisfied the arbitrator, who then issued her award. These discovery procedures happened in English, Spanish and French without the necessity of translation.

The costs were ordered to be paid were 70% by the respondent, 30% by the claimant (article 31, subpart 3). This is a fair breakdown of the payment of the costs, since the respondent was not completely defeated in this matter (he was not sentenced to pay punitive damages for breaking the contract).

In sum, this case exemplifies well how the freedom of choice that ICC arbitration procedure offers the parties can help them to satisfactorily resolve their matters. It is evident that this case was resolved in a short period of time and efficient manner for all involved. Despite the high costs, arbitration was worth these expenses to get a speedy resolution of the dispute.

3.3.3 Case Number 12.172

A company based in the United Kingdom that develops software signed a contract with an American company, according to which the UK produced software would be sold by the American company. The American company had to pay royalties to the British company. The first payments occurred on the expected dates, but then the American company started to experience difficulties, and it could not make the payments anymore. An addendum was held changing the payment dates, but the American company once again failed to pay its debts.

The agreement stated that arbitration under ICC rules using English law would be realized in Toronto, Canada. Thus, there was a party from the USA, another from the United Kingdom and the law used in the arbitration procedure is from the UK. There was only one arbitrator, and the procedure started in June 2002.

The British claimant company asked for the payment of the outstanding amounts that the American company owed. The American respondent company replied claiming that it did not have to pay these amounts: (International Chamber of Commerce, 2003) "the respondent has maintained that the royalty payments were only payable to the claimant when and if the respondent made a sale of its software product that contained the claimant's software."

This case was not so complex, since it only demanded document analysis and one hearing to get resolved. The final award ordered the respondent company to pay the royalties that the claimant asked. Regarding the costs, the parties agreed that the costs and expenses of the arbitration should be equally shared by the parties, and so it was awarded. It would be preferable if the parties would have to pay their costs only in the end, since it is not fair to pay these expenses at the beginning of the procedure. This is another case in which arbitration efficiently resolved an international issue in a satisfactory way. The law chosen by the parties seemed to be adequate and the final decision was fair.

3.3.4 Other Cases

Six cases of the ICC were studied in this part of my research. Below there is a summary of these cases. The cases in which there was only document analysis and no further evidence were coded as 'doc'. The cases in which there were hearings and

documents were placed in evidence were coded as ‘hearing.’ The field “award value” includes only the value of the decision, if there was any. The cost of arbitrators’ honoraria and ICC fees is not included in the award value. In the field “costs”, only the ICC costs were considered, not the attorneys’ honoraria and traveling expenses of the parties involved. ‘Claim’ means claimant, ‘res’ stands for respondent and ‘unknown’ was used to represent not known values. Unfortunately, the awards analyzed do not provide a larger amount of information.

Case N.	Idiom	Discovery	Place	Law	N. of Arb.	Winner
9.613	English	Hearing	Geneva, Switzerland	Italian	3	Res
10.377	English	Hearing	Amsterdam, The Netherlands	CISG and Finnish	1	None
11.307	English	Hearing	London, UK	South African	3	Claim
12.172	English	Hearing	Toronto, Canada	British	1	Claim
12.421	English	Hearing	London, UK	British	3	Claim
13.278	English	Hearing	Paris, France	Spanish	1	Claim

In case 10.377, the claimant claims were denied and so were the counterclaims of the respondent, thus, there was no winner. CISG stands for Convention on the International Sale of Goods. The awards values, unlike AAA examples, were unknown, except for case n. 11.307, in which the award was in the value of 8,421,765 USD. In case

13.278 the claimant won most of its requests and paid only thirty percent of the costs. Regarding the language, in that same case even though English was the official language, documents could be presented and witnesses could be heard in Spanish and French without necessity of translation. The payment of costs was always by both parties, ranging from 50% for each party to 70-30%, depending on the case.

3.4 Conclusion to Part III

After analyzing the ICC/ICA rules and institutions it remains clear that this institution is a great example of a successful institution for international commercial arbitration. Certainly the ICA is helping the ICC to achieve its main goal of fostering international trade. Although the rules are not as updated as those of the AAA, they still work efficiently in resolving complex international trade disputes. The arbitration cases supervised by the ICA have involved parties all around the world, and this is good evidence of how international this institution is.

Several suggestions were made regarding the ICC rules. These suggestions are summarized as follows: there must be three arbitrators, instead of one; deciding *ex aequo et bono* should not be allowed; the deadline for the issue of the award should be counted from the end of discovery, not from the beginning of the arbitration; the possibility of appealing the award to a state court house should be banned; and no party should be obligated to pay costs in order to start the procedure, these should be paid later.

These suggestions pertain to all arbitration procedures. They would give less freedom to the arbitration procedure (not allowing parties to choose to have judicial review of the awards, etc.) Although there would be less freedom of the parties regarding the procedure, this would make international arbitration cases more efficient and it would be better for the international community. It is important to mention that the ICC recognizes their rules are out-of-date and need to be updated; as a matter of fact the task force for updating its rules was created last year. Most of the suggested changes would make the procedure fairer and give more equality to the parties involved, tenets of liberalism theory. There is a large influence of liberalism and neoliberalism principles in arbitration held by the ICC and the AAA. In the following part there will be a further discussion regarding these theories.

The three cases analyzed in this part show a variety of complexity, and how the ICA arbitrators have efficiently conducted these cases to have a fast and fair solution. The fact that more and more cases continue to be filed every year is evidence that this institution is having success in resolving international disputes. A larger number of cases were not analyzed because this thesis compares the ICC and the AAA, and since only six AAA cases could be analyzed, I opted to analyze the same reduced number of cases from the ICC.

PART 04 - DISCUSSION OF FINDINGS AND CONCLUSION

In this conclusion, the findings of this thesis will be further discussed. I will continue to analyze the data and findings of this research, and will further critically assess them. The data from the American Arbitration Association (AAA) will be analyzed first, and then that of the International Chamber of Commerce (ICC). These findings will be compared in order to discuss which of these institutions offers better conditions to resolve international commercial disputes.

4.1 Goals Achievement

Even though there are other major institutions that supervise international arbitration cases, such as the London Court of Arbitration, Stockholm Chambers of Commerce, and the Hong Kong International Arbitration Centre, both the AAA and the ICC are the leading institutions for international commercial arbitration in the world. However, the goals of the AAA and ICC go far beyond supervising international arbitration. In the next subsections, I will analyze each of these two institutions achievement of their goals.

4.1.1 AAA

The American Arbitration Association has as one of its main goals to foster conditions for arbitration as an effective dispute resolution method. This institution was created in order to help resolve disputes through alternative methods, such as mediation and arbitration: “We are committed to providing exceptional neutrals, proficient case management, dedicated personnel, advanced education and training, and innovative process knowledge to meet the conflict management and dispute resolution needs of the

public - now and in the future" (American Arbitration Association, 2007). Thus, supervising arbitration procedures and providing the administrative support necessary for these cases is one of the ways that the AAA is achieving its goals.

The AAA maintains a roster with professionals who conduct alternative dispute resolutions procedures like mediation and arbitration. The 'neutrals' on these rosters have been approved by the AAA to conduct sponsored procedures. These are highly qualified professionals who help parties to better resolve their disputes. This is a valuable service that helps the AAA to achieve its goals of resolving disputes. If the parties do not select their arbitrators, they may be selected by the AAA.

Furthermore, the AAA also constantly offers professional courses so dispute resolution professionals can be trained to resolve disputes in the best possible way. These courses are usually taken by attorneys that work as mediators or arbitrators, and they are essential so the AAA can provide properly trained professionals in dispute resolution. This is another important activity of the AAA that helps this institution to achieve its goals of helping to resolve disputes effectively in a timely manner. These advanced training courses also help the AAA reach its mission of education and service to society.

The AAA is one of the two major international arbitration institutions, according to the number of cases supervised by this institution in the last years (see table in section 1.5.2). As was discussed earlier, arbitration is an efficient way of resolving disputes that has long been used by humanity. The data in the table in section 1.5.2 is evidence that the AAA is meeting its goal of helping the public to manage conflicts in a satisfactory way.

The creation of the International Centre for Dispute Resolution (ICDR) is also evidence that the AAA is seeking to achieve its goals within the international sphere of this increasingly globalized world. With the ICDR, the international arbitration cases managed by the AAA are receiving an appropriate level of attention. This center has agreements with 62 arbitral institutions in 43 nations in order to allow the AAA to efficiently handle international arbitration procedures. Professionals from several parts of the world have been trained and are able to handle international arbitration cases with the same high quality that cases regarding American law are handled.

4.1.2 ICC

The International Chamber of Commerce has different rules in comparison with the AAA. While the American association was created specifically with the purpose of helping parties to efficiently resolve its disputes, the ICC was created with the intention of creating conditions to improve international trade. Shortly after its creation, it was concluded that an essential way to achieve this technique would be to foster international arbitration. This is one of the most appropriate ways to settle international trade related disputes.

The ICA was established with similar intentions of the AAA, except that it focused on international arbitration while the AAA lacked such an international focus. While the AAA only created its branch responsible for international arbitration at the end of the twentieth century, the European institution created its branch that deals with international arbitration in 1923. This gives the ICC a clear advantage in experience regarding international cases. Since the beginning the ICC had a focus toward

international arbitration, while the AAA only established its international arbitration department in 1996.

It can be concluded that the ICC achieves its goals. Its arbitration supervising/organizing services are spread around the world. According to data analyzed in this thesis, during 2007 the ICC was involved with roughly 600 new arbitration cases with parties spread across the five continents (see table in section 1.5.2). Furthermore, this institution has a worldwide staff to further assist their cases.

Besides the involvement of ICC with arbitration, there are many other functions performed by this institution. Updating international commerce terms and offering courses that benefit the international trade community contribute to the ICC's achievement of its goals. Helping to diminish the protectionism that took place after the World War II was another activity performed by this institution that is conforming to its goals. Guiding business to expand, helping to promote international treaties that are related to international dispute resolution (Hague convention on choice of court agreements), and updating business regulations (like the uniform customs and practice for documentary credit) are examples of services offered by the ICC that are essential for its success and reaching its goals. It would be hard to imagine international trade nowadays without the high quality services offered by the ICC. Its presence in ninety countries on five continents makes this institution truly essential for the success of international trade and arbitration.

4.2 Arbitration Rules

In this section I will focus my attention on the arbitration rules that were analyzed throughout this thesis. A final discussion about the findings will be made, and I will summarize which changes need to occur in these rules so they can better serve international arbitration. I will group these recommended changes according to the themes to which they pertain. Given the theories discussed in the previous subheading and how the arbitration rules of the AAA and ICC can be improved, below are my suggestions for improving them.

4.2.1 AAA

The rules of the International Center for Dispute Resolution were the ones analyzed in the second part of this thesis. These are the ones applied specifically to international arbitration, which is the focus of this thesis. The current regulation was updated in March of 2008 and it has 37 articles pertaining to arbitration. Besides being consistent with liberal and neoliberal ideas (ideas I see as more effective for understanding international arbitration than other options such as realism), I concluded that these rules are pretty efficient and up to date. The AAA is one of the two-leading institutions in the world that deals with international arbitration and the rules that were previously analyzed are the basis for these procedures. Would the AAA have been so successful if the rules that the procedures are based on were not efficient? Certainly not. However, there is always room for improvement and the aforementioned rules can be improved in some aspects. Below is a summary of the points I consider important in the rules of arbitration that need to be revised.

The beginning of the arbitration occurs when the administrator receives his/her notice of arbitration from the claimant (article 2, subpart 2). This is not unfair, as long as the deadline to file the response only starts to count when the respondent is notified of the case pending against him/her. In most legal systems in the world the litigation process starts when the claimant files the case in the court house (as in the USA and Brazil). The crucial point is not to consider the arbitration procedure started, but to count the time to file the defense. The importance of the date of the beginning of the arbitration procedure exists because there is usually a deadline to have the award issued, and this is usually counted from the beginning of the arbitration. Furthermore, it would be more rational and fair (liberalism) to have the deadline to file the response after the defendant has been notified.

Amending the case is another point that should be improved in the AAA rules. The current rules allow the parties to amend the case at any time, as long as the amendment is within the arbitration scope. It would be a burden to have the case amended in its final stage. After the discovery is finished, it is still possible to amend the case according to the ICDR rules. This could make it necessary to reopen the discovery and would slow the procedure. Thus, it is important to prohibit amendments after the initial phase of the arbitration procedure. It would be ideal to allow amendments until the respondent files the response of the case, not after that. One exception would be to allow amending the case when this would not necessitate the introduction of further evidence. This way, if by the end of the discovery the parties agree that one more point related to the arbitration agreement needs to be decided in the award and there is no necessity of further evidence, the case should be able to be amended. This rule, if adopted, would

prevent the parties from reopening the discovery of the procedure, which could cause extra delays for the issue of the award. Allowing the parties to amend the case before the beginning of discovery or after it if there is no necessity of new evidence is a rational option, since this would not cause any delay in the procedure and would allow the arbitrator to settle the new issues that were amended to the case.

The number of arbitrators in a procedure is also important. I suggest that three arbitrators be mandatory in every proceeding. If this rule is adopted and three arbitrators are involved with each case they can better analyze each case and reach a better conclusion (Lee, 2008, McLean and Wilson, 2008 and Sayed 2005). Furthermore, each party can point their arbitrator and he/she will be able to serve as a translator and cultural intermediary for the party in the procedure. It would be the responsibility of the third arbitrator to be the completely neutral one in the procedure. This would allow better awards to be issued, since they would be examined by three arbitrators instead of one. That can assure that the award is fair and the parties are equally treated, one of the tenets of liberalism.

It is also recommended that the parties do not allow the arbitrator to issue an award that does not state the reasons in which the decision is based. This kind of award can look bad and may not be accepted according to the laws of some countries, like Brazil. Furthermore, an award that does not state the reasons can treat the parties differently and not be fair. Therefore, an international arbitration award must state the reasons on which it is based in order to avoid problems of being recognized by other nations.

The issue of guaranteeing more transparency to the arbitration procedures supervised by the AAA is the most important proposed change. It is necessary to have more transparency in order to guarantee that there is no corruption in these procedures, and the best way to ensure this is through transparency. However, it is necessary to continue to maintain at the same time the confidentiality typical of arbitration. Hence, it is important to disclose more information, but at the same time continue to protect the industrial secrets that may be exposed in the arbitration procedure.

Thus, it is concluded that the suggested alterations in the procedure of the ICDR would make the international arbitration procedure a bit more time consuming and perhaps expensive (i.e., not allowing the arbitrators to write awards that do not expose the reasons). However, these proposed changes would contribute to make the international arbitration procedure even more efficient and trusted by the international community, besides also making the ICDR arbitration fairer and more powerful. Consistent with the focus on liberal and neoliberal ideas, however, the power of the institution is less important than its increased efficiency. Because key actors in the international system value the absolute gains that an efficient arbitration process can foster, they should be opened to the AAA gaining responsibilities that it does not have today, like approving the place where the arbitration will take place.

The proposed changes for the ICDR/AAA are summarized in the table below, according to the area to which they pertain:

AREA	PROPOSED CHANGE
Time to file defense	All parties should be notified before the time to file the defense begins;
Arbitrator	Must have three arbitrators instead of one;
Amending the case	Should be allowed only before the beginning of discovery, or after it if it is not necessary to produce new evidence;
Award	It must always state the reasons in which it is based;
Transparency	There should be more transparency in the procedures, without disclosing sensitive information;

It is important to note that the AAA rules are very efficient, and international arbitration cases have been conducted following these rules. However, there is always room for improvement and the changes proposed in this thesis would only make the ICDR/AAA rules more efficient in conducting international arbitration cases. All the rules of this institution were analyzed and only a small number of changes were proposed. This is evidence that the AAA has proper conditions to handle international arbitration cases around the world. The rules not mentioned should not be altered, since they are working properly.

4.2.2 ICC

The International Chamber of Commerce is the other globally known institution that deals with international arbitration. As with the AAA, the rules of the International Court of Arbitration were analyzed in order to interpret how efficient they conduct international arbitration cases. Based upon the analysis that I performed I conclude that

the ICA/ICC rules created good conditions to conduct international arbitration cases, however, they are out-of-date and need to be updated (the last time this happened was in January, 1998). Below I summarize the most important reforms to the rules of this arbitration institution that I suggest.

As in the American institution, the arbitration is considered to begin when the ICC receives the written request of the party interested in starting the arbitration procedure. The beginning of the procedure date is not so important, as long as the beginning of the time to file the defense only happens when all the parties have been properly notified of the procedure. That is not only fairer, but also more rational. The time to file the defense is thirty days.

Regarding the number of arbitrators for each case, the same commentaries made for the AAA are valid for the ICC. Furthermore, three arbitrators would make corruption more unlikely in an arbitration case, contributing to the fairness of the procedure (liberalism). This argument alone is enough to suggest that three arbitrators become mandatory in every arbitration procedure (Sayed, 2004).

The award issued according to the ICC rules must always state the reasons on which it is based. However, it is accepted that the award can be decided *ex aequo et bono.* This possibility should definitely be banned. Deciding a case according ‘to the right and good’ is not a wise idea, since this is too vague (Derains and Schwartz, 2005). Plus, as it was shown earlier (section 3.2.4), some nations (like France and Netherlands) require the arbitrators to base their award on laws, not in the *ex aequo et bono* principle. Even though international courts like the International Court of Justice (ICJ) use this principle in their

decisions, this is not a good fit with arbitration, which is a system based on more liberal ideas. The reality of the ICJ is different from international arbitration. In the United Nation's sponsored court house, the parties are mainly states and they must accept the rulings of the ICJ, whereas each nation has its own law with its rules regarding the recognition of international arbitration awards.

One highlight of the ICC compared to the AAA is that a term of reference is required by the ICC. This term of reference, even though it slows down the arbitration procedure, is a positive asset in the end. This document summarizes what will take place during the arbitration and can be very useful during the entire procedure.

A maximum time limit is set by the ICC rules for the arbitrator to conclude the case. The award is to be issued within six months of the beginning of the procedure. This is improper since the discovery can take longer than expected and it is not possible to predict this. Thus, it is my suggestion that the deadline to have the award issued starts to count from the end of the discovery. This would be more rational since it would be easier to avoid delays and conclude the procedure within the deadline.

Article 28 claims that the award is binding, not final. The same article used to say the award is final before the 1998 update. I would recommend changing this rule to the way it was before this change. If the award is not final, the parties can choose to allow an appeal from the award to an upper judiciary court and the arbitration procedure will be submitted to judicial review. Avoiding this is one of the main intentions of arbitration and there have been a growing number of appeals. The case LaPine Technology Corporation

v. Kyocera Corp. in the San Francisco court house is one example of judicial appeal from an arbitration award to a state court house (Ginkel, 2003).

The substantive and procedure law to be used in the procedure are of utmost importance for the success of the arbitration. Parties should be able to select whichever law they believe is the best in order for the arbitration to succeed. This freedom of the parties to select their law, auto regulating their case (akin with neoliberal ideas), is essential for the success of the arbitration (Zhang, 2006).

In the ICC, costs have to be paid by the claimant in the beginning of the procedure. This is not fair at all. The claimant is the one claiming something and with the current rules s/he will always have to pay costs up front. The ICC should find another way to guarantee it will receive its costs without obligating the claimant to pay costs upfront. This would cause the parties to be treated more fairly and equally (according to liberalism ideas).

I summarize in the table below the proposed changes in the ICC rules. These changes are grouped according to their area:

AREA	PROPOSED CHANGE
Arbitrator	Must have three arbitrators instead of one;
Award	It should be final and binding; It should not be based on *ex aequo et bono;*
Time for conclusion	It should be counted from the end of discovery, not from the beginning of procedure;
Costs	Should not be paid in the beginning of the procedure.

The American institution's rules are more up-to-date and thus more effective for international cases of arbitration. However, it is important to note that most of the rules for *both* the AAA and the ICC are efficient and do not need to be changed; thus, they were not mentioned in this study.

4.2.3 Implementation of Changes

The suggestions here made for both the AAA and the ICC should be implemented in steps so they can be more easily accepted by the international community. The changes proposed can be classified as first order, second order and third order. This classification of changes is proposed by Peter Hall in his article entitled "Policy paradigms, social learning, and the state: the case of economic policymaking in Britain" (1993). First order changes are those that reflect only details of the current system. In other words goals of the institution are the same and only the details of policy of the institutions have to be changed. Second order changes are the ones in which the goals of the institution are still the same, but there is a bigger change in the policy of the institution. Third order changes are the ones in which profound changes are to be made in the institution, changing not

only its policy, but the goals of the institution. That would be necessary because the current goals are flawed or are no longer proper for the institution.

Most of the changes suggested in this paper are classified as first order, since they only refer to details and do not require big adaptations in the policy of the institutions. Thus, changes such as notifying all the parties before the beginning of the defense, count the time for conclusion of the procedure from the end of the discovery, and state the reasons in the award are just minor changes and do not need require profound changes in the policy of either the AAA or the ICC.

One example of second order change would be the proposed change that three arbitrators become mandatory instead of optional. This change would be more profound than the ones mentioned in the first paragraph, but would not require change of goals and general rules of the ICC and AAA. It would be ideal for the institutions mentioned to implement these changes in a second occasion, implementing first the first order changes. This would make it easier to have the public get used to the smaller changes before proceeding to the bigger changes.

The only example of third order change is the one of increasing transparency in the AAA. Even though the AAA has been achieving its goals, there is a profound lack of transparency in their procedures and it is important to ensure more transparency to them in order to guarantee that there is no corruption. The table below shows all the proposed changes according to their order of classification:

1ST ORDER	2ND ORDER	3RD ORDER
All parties should be notified before the time to file the defense begins (AAA)	3 arbitrators should be mandatory rather than optional (AAA and ICC)	There should be more transparency in the procedure (AAA)
Amending the procedure only in the beginning of the procedure (AAA)	No appeals should be allowed from awards (ICC)	
Award must state the reasons in which it's based/not be *ex aequo et bono* (AAA and ICC)	The costs should not be paid in the beginning, but in the end of the procedure (ICC)	
Deadline for conclusion should be counted from the end of discovery (ICC)		

Hall (1993) claims that this process of implementing changes in parts has important consequences for political science theories:

> This analysis has important implications for contemporary theories of state. By disaggregating the process whereby policy changes into three subtypes according to the magnitude of the changes involved and by invoking the concept of policy paradigms, we can discern more variation in social learning (p. 287).

Hence, it would be good for the AAA and ICC to allow the implementation of these proposed changes to their rules in parts. The incrementalism of change implementation helps the public to better accept new ideas.

The implementation of these proposed changes would also be eased if parties involved in the change process have the same interest. The common interest of a large

amount of users of arbitration will make it more likely to have proposed arbitration changes accepted, according to functionalism theory previously discussed. It is important that the proposed changes be promulgated so the users of arbitration are aware of them and possibly support them. Implementing them in parts, following incrementalism theory will make it even more likely to have these changes well received in the international community.

Since the proposed changes are mainly first and second order changes, they are affiliated with functionalism theory rather than with neofunctionalism. For these changes being implemented there is no necessity of pressure from several national governments, since they are not so controversial (neofunctionalism theory).

NGOs have a strong power today, and the AAA and ICC are good examples of powerful institutions that play a key role in today's globalized world. Nations should not be concerned with the large amount of power that such NGOs hold, since this is a good division of power. Instead of power being concentrated only in the state, today non governmental agencies share some of the power that used to belong only to states. The use of arbitration through institutions like the AAA and the ICC is a good example of power that used to be exercised by the state and is now exercised under the supervision of private organizations.

The proposed changes in this thesis would contribute for further success of arbitration, which would mean even more power for these institutions. The fact that such NGOs may become even more powerful should not be considered negative, since these

institutions have shown for almost one century to be responsible ones. In the world where liberal and neoliberal ideas are valorized this division of power is welcome.

4.3Which Institution Is More Efficient and Why?

This is not an easy question to answer. I will look at the suggestions of change in the rules of these institutions and then at their presence in the arbitration industry to discuss which institution tends to be more efficient and why. First I will analyze the amount of rules that should be changed according to my suggestions.

In the AAA/ICDR rules, there are 37 articles, most of them with subparts, regulating international arbitration. They all were analyzed and I concluded that five points need to be changed in order to better serve international arbitration. In the ICC rules there are 35 articles, also the majority of them with subparts (even though there are fewer subparts than in the AAA) and a total of five suggestions were made. Therefore, the percentage of articles that need to be changed in the AAA rules is 13.51%, while at the ICC is of 14.28%. This information is summarized in the table below:

Institution	Number of rules	Number of changes proposed	Percentage of rules proposed change
AAA	37	5	13.51%
ICC	35	5	14.28%

Source: data collected in this thesis

At a quick glance, the slightly higher percentage of rules that need to be changed in the ICC is an indicator that the American institution is a better one for international arbitration. However, this is not a good indicator, since the numbers of rules that are suggested to be changed are the same. The reason why the ICC has a higher percentage is because there are two more rules in that institution than in the AAA. One of the reasons why the ICC has a higher percentage of rules needing to be changed is the fact that their last update happened in 1998, eleven years ago, whereas the AAA rules were updated last year. The world has changed in these last eleven years and the rules that were efficient eleven years ago do not reflect the necessities of international arbitration today. There is no mention in the ICC rules of any electronic computer based communications like e-mail. Last year a committee to update the ICC rules was formed, as discussed previously, which confirms the necessity of updating these rules. The AAA, on the contraire, recognizes and stimulates the use of e-mail as a valid communication between the parties.

The number of cases of each of these institutions is not very different. From 2005 to 2007, the ICC had between 521 and 599 new cases being filed each year (refer to table

in part 01; data for 2008 is still not available). The AAA had, for the same period, between 580 and 621 new cases. The number of new cases for the AAA is 4.15% bigger than the one of the ICC. This difference is not significant enough to thoroughly conclude which institution is better. However, one point to be observed regarding these numbers is that the ones from the ICC are regarding international and national arbitration, whereas the ones of the AAA are exclusively of international arbitration. Thus, it is suggested that the American Arbitration Association has been preferred for international arbitration cases over the International Chamber of Commerce.

Nonetheless, in some aspects the ICC has advantages over the AAA. Throughout history the ICC has leaned more towards international arbitration than the AAA. The European institution was founded in 1919 and in 1923 its international arbitration branch was created (the ICA). Since the beginning of this institution, there was the interest of creating a specific organ to deal only with international arbitration. The AAA was created seven years after its European counterpart in 1926 and only in 1996 was its branch specialized in international arbitration created. The numbers of these branches also favor the ICC. The ICA has national committees in 90 countries and representatives in another 30. Meanwhile, the ICDR has international arbitration agreements with 62 institutions in 43 countries, but it has offices in only three countries.

It should also be noted that the ICC was created with the intention of fostering international commerce. Since the beginning the founders of this institution knew they had to foster international arbitration as a way to enhance international trade. The AAA was created with the specific purpose of supervising arbitration cases. However, in the beginning the focus was domestic arbitration. With time the number of international

arbitration cases increased, but only in 1996 did this institution create its branch which specializes in international arbitration. This gives a lot more experience in international arbitration to the ICC than the AAA.

Another aspect in which the ICC is better than the AAA is transparency and access to information. It is known that one of the main advantages of arbitration is the confidentiality of the cases. Albeit cases are confidential they can still be disclosed to the public so the academic community can study them. Based on this thought the ICC publishes a large number of awards every year. In order to maintain the confidentiality of the cases a simple measure is necessary: the names of the parties and information that could be used to identify the parties are removed from the awards before they are published. Thus, awards are published in the yearbook of commercial arbitration yearly. The transparency of the ICC allows potential clients to better understand this institution and is a good example to be followed.

The AAA seems to avoid any kind of publicity of its cases and prefers not to publish them. There were only very few cases of this institution published in a hardly accessible legal data bank. This tendency of the AAA to not publish their awards, while the ICC adopts a policy of publishing them maintaining the confidentiality of the parties involved, is another suggestion that the ICC has a better reputation in international society and that they can publish their awards and still be considered an efficient arbitration company, as in fact they are.

Besides better access to awards, the ICC also has a much friendlier web site and access to information is easier through this institution’s cyber address. The information

found at AAA's web site is satisfactory, but the lay out and access to information at the ICC web site is better. This emphasizes the idea that the ICC is better known in the international society and thus discloses more information about its cases, without giving up the confidentiality of the cases.

Thus, each institution has its advantages over the other. The AAA has more updated rules and a larger number of cases being filed and supervised. The advantages of the ICC are a longer history specializing in international arbitration, better access to information regarding its procedures, and more transparency in publishing its cases. In my opinion the more efficient rules and larger number of international cases outweigh a longer history, easier access to information, and transparency. However, although it seems that the AAA is better than the ICC, there is not enough empirical evidence to conclude so.

4.4 The Cases Analyzed and the Parties Involved

As it was previously mentioned, six cases of each of the two major arbitration institutions were selected to be analyzed in this research. These cases all had parties from several different countries. However, a pattern of preference for each institution can be found according to the origin of the parties and the institution they selected to conduct the arbitration case in which they were involved.

In the six cases analyzed from the AAA, four of them had some connection with the USA. In three of those cases the substantive law used is the law of New York and in one the procedure happened in California. In the two other cases information regarding the parties, location, or law used was not disclosed. It is clear that when the AAA is selected to conduct international arbitration cases there is some connection with the USA, either the procedure is happening in this country of the law chosen to be used is American.

Regarding the ICC cases there is also a similar connection of the parties with France/European Union. In the total of cases analyzed, five of them used laws of European Union countries to select their dispute. The only one that did not use European laws happened in London. Of the six cases analyzed, five had at least one of the parties based in European Union countries.

Therefore, it can be concluded that the ICC is preferred when there are European parties involved or when the law of some European Union country is selected to be used in the arbitration procedure. The AAA is preferred by parties when one of them is from the USA or Canada or prefers to use American law in the dispute resolution procedure. Thus, in countries where there is a bigger American influence the tendency is that the parties prefer to use the AAA, while in countries where there is a bigger European influence the preference is generally for the ICC.

One more point that helps to understand the bigger number of cases that the AAA has is the fact that in the USA the only big arbitration institution is the AAA, while in Europe there are several other major arbitration institutions that deal with international

arbitration (LCIA, NAI, SCC etc.) Furthermore, there is also a bigger arbitration culture in Europe than in the USA.

This confirms the tendency of regionalism for international arbitration procedures. There is clearly a preference of parties to look for realizing the arbitration in an institution located in the same geographical area where they are located. As discussed earlier in section 1.5.3, this trend of regionalism is part of globalization. Parties are seeking international institutions to solve their conflicts. There is, however, a preference for the local institutions rather than ones in a farther geographical position (regionalism).

4.5 International Arbitration Regulation

The national legislations and international agreements that regulate national and international arbitration are important for the success of this alternative dispute resolution method. If legislation favoring the recognition and enforcement of arbitration awards were not available in the majority of countries, there would not be conditions for the popularization of arbitration.

Before the creation of the AAA there was a strong mobilization of parties in several states in the USA so legislation could be approved regulating arbitration. Fourteen states passed legislation in the early 1920s before the Federal Arbitration Act (FAA) was finally approved in 1925. Only one year later the AAA was established. For

the creation of the ICC there was also pressure in order to approve national laws that foster arbitration.

A next step was the approval of international covenants regulating and promoting international commercial arbitration. The New York convention of 1958 and the United Nations Commission on International Trade Law rules of 1985 are the most important international legislation regarding international arbitration. Both the ICC and the AAA played a major role in the creation and approval of these international regulations. If these two institutions did not exist and actively work towards better conditions for arbitration, these important regulations perhaps would be only plans today.

As a consequence of these international laws, several countries have been approving new domestic regulations upholding international arbitration. Besides that, superior courts all over the world have been more and more often adopting decisions that favor international arbitration (like the decision analyzed in part 01 of the German Supreme Court). In sum, it is also concluded that local and national regulations helped to create the initial conditions for the AAA and ICC to start operating. After a while, these institutions were the ones that sponsored the creation of new national and international regulations that helped to make international arbitration essential for the current globalized world.

4.6 Conclusion

In this study it is clear that international arbitration is an essential alternative dispute resolution method used in international commercial cases. It is also concluded that arbitration developed as a consequence of human necessities and it got further developed according to the new necessities that arose. The two major international arbitration institutions analyzed in this thesis are of essential importance for the functionality of international arbitration today and the proposed rules changes would enhance their performance.

Essential for all of the success of international arbitration are the solid legislation foundations recognizing and fostering conditions for the use of arbitration. The New York convention and the Uncitral model law are the two most important international documents for this kind of dispute resolution method and, despite being from such a long time ago, still lay solid foundations for arbitration use. Another point of utmost importance is that parties were interested in honoring arbitration awards before the appearance of written legislation because this would preserve their reputation in the business sphere.

The national legislation which surged in most of the countries around the world was also another important step in the popularization of arbitration in the international scenario. Several countries adopted new legislation throughout the twentieth century recognizing and enforcing international arbitration awards. As domestic arbitration became more popular in many nations international arbitration agreements started to be approved, such as the Geneva Protocol of Arbitration Clauses and at a further point in

time the main international arbitration agreements of the NY Convention and the UNCINTRAL were approved.

Finally, the importance of the institutions that supervise the international arbitration cases is also essential for the success of this ADR. It remains clear that both the AAA and the ICC are serious, competent and efficient non-governmental organizations that perform essential services for the international community. Both these institutions were created when the conditions for international arbitration were not so good and they exercised a lot of influence to improve the conditions for this dispute resolution method.

The AAA is the most popular institution with the biggest number of cases being filed yearly. Its cases have been well handled, but some improvement in their regulations would be welcome. If the suggestions that I have made in this thesis are adopted, this institution would be able to perform even better work and handle more cases. Eventually the AAA could become the leading international arbitration institution in the world. As of now I consider the AAA generally better than the ICC because there is a higher number of cases in this institution and its rules are slightly more efficient than the ICC. Another point that definitely needs to be improved by the AAA is the access they provide to information and awards. As shown previously, this is possible despite the confidentiality.

The ICC may have fewer cases being filed yearly than the AAA, but it is a very efficient international arbitration institution. ICC rules, which have not being update in over eleven years, need to be modernized. This and the other recommendations previously mentioned would help the ICC to be more efficient in conducting its

international arbitration cases and with that this institution could perhaps be more popular than its American counterpart.

International arbitration is essential to modern life for several reasons. It was shown that this is a faster way to resolve disputes, and in this globalized world disputes need to be resolved as fast as possible. The flexibility that arbitration offers continues to be an important reason why this method is constantly chosen to settle international disputes. Even though the suggestions proposed in this thesis would make this procedure a little less flexible, there would still be enough flexibility in the procedures. The confidentiality is, however, the best advantage of arbitration over litigation. Today parties are very interested in keeping their commercial secrets away from the public, and arbitration makes this possible. In sum, confidentiality, flexibility and speed are the advantages that make international arbitration so important in today's world.

Even though getting involved in disputes is a negative characteristic of human beings, this will continue to happen. Arbitration and other alternative dispute resolution methods will continue to be more important in a society where the fast and efficient resolution of disputes is more and more important. Institutions like the AAA and the ICC will continue to gain more power and important in international society.

I would like to point out that the suggestions which I have made in this thesis are not absolute and there is necessity of further research in this area. There is a vast literature in international arbitration, but the existing works fail to compare and contrast the rules of the two major international arbitration institutions. This is an interesting field and I hope that this work will stimulate other scholars to do further research in this area.

International arbitration is a great method of dispute resolution, but it could be even better if the suggestions offered in this thesis were accepted. As human history and commerce progressed, arbitration became a necessary development. Since this progression continues, it is important to continually keep the rules of international arbitration current. Time will tell us the outcome of these possible changes.

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