

Comparative Analysis Between the Peruvian Arbitration Law and the Arbitration Law of the Dubai International Financial Centre

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“If all of them would go to the same direction, this would throw off the balance of the world”

Nasreddin Hodja, *Balance of the World*

The present work analyzes the characteristics, limits and advantages of the new legislative decree that governs arbitration in Peru and the new arbitration law of the Dubai International Financial Centre.

1. Introduction

The Legislative Decree that governs Arbitration in Peru (LDA), Decree Legislative 1071, has a multiple similarities with the Arbitration Law of the Dubai International

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Financial Centre (LDIFC), DIFC Law N^o 1 of 2008. The LDA and the LDIFC even come in force the same date, September 1, 2008.

2. Genesis

It is convenient to initially observe that the latest LDA assumes as its main and direct model the Spanish Law of Arbitration (SLA) -60/2003, dated December 23rd.

However, when assuming the model of the SLA, our LDA indirectly assumes the model used by the former, which for the most part is the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL)¹, dated June 21st, 1985. This is combined with other laws that were also used to shape the SLA, such as the Swiss Federal Law on Private International Law², dated December 18th, 1987 (LPIL), and the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce³, effective from January 1st, 1998 (RICC).⁴

1. As recognized by the Exhibition of Reasons for the SLA, when indicating that "its main inspirational criterion is to base the Spanish legal regime of Arbitration on the Law Model elaborated by the Commission of the United Nations for the International Commercial Law, of June 21st, 1985 (Law Model of NUCMIL/UNCITRAL), recommended by the General Assembly in its Resolution 40/72, of December 11th, 1985, *considering the exigencies of the uniformity of the arbitration procedural law and the necessities of the international commercial arbitration practice*".

2. In such form, it is observed that article 2 (2) of the LDA, assumes, indirectly, the model of article 177 (2) of the LPIL. Also, article 13 (7) of the LDA, assumes, indirectly, the model of article 178 (2) of the LPIL.

Finally, we considered that, for effects of the best effectiveness of the LDA and in order to solve the problem generated by the possible conflict between the judicial litispentence and the arbitration one, that affects the same controversy or by prejudiciality, it would have been useful to also welcome the tenor of article 186 (1bis) of the LPIL, which indicates that "[The arbitration court] *decides on its competition, independently if an action on the same subject matter, between the same parts, is pending before a state or an arbitration court, unless by serious reasons the suspension of the procedure is required*".

3. In this sense, article 12 of the LDA assumes, indirectly, the model of article 3 (4) of the RICC. This indicates that "*the terms specified in this Regulation or fixed in accordance with itself, will begin to run the following day to that one in that a communication or notification is considered carried out according to the previous paragraph...*".

Also, article 23 of the LDA assumes indirectly the model of article 10 (1) of the RICC. This indicates that "*Where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is to be referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to article 9*".

Also, article 28 of the LDA assumes directly, the model of article 7 of the RICC. This indicates that "*1. All arbitrators must be and remain independent of the parties in the arbitration. 2. Before its appointment or confirmation, the person proposed as arbitrator must subscribe to an independence declaration and present in writing to the Secretariat any susceptible facts or circumstances, from the point of view of the parties, which may put in doubt his independence. The Secretariat will communicate in writing this information to the parties and fix a term so that these show their commentaries. 3. The arbitrator will have*

Also, the LDA receives elements from other foreign laws, such as the Croatian Arbitration Law, October 11th 2001 and effective from October 19th of the same year and other Regulations on Arbitration, like that of the London Court of International Arbitration (LCIA), effective from January 1st, 1998, and the regulations of the World Intellectual Property Organization (WIPO), whose influence is discussed further below.

The new LDIFC is based on the UNCITRAL model law⁵, combined with other legal structures used during its formation, such as the LCIA Arbitration Rules.

3. The arbitration model

From the dualistic nature of the previous General Law of Arbitration (GLA),⁶ where international arbitration was regulated totally or to a great extent by different rules from those concerning national arbitration, the LDA shifts to a new paradigm, the monist model of arbitration. That is one that, without accepting that international arbitration responds in many occasions to different circumstances⁷, assumes that the same rules should be applied to national and international arbitration,

In its current form, the LDA follows a recent trend amongst other jurisdictions in considering the Model Law of the UNCITRAL suitable, not only for international arbitration, but for arbitration in general.⁸ The LDIFC also uses a monist model of arbitration.

to present immediately and in writing, as much to the Secretariat as to the parties, any facts or circumstances of similar nature that may arise during the arbitration...".

Finally, articles 30, 31 and 72 of the LDA take as model -the first two- article 12 and -the last one- article 30 of the RICC.

4. A similar opinion is expressed by Verdera y Tuells, Evelio, *La Ley 60/2003, de 23 de Diciembre, de Arbitraje. Entre la Tradición y la Innovación* ("Law 60/2003, of December 23rd, Arbitration: between Tradition and Innovation"), Real Academia de Jurisprudencia y Legislación, Madrid, 2005, pp. 59-71.
5. A similar opinion is expressed by Salomon, Claudia T.; Duffy, J.P. y Canning, Tom "The New Dubai International Arbitration Law" in *New York Law Journal*, N° 97, New York, 2008, p. 1.
6. Let us remember that the previous GLA was divided in two sections The first section dedicated to the "national arbitration" and the second section treated the "international arbitration".
7. In this sense, article 7 of the LDIFC indicates that "(1) Parts 1 to 4 and the Schedule of this Law shall all apply where the Seat of the Arbitration is the DIFC. (2) Articles 14, 15, Part 4 and the Schedule of this Law shall all apply where the Seat is one other than the DIFC".
8. A similar opinion is expressed by Lorca Navarrete, Antonio Maria, *Comentarios a la Nueva Ley de Arbitraje 60/2003 de 23 de Diciembre* ("Commentaries to the New Law of Arbitration 60/2003 of 23 of December"), Instituto Vasco de Derecho Procesal, San Sebastián, 2004, p. 51.

4. The objective scope of application

The LDA⁹ establishes, as a general rule, that arbitration deals with disputes that are within the field of free disposition of the parties according to law. It assumes therefore an open and positive formula, or *numerus apertus*, different from that of the old GLA.¹⁰

This "free disposition" implies to assume subject matters that can be in diverse and specific substantive regulations. Also, this freedom has to be in addition "*according to law*", without being established such conformity through a list system, but only a dual relation between legal availability and arbitrability¹¹.

In such form, the LDA makes possible an ample and not listed interpretation of that which can be understood as availability according to law, which assumes a *favor arbitralis* when establishing an *ex post* control of the non availability through the annulment of an arbitral award.

In addition, the LDA chooses to put aside the assumptions of fraud in arbitration that may be presented in case of connection between subject matters, through the recognition of the separability doctrine.¹² Also, this last option is used by the article 41(2)(a)(iii) of the LDIFC.

5. The administering arbitration

The LDA has as, one of its central themes, the recognition of the administering arbitration. The regulation of which, in accordance with its monist character, does not distinguish between internal and international institutionalization, welcoming both modalities. Also, the LDIFC alludes to the administering arbitration in its articles 17(4)(c), 18(1), 22 and 38(5)(g).

Unlike our previous law, the LDA establishes as default provision in case of a

9. With this same opinion, its article 2 (1) indicates that "*Disputes on subject matters of free disposition according to law, as well as those that international law or treaties or agreements authorize, can be put under arbitration*" (my emphasis).

10. Which chose one closed and negative formula -or *numerus clausus*- in its article 1 GLA.

11. The LDIFC has a contrasting, *expressi verbis*, article about the arbitrability of the disputes.

12. Similarly, article 63 (3) of the LDA indicates that "*Being the causes specified in interjections d. and e. of numeral 1 of this article, the cancellation will only affect subject matters not submitted to arbitration or non susceptible of arbitration, always counting that they can separate from the others; on the contrary, the cancellation will be total. Also, the cause anticipated in the interjection e. could be appreciated officiously by the Superior Court that knows the cancellation resource*" (my emphasis).

pathological arbitration agreement, of correctable character or not,¹³ tied to the institutionalization of the arbitration. In such cases, it will be understood, save where the parties agree otherwise, that the arbitration will be *ad hoc*.¹⁴

Also, article 7(4)¹⁵ of the LDA, following the model of the WIPO Arbitration Rules¹⁶, and certain other theoretical assumptions,¹⁷ establishes as a general rule the immediate temporary application of the institutional regulation. In other words, the regulation applicable to the arbitration will be, in the absence of agreement between the parties, the effective one at the time of the beginning of the arbitration process.

6. Confidentiality

Article 51 of the LDA, following the model of article 30¹⁸ of the LCIA Arbitration Rules, specifically regulates the obligation of confidentiality that the diverse subjects of the arbitration (parties, counsels, arbitrators, administering institutions, etc) must respect. This will apply, subject to other legal claims, to the course of the arbitration proceedings, the information made available to them through these, and the arbitral award.

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13. A pathological arbitration agreement from subsanable character is that in which a nonexistent arbitration institution is designated. On another side, a pathological insubsanable arbitration agreement is that in which no arbitral institution is designated (with similar view Scalbert, Hugues and Marville, Laurent "Les Clauses Compromissaires Pathologiques", in *Revue de L'arbitrage*, N° 1, Paris, 1998, pp. 119-130).
 14. See also, article 7(3) of the LDA, which indicates that "*In case of lack of designation of an administering institution, it will be understood that the arbitration is ad hoc. The same rule is applied when designation exists that is incompatible or contradictory between two or more institutions, or when reference to a nonexistent arbitral institution, or when the institution does not accept the order, in the absence of agreement between the parties*" (my emphasis).
 15. Which indicates that "*the regulation applicable to an arbitration is the effective one at the time of its beginning, unless the parties have agreed otherwise*" (my emphasis).
 16. The World Intellectual Property Organization (WIPO) Arbitration Rules, effectives from the October 1st, 2002, indicate at article 2 that "*Where an Arbitration Agreement provides for arbitration under the WIPO Arbitration Rules, these Rules shall be deemed to form part of that Arbitration Agreement and the dispute shall be settled in accordance with these Rules, as in effect on the date of the commencement of the arbitration, unless the parties have agreed otherwise*" (my emphasis).
 17. In our country, we postulate this criterion of solution, in a written and solitary way, since 2007 (see Matheus Lopez, Carlos Alberto, *El Reglamento Institucional* ("Rules of arbitration institution"), Athina, N° 3, Lima, 2007, p. 364-366).
 18. Which indicates that "*Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority*".

Also the article 14¹⁹ of the LDIFC, following the model of the LCIA Arbitration Rules, regulates the obligation of confidentiality.

7. Waiver of right to object

The LDA regulates in its article 11,²⁰ following the model of the Croatian Arbitration Law,²¹ the waiver of right to object. Due to the monist character of the rules, this is applied to national as much as international arbitration. A step beyond the absence of regulation in national arbitration scoped by the previous GLA.²² Also the article 9²³ of the LDIFC regulates the waiver of right to object.

The waiver of right to object has a purifying effect in the interior of the arbitration process, being a kind of shield against later objections not made at the time. For example, when an arbitrator discloses all the facts that could reasonably be considered as affecting his independence and impartiality yet the parties do not make any challenge or opposition. Then, any later objection that is made during the arbitration process or on the annulment of the arbitral award is destined to fail, because it is understood that there has been a resignation by the parties to object with respect to the revealed facts.

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19. In this sense, article 14 of the LDIFC indicates that *"Unless otherwise agreed by the parties, all information relating to the arbitral proceedings shall be kept confidential, except where disclosure is required by an order of the DIFC Court"* (my emphasis).
20. Which indicates that *"If one party, knowing or having to know that it has not been observed or has infringed a rule of this Legislative Decree from which the parties can separate, or an agreement between the parties, or a disposition of the applicable arbitral regulation, continues with the arbitration and it does not object its breach as soon as is possible to him or her, it will be considered that he or she resigns to object the arbitrator's decision by these circumstances"* (my emphasis).
21. Whose article 5 indicates that *"A party who knew or should have known that any provision of this Law from which the parties may derogate or any requirement to under the arbitration agreement has not been complied with and yet proceeded with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided therefore, within such period of time, shall be deemed to have waived his right to object"*.
22. Let us remember that the "waiver of right to object" was regulated only in the Second Section of the GLA, in relation to the International Arbitration (article 95), but not in that of the National Arbitration (First Section).
23. In this sense, article 9 of the LDIFC indicates that *"A party who knows that any provision of this Law, including one from which the parties may derogate, or any requirement under the Arbitration Agreement has not been complied with and yet proceeds with the Arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided therefore, within such period of time, shall be deemed to have waived his right to object"*.

8. Notifications and time limits

The LDA improves the previous writing of the GLA²⁴ with respect to notification of arbitration acts, when alluding *expressi verbis* in its article 12(b)²⁵ the mechanisms of electronic character. This differs from article 8(a) of the LDIFC, which does not allude to the electronic mechanisms.

Also, the LDA corrects an omission²⁶ of the previous rule, establishing specifically in its article 12(c)²⁷ that the procedural time limits are computed from the day following the receipt of the notification or communication. The article 8(b)²⁸ of the LDIFC has a similar meaning.

Finally, article 34(4) of the LDA grants to the arbitral tribunal the unexpected power "*to extend the time limits established for the arbitral proceedings, even if these time limits were overcome*", which, in addition to conflicting with the preclusive principle, is the opposite to the temporary offer that justifies the use to the arbitration.

In addition, with respect to the time limit to render the arbitral award, this disposition, combined with article 53 of the LDA -which indicates that "*the controversy must be decided and be notified within the term established by the parties, the rules of arbitration institution or, in its defect, by the arbitral tribunal*"-, prevails of effectiveness to the annulment of arbitral award justified in the first causal of article 63 (1)(g) of the LDA (arbitral award rendered outside the time limit agreed), when the time limit to decide was originally established -in case of lack of agreement or rules of arbitration institution applicable- by the arbitral tribunal, because it can always extend the time limit that it established to render, even if it were overcome.

24. Contained in its articles 8 (national arbitration) and 94 (international arbitration), which recognized the validity of "*the notifications by cable, telex, facsimile or means...*".

25. Which indicates that "*Also, it will be valid for the notification or communication made to be made by fax or another mechanisms of electronic telecommunication, telematic or of another similar class that allow the shipment and the reception of writings and documents, leaving certainty of their remission and reception and that have been designated by the interested party*" (my emphasis).

26. Omission which we have already demonstrated several years ago, suggesting in addition to decide on the solution contained in article 5 of the SLA (see Matheus Lopez, Carlos Alberto, *Introducción al Derecho de Arbitraje* ("Introduction to Arbitration Law"), Semper Veritas ediciones, Lima, 2006, p. 138).

27. Which indicates that "*The terms established in this Legislative Decree will be computed from the following day to the one of reception of the notification or communication...*".

28. Which indicates that "*the communication is deemed to have been received on the day it is so delivered*".

9. The arbitration agreement

Article 13 of the LDA reinforces²⁹ the non formalist character of the arbitration agreement, while clearly establishing the character *ad probationem* of the exigency of its written form together with the context of new mechanisms of electronic character. This is demonstrated from reading "*that the arbitration agreement exists in writing when an electronic communication is sent and the information in it briefed is accessible for a later consultation*" (article 13(4) LDA). The article 12(5)³⁰ of the LDIFC has a similar meaning.

In the LDA, the formal requirements of the arbitration agreement will not override an agreement between the parties or, which is the same, these lighten because of the principle of *favor negotii* assumed by it. In this sense, it is considered "*that the arbitration agreement is written when it is briefed in a writing interchange of demand and answer in which the existence of an agreement is affirmed on the one hand, without being denied by the other*" (article 13(5) LDA). Also, this last option is used by the article 12(6) of the LDIFC.

On another side, with respect to the types of formation of arbitration agreements, a single model conception in our LDA does not exist, rather it is possible to observe the following modalities:

1. *Adhesive arbitration agreement*: that which comes formalized as a clause incorporated to an adhesion contract.³¹
2. *Unidocumental arbitration agreement*: that which is formalized in an single document, be it as an independent agreement or a clause incorporated to a main contract.³²

29. We say that it reinforces, because the previous GLA already bet to an antiformalism of the arbitration agreement, and also to a weakness of its written form, in the context of new mass media (to see Matheus, "Introduction...", ob. cit., p. 35).

30. Which indicates that "*The requirement that an Arbitration Agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy*".

31. Modality regulated by article 15(1) LDA, whose tenor indicates that "*In national arbitration, the arbitration agreements referred to legal relations contained in general clauses of hiring or contracts by adhesion will be indispensable only if these agreements have been known, or could have been known by whom did not write them, using an ordinary diligence*".

32. Gathered in the first paragraph of article 13(2) LDA when indicating that the arbitration agreement "*...May adopt the form of a clause including in a contract or the form in an independent agreement*".

3. *Arbitration agreement by reference*: that which that does not appear in the main contractual document, but in a separated document, understood incorporate in the content of the second by references of the first.³³ The article 12(7) of the LDIFC regulates this same modality.

Finally, article 14 of the LDA establishes a subjective scope of application of the arbitration agreement wider than the one gathered by the previous GLA,³⁴ specifying that this one "*extends to those whose consent to be put under arbitration, according to the good faith, is determined by its active and determining participation in the negotiation, celebration, execution or completion of the contract that includes the arbitration agreement or to which the agreement is related*" and "*to those who try to derive rights or benefits from the contract, according to its terms*".

10. The number of arbitrators

To be an arbitrator, the LDA articles 19³⁵ and 20³⁶ require, *in a positive form*, that the subject be a *physical person* and in number fixed by the parties always in case of a arbitral tribunal. Nevertheless, unlike the previous GLA³⁷, the LDA does not demand necessarily the imparity, but leaves it voluntarily to the parties. This can generate serious operational problems in the deliberation and decision of the arbitral tribunal. It would had been desirable that the LDA decides on the integral formula of article 12 of the SLA, which indicates that "*the parties will be able to fix the number of arbitrators freely, providing it is odd*". Also, this same formula is assumed by the article 16(1) of the LDIFC.

11. The capacity of the arbitrator

The LDA associates the figure of the *arbitrator inhabilis* to the regime of incompatibilities that arise from the respective norms to which it can be put under the arbitrator in the

33. Gathered in the first paragraph of article 13(6) LDA when indicating that "*The reference made in a contract to a document that contains an arbitration clause constitutes an arbitration agreement in writing, whenever this reference implies that that clause is part of the contract*".

34. Let us remember that article 9 of the GLA indicated that "*the arbitration agreement forces the parties and his successors to the accomplishment of whichever acts necessary so that the arbitration is developed, have fullness of effects and is the arbitrator's decision fulfilled*" (my emphasis).

35. Which indicates that "*the parties will be able to freely fix the number of arbitrators who conform the arbitral tribunal. In case of doubt or lack of agreement, there will be three arbitrators*" (my emphasis).

36. Which indicates that "*natural persons can be arbitrators...*" (my emphasis).

37. As it did, for national arbitration, in article 24 GLA. Although the article 101 GLA, for international arbitration, had a similar formula as to the one in the present article 19 LDA.

exercise of his public office (article 21 LDA).³⁸ Deciding thus on a criterion of remission of an open character, different from the one of the old article 26, GLA that assumed a direct regulation of a closed character. The LDIFC does not have a similar article.

12. The arbitrator in law

Also, article 22³⁹ of the LDA allows in the arbitration in law -and national- that parties can designate a non-lawyer, unlike the previous GLA, which demanded such condition inescapably.⁴⁰ Otherwise, the international arbitration, peculiarly, does not require such exigency to be arbitrator "*in any case*". In addition, the LDA indicates, in a suitable manner, that when it comes demanded the condition to be a lawyer "*it will not be required being a practicing attorney nor to belong to an association or national or foreign union of lawyers*". The LDIFC has not a similar article.

13. Nomination of the arbitrators

In case the arbitrators nominated by the parties, by an administering institution or by a third in charge, do not fulfill the nomination of the third arbitrator, it proceeds a residual resource which we can denominate as *cameral designation*⁴¹ (which replaces the old *judicial designation* of the GLA), which concerns a procedure carried out by a Chamber of Commerce -from the place of the arbitration or of the celebration of the arbitration agreement-, destined to satisfy a request founded on the lack of agreement as far as the nomination of the arbitrators. Also, the Chamber of Commerce in charge of the nomination will have to take into account the qualities required by the parties, as well as the convenience that the third arbitrator has a different nationality from these.⁴²

38. In such form, article 21 LDA indicates that "*Have incompatibility to act as arbitrators the civil employees and public servants of the Peruvian State within the margins established by their respective norms of incompatibility*" (my emphasis).

39. Which indicates that "*In the national arbitration that must be decided in law, it is required to be lawyer, except in case of an opposite agreement ...*", being therefore "facultative".

40. Let us remember that article 25 of the GLA prescribed that "*the appointment of arbitrators in law must fall on lawyers*", being therefore "imperative".

41. On this particular option we have already pronounced ourselves previously (see Matheus López, Carlos Alberto *Apostillas al Proyecto de Reforma de la Ley General de Arbitraje* ("Comments on the General Law of Arbitration Reformation Project"), Legal Express, N° 67, Lima, 2006).

42. With this same seeming, article 25(5)(7), of the LDA, indicates that "*the Chamber of Commerce will consider, when carrying out an appointment, the requirements established by the parties and by the law to be an arbitrator, and will take the necessary measures to guarantee its independence and impartiality (...)* In international arbitration, being about unique arbitrator or the president of the arbitral tribunal, it will

The article 17(3)(4)(5) of the LDIFC regulates a *judicial designation* system. The DIFC Court of First Instance shall be made the appointment of the arbitrators.

On the other hand, article 23(c) of the LDA, regulates -for the first time- the nomination of arbitrators, in case of multi-party arbitration⁴³. In such a way, it indicates that the plaintiffs will have to nominate an arbitrator, as well as the demanded ones, and if these or those do not agreed on the nomination, then -in accordance to article 23(d)⁴⁴ of the LDA- it will be done by the Chamber of Commerce of the place of the arbitration or of the celebration of the arbitration agreement. Being observed that the LDA chooses to leave into the hands of the Chambers of Commerce the -residual- nomination of all the arbitrators.

14. Resignation and removal of the arbitrator

Article 30 of the LDA⁴⁵ regulates the assumptions in which the resignation of the arbitrator is possible, which comes by own will to its removal of the arbitration process. These cases allude to the figures, seen before, of *arbiter inhabilis* and *arbiter suspectus* (disabled by law), as well as gathers the assumptions of *arbiter impeditus* (disabled in fact), that is, that whom, by lay or in fact, is crippled to exert its functions as an arbitrator. The article 20(1) of the LDIFC assumes this same criterion.

Also, in the cases seen before, if the parties decide it, they can remove the arbitrator off the process, which by virtue of this he or she will stop in his position (article 30(1) LDA), a totally coherent faculty with the principle of party **autonomy**, which did not exist in the previous GLA. The same faculty is regulated by the article 20(1)(2) of the LDIFC.

also consider the convenience of nominating an arbitrator of a different nationality from the one of the parties" (my emphasis).

43. The article 17(3)(c) of the LDIFC have a similar sense.

44. Which indicates that "*If in any of the previous assumptions it is not gotten to name one or more arbitrators, the appointment will be carried out, by request of any party, by the Chamber of Commerce of the place of the arbitration or the place of celebration of the arbitration agreement, when the place of the arbitration had not been agreed. If there is no Chamber of Commerce in these places, the appointment will correspond to the Chamber of Commerce of the nearest locality*" (my emphasis).

45. Which indicates that "*When an arbitrator is itself crippled in fact or by law to exert his functions, or by any other reason does not exert them within a reasonable term, it will stop in its position if the parts decide their removal...*" (my emphasis).

15. Competence of the competence

Article 41 of the LDA indicates -dangerously and improperly-⁴⁶ that the "*arbitral tribunal is the only competent one to decide on his own competence...*", approaching thus the notion of *kompetenz-kompetenz* of the German legal terminology,⁴⁷ but moving away from the notion globally accepted of the principle of competence of the competence. Accordingly, this principle allows to avoid that one party, limiting itself to invoke the incompetence of the arbitral tribunal, may delay or interrupt the development of the arbitration, when granting to arbitrators the power to decide "first" on their own competence, although their decision will still be putted under the control of the state judges, particularly,⁴⁸ in the occasion of the annulment of arbitral award (article 63 LDA).

The article 23 of the LDIFC regulates -properly- the principle of competence of the competence.

16. The interim measure in arbitration

The LDA distinguishes the moments at which the interim measures must be asked, according to request at the beginning of the arbitration or prior to this moment. In such assumptions, it will be required the support of the jurisdictional organ, for the dictation and/or execution of the interim measure.

In this way, we can observe that the judicial intervention in this case, appears in the following cases:

46. It would have been preferable to maintain the tenor of articles 39 -national arbitration- and 106 -international arbitration- of the previous GLA, which indicated that the arbitrators are authorized "*to decide about their own competence...*", tenor that is as well similar to the one of article 22(1) of the SLA, which also had been preferable to one used in article 41(1) of the LDA.

47. It is necessary to precise that, though the custom exists to describe the principle by which the arbitrators have competence to know their own competence under the terms German of "Kompetenz-Kompetenz". Nevertheless, the source of the expression is never defined, being gladly mentioned only this one. Such situation is not very happy, since in the German legal terminology the expression has a different sense than that which is handled in international literature, implying the principle of "Kompetenz-Kompetenz" that the arbitrators have the power to judge, in last instance, and without judicial control, its competence (with a similar view Fouchard, Philippe; Gaillard, Emmanuel; Goldman, Berthold, *Traité de L'arbitrage Commercial International* ("A Treatise on International Commercial Arbitration"), Litec, Paris, 1996, p. 215).

48. We say this because, on occasion of the exception raised to the arbitration agreement in a judicial process, is possible a *prima facie* control, on the part of the jurisdictional organ, of the existence and validity of the arbitration agreement (article 16(3)(4) LDA), implying consequently also a control the competence of the arbitrators.

a. Interim measure ante causam arbitratum

The request of this interim measure prior to the beginning of the arbitration is posed before the judge subspecialized in commercial matters or, in its defect, before the judge specialized in civilian matters, of the place where the measure must be executed or that where it must produce its effectiveness.⁴⁹ Also, it fixes the temporary requirement of ten days to begin the arbitration.⁵⁰

Additionally, when determining the term of expiration of the measure ninety days posterior to its dictation,⁵¹ a temporary regime of permanence of the adopted *ante causam* interim measure is settled down, more beneficial than the judicial one, in which the inexorable term of ten days can be determining.

b. Interim measure intra causam arbitratum

The request of an interim measure being the arbitration pending, is carried in front of the arbitral tribunal, which -by a party request- will adopt the most suitable measure to assure the future effectiveness of the arbitral award to pronounce itself, requiring for its execution the support of the static jurisdiction.⁵²

Also, the LDA establishes that the *interim measure intra causam arbitratum*, in its

49. In this sense, article 8(2) of the LDA indicates that "*For the judicial adoption of preventive measures, will be competent the judge subspecialized in commercial law or, in its defect, the judge specialized in the civilian law of the place in which the measure must be executed or the one from the place where the measures must produce their effects. When the preventive measures are to be adopted or executed abroad, treaties on execution of preventive measures abroad or to the applicable national legislation will proceed*" (my emphasis).

50. With this same seeming, article 47(4) of the LDA prescribes that "... *Executed the measure, the benefitted party will have to initiate the arbitration within the ten (10) following days, if he or she have not done it previously*".

51. In this sense, article 47(4) of the LDA indicates that "... *If he does not do it within this fulfilled term, or having done it, the arbitral tribunal does not constitutes itself within the ninety (90) days of dictated, the measure will expire by law*".

52. In this form, article 48 LDA prescribes that "*the arbitral tribunal is authorized to execute, at request of a party, its interim measures, unless, to his single discretion, it considers necessary or advisable to require the attendance of the public force (...) In the cases of breach of the preventive measure or when it is requires a judicial execution, the interested party will resort to the competent judicial authority, whom by the single merit of copies of the document that credits the existence of the arbitration and the decision to prevent, will execute the measure without admitting any resource nor opposition*" (my emphasis).

We must indicate that although this article authorizes arbitrators to execute their own preventive measures they dictate, nevertheless, the character of jurisdictionality of the preventive process, combined to the necessary concurrence of the judicial "auctoritas", and to the fact that the arbitrators are not but private subjects, whose power is born from the autonomy of will of others like them -the parties-, makes us deny the technical pertinency and practical operativity of such faculty.

adjective way, is governed -as a general rule- by the *audita altera pars* principle; that is to say, the arbitral tribunal "*before deciding, will put in knowledge the petition to the other part*".⁵³ Although it will be possible to decide on the opposite principle -*inaudita altera pars*- when the petitioner "*justifies the necessity of not making it [put in knowledge to the other party] in order to guarantee that the effectiveness of the measure is not frustrated*".

On another side, the article 47(2)⁵⁴ LDA has taken completely the text from article 17(2) of the UNCITRAL Model Law (with the amendments of the 2006). Also, the article 24(1)(b) of the LDIFC adopted this formula.

17. The arbitral award

Unlike the GLA, that recognized only the final arbitral award, the LDA recognizes in its article 54, except in case of a different agreement between the parts, two types of arbitral awards: the partial and the final one.⁵⁵ In such form, the arbitral tribunal can decide the controversy "*in a single decision or in so many partial decisions as it considers necessary*", which can deal on a part of the controversy or on other subjects, as the competence of the arbitrators or the interim measures. For example, it would be possible to decide first if extra-contractual responsibility of the demanded one exists, and only later to decide, being the case, the compensatory amount. Also, the partial arbitral award is, for all decisive effect, a definitive decision, which when acquiring firmness will be invariable (article 59(2) LDA). With a difference sense, the article 39 of the LDIFC recognizes only the final award.

With respect to the form of the decision, the LDA assume a non formalist canon, when assuming the exigency of its written form as an *ad probationem* character, agreed to the context of new mechanisms of communication. This is demonstrated by its article 55(2) which indicates that "*it will be understood that the decision consists in writing when of his content and signatures it is left certainty and are accessible for its later consultation in electronic support, optical or of another type*".

Finally, the LDA welcomes a new modality of sanitation of the arbitral award by which "*any party can ask for the exclusion out of the decision, of any part of it, without being putted under knowledge and decision of the arbitral tribunal or that has not been*

53. Principle which -in general- agrees with the arbitral garantism contained in the LDA and, particularly to the respect of the contradiction guarantee.

54. This article regulates a different interim measures like the *Mareva Injunction* -article (47)(2)(b)- and the *Anton Piller Order* -article (47)(2)(d)-.

55. By which we can affirm that the LDA recognizes two types of arbitration resolutions: the decision (partial or definitive) and the resolutions different from the decision.

susceptible of arbitration" gathering in addition figures already regulated by the GLA, name now as *rectification*, *interpretation* and *integration* (article 58 LDA). With a same sense, the article 40 of the LDIFC regulates the modalities of *correction*, *interpretation* and *additional award*.

18. Conservation of the arbitration records

Article 61 of the LDA -following article 38(3) of the SLA- establishes the subsidiary term of three months, from the culmination of the arbitral proceedings, for the cease of the obligation of the arbitral tribunal to conserve the arbitration records. Also, in this lapse the parties can ask for the return of presented documents or the remission of the file to an administering institution or Chamber of Commerce, for effects of their safekeeping. We must say that the LDIFC has not a similar article.

19. The recourses

The LDA regulates the recourse of reconsideration, now possible of being raised as a party or an *ex-officio* initiative (article 49 LDA), and to the annulment recourse, eliminating therefore the inoperative recourse of appeal established by the GLA.

Now, with respect to the annulment recourse, its newness appears that they can be object of it, as much the partial as the final arbitral award, because article 62(1) LDA indicate that "*Against the arbitral award it will only be able to interpose the annulment recourse...*".⁵⁶ Also, this will generate interesting reaches tied to the consequences of the annulment, when several decisions at the interior of the same arbitration exist.

On the other hand, if annulled the arbitral award -partial or final- it proceeds to raise the cassation recourse, which, unlike the old GLA, comes needed in its purpose by the Second Modifying Disposition the LDA, which indicates that "*In the cases anticipated in the General Law of Arbitration, the cassation recourse has as its purpose the revision of the resolutions of Superior Courts, for a correct application of the causes of annulment of the arbitral award...*".

The annulment recourse is regulated by the article 41 of the LDIFC (nominated *application for setting aside*).

56. Unlike article 40 of the SLA, which, prescribing that "*Against the final arbitral award, it may be exercised the action of annulment in the terms anticipated in this title*", restricts the recourse of annulment only to this type of arbitral award.

20. The execution of the arbitral award

Although the LDA alludes as much to an "arbitral" (article 67) as to a "judicial" execution (article 68) of the arbitral award, we considered, for the same reasons before exposed in the interim measures, that the execution of the decision -technically- has only a judicial character, this without entering the analysis of the responsibility⁵⁷ that it would generate, to the arbitrators, the denominated "arbitral execution". More over, its own article 68(1) of the LDA insinuates this same and only way, when indicating that the interested party *"will be able to ask for the execution of the arbitral award before the competent judicial authority accompanying copy of this one and its rectifications, interpretations, integrations and exclusions and, in its case, of [frustrated] proceedings of execution effectuated by the arbitral tribunal"*.

The LDIFC regulates only the judicial execution of the arbitral award and the DIFC Court held on charge of this job (article 42).

57. Which indirectly comes remembered by article 67(2) LDA, when indicating that *"it is excepted of the arranged in the previous numeral the case in which, to his single discretion, the arbitral tribunal considers necessary or advisable to require the attendance of the public force. In this case, it will stop in its functions without bearing responsibility, and will give to the interested party, to his cost, copy of the corresponding acted files so that he may resort before the competent judicial authority with the object of the execution"* (my emphasis).