

Binding Nature and Scope of the Arbitration Agreement Stipulated in the Articles of Incorporation for New Partners

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Abstract

A company formed with bylaws that include an arbitration clause and the entry of the participation of new partners and/or shareholders, a legal debate begins as to whether or not these partners and/or shareholders are subject to compliance with the arbitration agreement established in the bylaws and whether or not it is binding for the new partners and/or shareholders participating in the company. The above legal approach is a problem that has been discussed in the country for a decade now, without having reached a peaceful conclusion, since in different judicial scenarios two theses have been held contrary to each other, in this case the honorable Constitutional Court and the Superintendence of Corporations, have completely opposite positions. The purpose of this paper is to analyze the positions of both bodies in order to determine which of the two theories is more consistent with the regulations governing corporate activity, as well as the regulations governing the arbitration clause and the arbitration agreement

Keywords: Arbitration Agreement, Shareholders Participation, Regulations.

INTRODUCTION

In Colombia, there are some figures to extinguish the obligations, such as the dation in payment, there in a voluntary way the debtor seeks to consummate its obligation with the creditor delivering in payment some real estate or even securities and why not even shares of a company, in many cases the creditor in the desire to recover some invested capital has no other option but to receive the good or title, in the best of cases, In this figure a judge authorized by law, uses the debtor's assets to pay the obligations to the creditors, this type of transfers are commonly known as a forced adjudication, in these cases a natural or legal person may be awarded a small shareholding in a company which was not planned to arrive.

And it is in these cases where great tensions are generated within a company, between the fixed or capitalist partners, who in most cases are the majority shareholders, and the temporary or transitory partners, who in most cases are the minority shareholders, since the latter may enter a company by accident since they never contemplated participating in a company in which they are now partners, and where very possibly they do not agree on certain parameters or clauses established in the company's bylaws.

This is the beginning of the tensions that are generated within a joint stock company. Now, in the Colombian legislation there are mechanisms to solve this type of tensions by judicial means, such as the action of impugnation of the agreements of assemblies or agreement of partners, action that is known by the civil judge of circuit, in case there is no compromissory clause within the bylaws of the joint stock company, and it is here where the controversy becomes more acute, since the new partner did not participate or express its will in the participation of the arbitration agreement established in the bylaws of the partnership and that now very possibly is obliged to use to resolve the controversies that it has with the other partners.

In this sense, it is important to remember article 98 of the Code of Commerce which defines the company as a contract or agreement of wills. It is also important to highlight the nature of the Arbitration Agreement that despite not being defined punctually in the law 1563 of 2012 as does Article 98 of the Code of Commerce, and is known and defined widely by jurisprudence and doctrine as an agreement of wills, it is at this point that there has been a crossroads of opinions between different judicial bodies, such as the Honorable Constitutional Court, in judgment C-14 of 2010, where it pointed out the validity of an arbitration agreement established in a corporate statute, in which the new associate did not express its will to go to a private justice to have its conflict

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solved, a thesis very contrary to the jurisprudence line that has emanated from the Superintendence of Superiorities, opinions that I intend to compare in order to determine which of these theses is more consistent with the current regulations, especially with regard to the arbitration clause.

To establish whether or not the future partners and/or shareholders of a company are obliged to comply with the arbitration agreement established in the bylaws of the company they intend to join. The specific objectives of the study are to identify the validity of an arbitration clause or arbitration agreement against new partners of a partnership, identify the legal effects and consequences of this arbitration agreement already established with respect to our partners, and analyze the incidence of the principle of the autonomy of the will in the social contract, as well as in the arbitration agreement

LITERATURE REVIEW

Preliminary Considerations

Within the mercantile and commercial scenarios and in general, in all those where there is talk of the circulation of wealth, the association between traders (today, instead of trader, it is understood to mean the businessman in all its dimensions, since we are not currently talking about a simple intermediary between producer and consumer), since long ago and until today's market environments, has been considered as a cornerstone in the generation of synergies and efficiencies for the optimal development of a commercial activity; To this effect, it is sufficient to consider the partnership contract as a legal business that by *antonomasia*, has the vocation or the purpose of seeking to combine contributions and efforts of the partners for the development of a lucrative corporate purpose, for the subsequent distribution of profits and in line with a spirit of association. It is in such conceptual scenario, where the associative scaffolding is present in a preliminary manner, as a conductive and unifying element of the capacities of the partners individually considered and that, as all the participants in the course of legal business, are subject to the rules and guidelines of both the establishment (understood as the rules of constitutional, legal or regulatory order) and their own (bylaws to cite an example).

In view of the foregoing and with regard to the objective of this work, it is worth noting that the partners that form a commercial company, regardless of its typology or consecration in the light of the commercial statute or the rules that are part of the private law system (such as Law 1258 of 2008 on simplified joint stock companies, for example), must have the right to be represented by the partners of the company, and to have the right to be represented by the partners of the company. (Congress of the Republic of Colombia, 2008) or Law 1901 regarding commercial companies of collective benefit or interest (Congress of the Republic of Colombia, 2008). (Congress of the Republic of Colombia, 2018).), under both internal and external regulatory provisions, are subject and committed to contractual burdens and duties susceptible to controversy, both in their definition and interpretation, and it is on such discrepancies that are established in the regulatory system, as well as by the actions of the parties involved in them, resolution mechanisms such as arbitration, a mechanism that will be part of later chapters and considerations, but of which special reference is made because it is essential in the course of private law legal-equity relations.

General Notions Related To Corporate Law

If we go back to the original provisions of the Colombian corporate law, which are enshrined in Articles 98 and subsequent articles of the Code of Commerce, we will see that the following provisions were included in the Colombian Corporate Law (Office of the President of the Republic of Colombia, 1971) The partnership contract is outlined and established as a collaboration contract that has 4 essential elements without which it cannot be considered as such, or even, the phenomenon of non-existence can be predicated, namely and without a different intention than merely referential (for the purposes of this academic effort), they are: the partner or partners (remember the corporate unipersonality enshrined in the rule of simplified joint stock companies), the contribution of the partners (money, labor or kind), the distribution of profits and the "*animus* or *affectio societatis*" or spirit of association, being on this last component on which the reflection associated with the applicability or not of the arbitration clause in the face of a partner who enters the company after the formulation of the same in the bylaws gravitates.

So true and relevant is the essence of the spirit of association and the legal consequences derived therefrom, that in the great majority of times and cases, it is on this gravitational axis of the social contract that the effect, scope or opposability of legal relations both primordial and consequential of the social contract in itself considered, to this effect, reference can be made to article 158 of the Code of Commerce, which in dealing with the forms and scope of the statutory reforms, is clear in indicating that the act registered before the respective Chamber of Commerce (and overcoming the debate on whether or not to record this reform in a public deed in view of the current regulatory provisions) is only relevant to the effects of the statutory reform with respect to third parties, since with respect to the partners it is applicable from its agreement or pact.

This means that the spirit of association is of such an entity that the predictability or not of legal relationships is structured on it, as well as of obligational phenomena, among them, the resolution of controversies under the arbitration scenario. The foregoing is based on the fact that the spirit of association is the one that permeates the structure of the bylaws and the internal configuration of the company and on this basis is predictable of the partners, both of those who enter into the partnership agreement or its amendments, as well as those who subsequently adhere to such expressions of will, this under the criterion and in the sense of unity of matter and consistency that the social contract itself emanates.

The unenforceability of provisions contained in the corporate contract (including the arbitration agreement) cannot be predicted in an isolated manner and without systemic criteria, if from the perspective of the spirit of association a consideration of the uniqueness of the internal corporate rule is made, This uniqueness gives it materiality and consistency from the legal and clearly from the factual point of view, i.e., it is not possible, for example, to speak of the non-predictability of the arbitration clause against a partner who adheres to the bylaws (e.g., via the purchase of shares on the stock exchange), but it is possible to speak of the absolute predictability of the arbitration clause against a partner who adheres to the bylaws (e.g., via the purchase of shares on the stock exchange.) but the absolute predicability of the provisions associated with economic and political rights (such as payment of dividends and participation in the general shareholders' meeting) when both provisions are prior to the occurrence of the adherent member's status or "a posteriori" in the face of the corporate bylaws or any of its amendments.

For the sake of discussion and in order to give more consistency and weight to the above, but without prejudice to modulate the scope of this dissertation in view of the jurisprudential and doctrinal analysis to be developed, it is appropriate to make a consideration associated with the fact of the complexity and difficulty that would represent the splitting of the mandatory nature of the arbitration clause in the face of the partners of a commercial company when disputes or differences arise in the context of commercial and financial relationships of deep and highly complex depth, such as may be the case of business groups or parent-affiliate and/or subsidiary relationships, where undoubtedly, resorting to criteria such as the one referred to may not only imply business immobility and by default, the loss of wealth, but also an uncertainty regarding the channel for the resolution of disputes that could configure hypothetical scenarios of disinvestment, non-accessibility to markets or high risk rating, all of them of simple wording in this document but of almost infinite variables and consequences if applied to commercial traffic. The above without prejudice of making the proposed scenario even more complex in consideration of the existence of commercial companies in which other commercial companies are partners, since we would not be talking about a singular interpretation but about the concurrence of different interpretations due to the mere existence of several bylaws in the legal relationship to be dissipated (the bylaws of the partner legal entities and the bylaws of the company in which they exercise such capacity, just to give an example).

A reference that could complement, even in an analogical manner, the previous consideration lies in Article 378 of the Code of Commerce, which expressly and clearly establishes the indivisibility of the shares in corporations, for the enjoyment of the rights of the partner and, by subtraction of matter, for the fulfillment of its duties and burdens to the corporation; The above, regardless of whether there is unicity or plurality of persons holding the share, since regardless of such circumstance, it converges in an instrument that cannot be disaggregated because from its very essence and from its ontic character, it is in the inseparable unity of its own conception where its effectiveness and its relevance with the purpose of the mercantile order is predicated; In

other words, and bringing up the aforementioned reference, the corporate bylaws predicate its effectiveness and its congruence in that in itself considered it is systemic, harmonic and concordant, besides being clearly opposable both for the founding partner or partners, for those who are part of the company at the time of forging a statutory reform or for the partner or partners who enter at any different time to the company. This is so true that the aspiring partner who is not a founding partner or does not participate in a statutory reform, may choose not to join the partnership, since his duties of diligence, care and good faith (especially qualified in the framework of commercial relations) require him to know and accept as a unit the bylaws to which he manifests compliance and respect with the acquisition of the status of partner.

In line with the reasoning previously outlined, and leaving aside postulates that could be called merely organicist and that are more widely received in dissertations associated with the extensibility of the corporate contract with respect to persons other than the partners or in a capacity different from that of partner, it is pertinent to indicate that to expressly demand the subscription of the arbitration clause with respect to partners other than the founders or participants in statutory reforms, would be equivalent to rendering the bylaws themselves inane by resorting to the merely contractualist postulate of the independence of the arbitration clause with respect to the contract that contains it. This postulate, as previously noted, is inappropriate and inapplicable with respect to the corporate bylaws given their complexity, systematicity and particular operation, since, for example in capital companies, it is almost materially impossible for the concurrence of an express and individual acceptance of the arbitration clause by non-founding partners or reformers of the corporate bylaws. In fact, from a commercial perspective, it would be unattractive to the stock market to have this obligation in the terms and conditions previously mentioned, not to mention the legal and market insecurity that would result from this circumstance (Bennetti, 2001).

As can be seen up to this point of the present work, the understanding and conception of the social contract demands a systemic and unitary interpretation of the same in view of the corporate entity as a business foundation and not as a mere obligatory relationship, this without leaving aside, as has been outlined, market complexities (e.g. stock market,) of conglomerates and why not, even of special regulations as in the case of companies with high regulation (redundancy) and/or state intervention either by their nature or by their corporate purpose or both (e.g., private security companies that must necessarily have the character of limited liability companies). Private security companies that must necessarily have the character of limited liability companies.) under this spectrum, the corporate contract is a unit where the maneuverability to deviate or not from an arbitration clause enshrined therein, can clearly be predicated of the partners signing the bylaws or its amendments, but to a lesser extent (and subject to the jurisprudential variables that may occur) of the adherent partner to the bylaws, which as it has been indicated in many cases, practically ignores the statutes to which it adheres (e.g., the purchase of shares by digital platforms or the purchase of shares through digital platforms, or the purchase of shares through the Internet), purchase of shares through digital platforms or in the traditional stock market).

In consideration of the above arguments and in order to provide a basis for this paper, from the perspective of corporate law, both general and special, it is possible to affirm, without prejudice to specialized interpretations, that the arbitration agreement duly and integrally incorporated in the bylaws, forms a unit with the rest of the regulatory scheme for this content and therefore, the partner who joins the company in any capacity, is bound to respect and observe this provision, to consider the contrary, at least from a perspective that could be qualified as rational, would entail the inoperability of the partnership and the loss of synchronization between the economic activity and the performance of corporate governance, this because the resolution of disputes cannot be subject to the consideration of the appropriateness or not of a mechanism, regardless of its qualification or qualification from the perspective of effectiveness and efficiency, if it is peaceful in terms of the channel and means of transaction of differences between partners.

The reality of the commercial traffic, the dynamics of the market and the same large-scale corporate operation, almost inevitably demand expeditious times, mechanisms and agency costs that can hardly coexist with the variable of an arbitration clause severable from the bulk of the bylaws. This does not even have a hypothetical place under the assumptions of the duties of a good businessman applicable to traders as partners, since in the face of massive, fast and almost vertiginous contracting given the new technologies, the possibility of

consulting, questioning and deviating from the corporate bylaws of the company receiving investments and capitalizations could at least be catalogued as of doubtful occurrence.

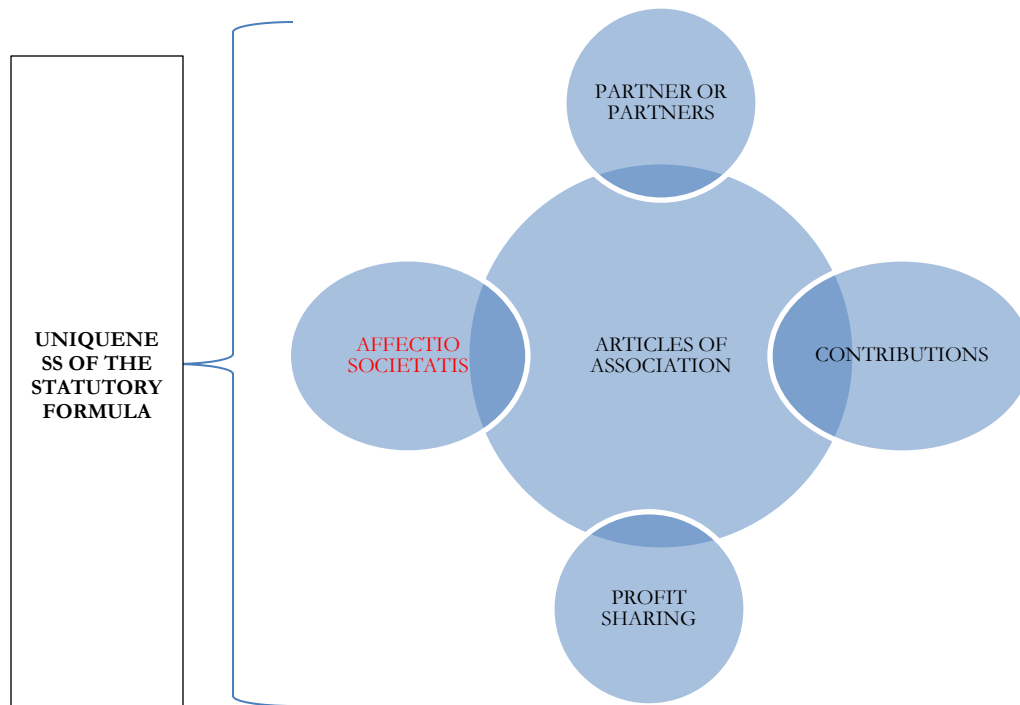


Figure 1: Elements of the essence of the social contract

From the corporate perspective, and without wishing to exhaust the arbitration considerations which will be addressed later, it should be noted that the current and trend of interpretation of contemporary private law cannot be conceived as anything less than corporate, since the new contractual regulations (e.g., the proposal of the Pavia project - European Code of Contracts, etc.) have been in force since the beginning of the 20th century. (Nuñez Santos, 2010)) to the corporate ones, the survival and maintenance of the legal instruments generating wealth is sought (an applicable analogy would be the social function of the property which is of constitutional rank) and, in this understanding, it is necessary and necessary to consider that the vertiginousness of the commercial traffic and the vocation of high transactionality of some aliquots of corporate capital such as the shares when the fragmentation of the bylaws refers and in the face of the traditional position of the autonomy of the arbitration clause against the bulk of the contract that contains it.

In this regard and as evidence to be weighed in this reflective effort, see that the law 1563 of 2012 (Congress of the Republic of Colombia, 2012) in its article 5 considers and establishes that the assignment of a contract that contains an arbitration clause, entails the assignment of the clause, despite the fact that the assignee is not a participant of the original contract, did not negotiate the scope and structure of the same or at least of the arbitration clause and that its will may manifest itself in refraining from taking part in the contract and withdrawing from the legal-economic relationship that it contains if its interests are not aligned with the contractual structure or at least with the arbitration clause.

This preservation of the contractual legal instruments that generate wealth, if viewed from a broad and, so to speak, teleological perspective, takes into account the fact that over and above the autonomy of the will or the theoretical positions that defend it, there are interests, principles and postulates whose defense and preservation require limitations to the aforementioned will, by way of example, consider the purposes of the state for the Colombian case, purposes that are developed and materialized through institutions such as private initiative, freedom of enterprise and the social function of property, where the finalist interpretation must always and in

all cases converge in the maintenance of the productive apparatus and the mobility of the flow of wealth; in other words, the conditions of commerce and the modern market lead to the need to preserve the generation of wealth on other grounds as a manifestation of the will that is dissonant with it, just as it could happen with the opposition of a partner who claims not to agree with an arbitration clause contained in some bylaws to which he adhered when he became a partner (this regardless of the mechanism used for the effect.)

Final Considerations

As a corollary of this approach to the specific aspects of corporate law applicable to the objective of this paper, it is pertinent to indicate that even in the practical sense and above the exercise of hypotheses, the arbitration clause is the one called to provide an expeditious, technically specialized, prompt and efficient jurisdictional solution to conflicts between partners, This situation becomes even more relevant given the role of commercial companies in the business environment and in market scenarios, where the resolution of disputes through ordinary jurisdiction is far from offering healthy solutions to the business and corporate governance fabric, which are necessary for the promotion of decent social conditions and national development.

In this regard, it is pertinent to remember that not only are there specialized rules on arbitration in the regulatory framework of private law, but there are also references from the general provisions that have provided in the dynamism of commercial law the need to generate equally expeditious resolutions to disputes between partners, to this effect see Articles 100, 137, 194 and 221 of the Commercial Code (Presidency of the Republic of Colombia, 1971). (Office of the President of the Republic of Colombia, 1971) and 233 of Law 222 of 1995 (Congress of the Republic of Colombia, 1995). In these provisions and in the rules that harmonize them, the pertinence, relevance and almost notorious need for specialized, technical and expeditious corporate conflict resolution mechanisms within the commercial environment is evident, which, as indicated above, corresponds to the engine of the flow of wealth and to an entity where the traditional forms such as, for example, the generation of individual contracts between two or more companies, the generation of individual contracts between two or more companies, or the generation of individual contracts between two or more companies, or the generation of individual contracts between two or more companies, or the generation of individual contracts between two or more companies, the generation of individual contracts between 2 parties give way to massive processes, nowadays automatic and in a good percentage of complete adherence and in which there is no room for the fragmentation of statutory provisions as is the case of the arbitration clause in the terms previously exposed. (Pineda Lemus, 2017)..

References Associated With Arbitration

Preliminary Regulatory Considerations

To begin the approach to the object of this work from the perspective of commercial arbitration, understood as a dispute resolution mechanism that invests individuals with jurisdiction for the purpose of a quick and well-founded resolution of disputes from a technical perspective, it is necessary to have as an initial milestone the provisions of Law 1563 which enshrines the Statute of National and International Arbitration. (Congress of the Republic of Colombia, 2012). This provision, which is concomitant in its chronology with the provisions of the General Procedural Code, prints an important modernization to the arbitration system and makes technical clarifications that are relevant to the dissertation contained herein.

At this point of dissertation it is appropriate to indicate that, by essence or by definition and in a simile to the institution of the "affectio societatis" of the social contract, arbitration demands the concurrence of the will of the persons who submit to its rule, that is, an unequivocal manifestation of the consent of those who, at their discretion, consider it appropriate to grant a degree of jurisdiction to the arbitral authority to settle a controversy brought to their knowledge. Under such criterion and conception, it is necessary (and in advance) to indicate that the submission to the arbitral authority may occur concurrently to the adherence to a multi-personal contract embodied in pre-existing bylaws, such as may occur in the case of the bylaws of commercial companies, in which the resolution of disputes between partners through the arbitral authority has been foreseen.

To this effect and with emphasis on the purpose of this work, it is appropriate to indicate that, within the most common corporate bylaws, the configuration of an arbitration clause has become the preferred mechanism for the resolution of disputes between partners, so much so that even at the level of pro forma suggested by the Chambers of Commerce this provision is established as a standard suggestion for an adequate exercise of corporate governance.

CAPÍTULO VI RESOLUCIÓN DE CONFLICTOS

ARTÍCULO 18. ARBITRAMENTO.

Todas las diferencias que ocurran a los accionistas entre sí, o con la sociedad o sus administradores, en desarrollo del contrato social o del acto unilateral, incluida la impugnación de determinaciones de asamblea o junta directiva con fundamento en cualquiera de las causas legales, será resuelta por un tribunal arbitral compuesto por **SELECCIONE LA CANTIDAD DE ARBITROS** en **SELECCIONE EL TIPO DE ARBITRAJE**, designados por el Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá. El tribunal sesionará en el Centro antes mencionado y se sujetará a las tarifas y reglas de procedimiento vigentes en él para el momento en que la solicitud de arbitraje sea presentada.

Figure 2: Arbitration clause suggested by the Chamber of Commerce of Bogota

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Under these assumptions, the bylaws and in general the development of the corporate purpose of the commercial company over time, have arbitration as an appropriate instance of conflict resolution given the technical specificity of the same, the speed of its times and the scope of closing instance of its decisions (jurisdictional scope of the awards,) this in agreement with the voices of Article 1 of the Arbitration Statute that establishes as principles and rules of arbitration those of impartiality, suitability, speed, equality, orality, publicity and contradiction.

This being the case and having considered the pre-existence of the arbitration agreement in the bylaws, it is appropriate to indicate that it is systemic to the operation of the company and, therefore, the partners that after the founding act or the statutory reform enter the corporate entity, as a matter of course and in accordance with the duty of diligence that is predictable to them, adhere to the arbitration agreement and are subject to its considerations just as they do with respect to the corporate purpose, the formation of capital, validity and domicile of the company, aspects which they do not control or can not modify with their entry into the company (at least not in principle and under the common rules of corporate law.)

For this reason, trying to separate the adherence to the arbitration agreement from the manifestation of the incoming partner's will, at least initially, escapes the logical considerations of the commercial traffic as far as the investment as a partner is concerned, even if this consideration is further deepened if one goes from the consideration of a purely capitalist partner to a managing partner where the liability regime increases or when one goes from a capital-based type of company to one based on the person, for example, the general partnership.

The arbitration itself, whether ad hoc or institutional, as provided for in Article 2 of the Arbitration Statute, clearly establishes a series of methodological and legal conditions that cannot be considered minor within the statutory scheme and therefore cannot be foreign or unknown to the incoming partner to the commercial partnership, who as a merchant or at least as an individual developing commercial acts, adheres to a regulatory unit with its favorable and unfavorable implications, or at least inconvenient ones; This is so true that even at the level of the general principles of law, it is neither feasible nor acceptable to consider the existence of intermediate laws or "lex tertia" where some points of a rule are accepted and others are not at the convenience of the interpreter. (Olaya Gómez, 2016).

In view of the above, it is considerable then that the arbitration agreement regulated in Article 3 of the Arbitration Statute is a part in complete unicity with the corporate bylaws and therefore, it is predictable, opposable and applicable to the partners other than those who constitute the company or reform its bylaws, this because "a priori" the partner to enter understands and accepts that the controversies derived from the corporate contract to which it adheres will be ventilated through the arbitration regulated by the bylaws; to consider that there is no concurrence of the manifestation of the will in front of an isolated part of the bylaws, in itself and in front of companies where there is a wide plurality of partners numerically speaking, opens a complex situation of governance and ventilation of controversies where the bifurcation of procedural routes can lead to the generation of contradictory effects and of doubtful applicability from the factual level.

The ontic support of the above-mentioned lies in the fact that the uniformity of the mechanisms for the resolution of controversies between partners, will allow a governance that from the language of the market or from the edges of the same can be summarized as the liberation of governance problems for the optimal generation of profits, This is because good corporate governance practices, as in the case at hand, have a teleological foundation, which is the effective development of the corporate purpose in order to promote a distribution of profits that can be classified as voluminous (in this regard, the provisions of Article 3 of the Arbitration Statute can be taken as a reference when referring to the following: *"The arbitration agreement implies the waiver of the parties to enforce their claims before the courts. The arbitration agreement may consist of a compromise or an arbitration clause"*).

Contrary to what could be considered from a merely literal reading, within the normative consecrations enshrined in Article 5 of the Arbitration Statute, the autonomy of the arbitration clause stems from the need to preserve the dispute resolution mechanism above the contractual vicissitudes in which it is contained, given its relevance and the need for legal certainty regarding the procedural means to achieve the resolution of disputes.

If this consideration is transferred to the corporate scenario, it is clear then that the autonomy of the arbitration clause is only predicated on the fact that over the variants of the existence, effectiveness or nullity of the corporate contract, it is necessary to be clear about the scenario and the jurisdiction on which statements will be made in this regard. Therefore, and in line with what has already been warned in previous lines, it cannot be separated from the will of the partner who enters the social framework, since, since its constitution, conformation and operation, this alternative dispute resolution mechanism has been consolidated as a transversal axis to the social development sought by the partner to enter; in other words, the arbitration clause is so relevant and important that it survives the variants of social development and permeates all the partners without distinction of the chronology of their entry into the partnership. (Vita Mesa, 2019).

Special Considerations

Although all the foregoing may be considered as conclusive regarding the applicability of the arbitration clause to partners other than those who agree to it in the founding or statutory reform act, it is no less true that administrative and jurisdictional authorities, as is the case of the Superintendence of Corporations, consider that it is not applicable to such partners, since they do not expressly consent to it at the time of joining the company.

Well, in this regard it is necessary to indicate that the arbitration clause, although autonomous from the examination of the contractual effectiveness of the corporate bylaws, is far from being accessory or catalogued as an appendix to the same, since, as indicated above, it is absolutely consubstantial to the basis of the corporate operation and generates a legal certainty essential for the proper functioning of the entity as an economic entity.

With all due respect to the dignity of the Superintendence of Corporations, it is not easily predictable that the social contract (bylaws) be discussed freely and in detail within the circulation of capital shares of commercial companies, since the mechanisms and channels to acquire the dignity of partner, in the reality of commercial traffic and wealth mobilization relations, are far from this degree of detail where the statutory clauses are expressly examined, reviewed and approved.

Just to refer to a situation applicable to this postulate, consider the convergence of shareholders and the transfer of shareholding positions in the public stock market, a scenario where the financial, legal and equity operations

in some events cannot be classified as less than vertiginous and clearly inaccessible to the postulate of individual review of the arbitration clause and without any mechanism for the express manifestation of the same, since even the share subscription process is massified and subject to material conditions to those initially contemplated in the Code of Commerce in article 384.

Without the intention of generating in this document transcriptions that increase its volume, it is considered pertinent to transcribe the aforementioned rule to validate that the corporate bylaws are accepted en bloc, as a unit and as a single legal entity: "**ARTICLE 384. <DEFINITION OF SUBSCRIPTION OF SHARES>. The subscription of shares is a contract whereby a person undertakes to pay a contribution to the company in accordance with the respective regulations and to submit to its bylaws. In turn, the company is obliged to recognize the person as a shareholder and to deliver the corresponding title. The subscription contract may not include any stipulation that may result in a decrease of the subscribed or paid-in capital**". (underlining and bold of the undersigned).

Another normative reference that demonstrates the uniqueness of the statutory rule and its predictability with respect to the partners that are not present in the act of incorporation or statutory reform, lies in the provisions of Article 343 of the Code of Commerce, which allows that in the incorporation of limited partnerships by shares the limited partners do not attend, but without at any time even by any chance considering that they are not subject to the rigor of the clauses of the statutory rule, to that effect the previously mentioned provision states: "**ARTICLE 343. <MINIMUM NUMBER OF SHAREHOLDERS FOR THE INCORPORATION OF A LIMITED PARTNERSHIP BY SHARES>. In the incorporation of the company it shall not be necessary for the limited partners to participate; but the deed shall always state the name, domicile and nationality of the subscribers, the number of shares subscribed, their nominal value and the part paid. The limited partnership by shares may not be incorporated or operate with less than five shareholders**".

To give an exogenous treatment to the compromissory clause regarding the bylaws and the basis of the economic or business unit is economically risky and legally insecure, in addition to not generating in a particular position any kind of doctrinal value to corporate law, on the contrary, it blurs and reduces its cohesion when the commercial company is the primary and most relevant cell in business affairs and as a logical consequence, of national development and the purposes of the state.

In other words, a dissertation associated with the non-applicability of the arbitration clause against partners who were not present at the time of its stipulation, far from adding to corporate law, complicates the operation of commercial companies and opens a dangerous gap in corporate governance that can lead to the immovability of the company in its business sense and contrary to the generation of wealth, To cite just one example, imagine the state and private wear and tear derived from thousands of legal proceedings in progress against a company of the size and economic dimension such as Ecopetrol or Bavaria, corporations of high patrimonial significance and that could be blocked by virtue of the interpretation previously outlined.

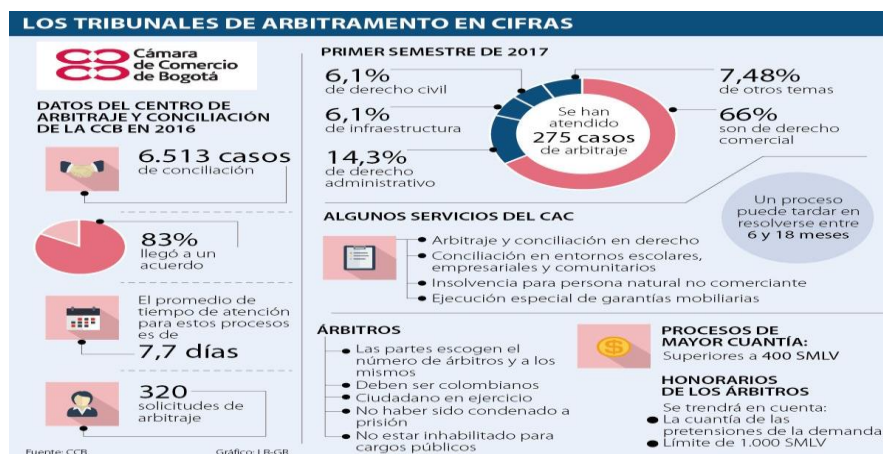


Figure 2: Example of the relevance of arbitration in commercial transactions 2017.

Retrieved from <https://www.asuntoslegales.com.co/consumidor/lo-que-debe-saber-de-los-centros-de-arbitraje-2540259>

The corporate structure in itself considered, the composition, ontology and commercial social teleology, derive in a normative unity that requires its consolidation and integrity to be predicated as effective and relevant for the purposes of wealth generation that ultimately irrigate and permeate the entire construction of corporate law, including the arbitration that is incorporated as a statutory provision and that has a vocation of permanence in time even for partners that after its consecration come to the commercial company.

Regarding the present discussion and in accordance with the provisions of the arbitration institution as a jurisdictional function, in the Colombian legal system and within the framework of the arbitral precedents applicable to the subject matter of this brief, in the course of the postulates of the *Kompetenze-Kompetenze* principle, it has not been observed that the arbitration courts deny their jurisdiction because of the lack of express, individual and detailed acceptance of the arbitration clause based on the corporate bylaws; on the contrary, it is considered that this is practically a double empowerment that makes the figure of the corporate contract inoperative.

In the self-determination of its competence, the arbitration court ratifies and validates the consistency of the unity of the corporate bylaws and that contrary to what was proposed by the Superintendence of Corporations, an express acceptance of the arbitration clause is not demanded individually to what is provided for by the corporate bylaws, quite the contrary, the partner who wishes to join the company has full freedom to accept or not in its entirety the corporate bylaws, that is to say, he cannot resort to a selective acceptance of fractions of the same in order to satisfy his individual considerations, when the regulatory text of the bylaws is systemic and integral and as already mentioned in previous lines, of mandatory compliance by the partner who upon joining the company submits to the same. (Eduardo Alejandro Orjuela Rodriguez Vs KPMG Ltda and others, 2015)..

At this point of the present work and for the purpose of considering a systemic analysis of the subject matter formulated, it is pertinent to address the applicability of the binding nature of the arbitration clause from the perspective of adhesion contracts and to consider whether or not there is any kind of abuse in the factual legal development of this arbitration agreement, This is because we are talking about the coverage of a statutory provision in the face of partners not present at the time of its consecration or even dissenting to the decision of the stipulation of the arbitration agreement, in other words, we are talking about the legal effects of a provision subject to the governance of the majorities.

The above has a special consideration on the basis of the figure of abuse of rights or its non-existence in the thesis worked on in this study, since it is on such consideration and review that a closing position can be established, at least tentatively, that gives certainty and validity to the present reflections, without leaving aside that as a principle and according to what has been argued, the position to be worked on is the one referring to the block proceeding of the opposability of the corporate bylaws in full, that is, including the provisions of arbitration as an alternative dispute resolution mechanism. (Messineo, 1986).

Regarding the adhesion of partners not participating in the structuring of the bylaws, the presence of a figure of adhesion is clearly established with respect to them and their discretion to accept or not the integrity of the clauses of the bylaws for the purpose of consolidating or not their status as partners, in accordance with the provisions of entry into the company according to the applicable corporate type.

In this context and with regard to the social contract and the adherence to it or not, it is clear that the criteria of unilaterality in the statutory stipulation and the adhesion or not to it as a whole are met, this as qualifying pillars of the existence of a contract of adhesion on which it is necessary to qualify the existence of abusive conditions.

At this point of reflection it is clear that the modern mercantile traffic, the existence of multiple associative forms and the presence of massive contracts or with clear components of agility and speed in its celebration, lead to the consideration of the figure of adhesion as a figure of acceptable usage and of deserved place in the normative scenario and of mercantile custom, this making clear that the limitation of the will with all its rigor of validity, is centered in the acceptance or denial of the contractual block in itself considered, as is the case of a corporate bylaws, where there is no disintegration of the same and where the accidentalness of some clauses such as the arbitration clause cannot be rampantly qualified as such, since it is part of the corporate functioning,

it is part of the corporate manifestation and identity and, as indicated in the preceding lines, it is necessary for a corporate governance based on good practices and legal and business security. The foregoing finds foundation and foundation not only in the provisions of our constitutional and legal system, but even in decanted jurisprudence where the closing judicial operator has warned that in the current market scenarios this form of manifestation of the will and generation of contractual consent is completely valid and does not ignore principles or fundamental rights of both the person of the contracting party and of the legal institutions represented in this legal business (Ospina Fernandez, Guillermo, 1982).

In this context and in view of the doctrinal and jurisprudential rules of the qualification and qualification of an abusive contractual clause, it is pertinent to point out that, contrary to the considerations generally accepted by the doctrine, there is no situation of manifest detriment or inferiority with respect to the partner who adheres to the arbitration clause, i.e., its harmfulness is not obvious and a situation of detriment cannot be inferred from it by itself, Especially when we are talking about a contract that although it requires the adherence or not en bloc to a corporate rule, it does not deprive the partner who enters the commercial company of room for maneuver, which according to the corporate position to be held and other factors such as those of governance and political management, can strengthen, modify or even repeal this clause in subsequent scenarios and making use precisely of the statutory rule to which it made acceptance.

It should be borne in mind that the qualification of a clause as abusive requires an unjustified imbalance such as that of the dominant position in the massive commercial contracting or of products with a special market margin such as financial or telecommunications products, something that does not properly occur in the social structure and that cannot easily be alleged from the same, since the access or not to the condition of partner in a commercial company is not proper of the daily business of the average consumer but an act of commerce subject to fiduciary duties, of good faith and of diligence almost very special, which in principle deprive the notion of force and prevalence of one party against the other.

Jurisprudential support of the above statement can be found in the following excerpt: *"As previously stated, the arbitration agreement either commitment or arbitration clause is a contract in itself, by the autonomous nature of this against the contract or business that contains it, therefore it cannot even be considered the abusive nature of the -clause regardless that the arbitration agreement is the result of a negotiation by adhesion, because there is no rule that prohibits it and accepting it would be as much as to ignore the very existence of adhesion contracts in Colombia. Therefore, the arbitration agreement originated in a negotiation by adhesion cannot even be considered contrary to the Constitution, since it is the same Political Charter which recognizes the existence of what has been called the principle of empowerment developed in the aforementioned Article 116 of the National Constitution."* (Arbitration Court of Fiduciaria Corficolombiana S.A. vs. Juan Eleuterio Díaz, 2008).

METHODOLOGY

It is a dogmatic methodology, where the study of the aforementioned contracts, the applicable legislation, doctrine and Colombian jurisprudence is intended.

THEORETICAL FRAMEWORK

In order to take the preceding dissertation to the main applicable jurisprudential milestones, it is appropriate to recall the following judicial pronouncements, with the special consideration that there is no pacific point from the judicial closing instances regarding the applicability or not of the arbitration clause against the partners who did not participate in the agreement of the same, either in instances of incorporation of the commercial company or in instances of an eventual statutory reform.

The jurisprudential review to be presented contains wide pendular movements in the pronouncements contained therein, this being a reliable reflection of the non-existence of a definitive north facing the point of study and giving consubstantial validity to the origin and relevance of this academic effort.

Jurisprudential References Associated With The Superintendency Of Corporations

The Superintendence of Corporations, in addressing the subject matter of this work in its jurisdictional exercise, has established several precedents associated with the inapplicability of the arbitration clause against non-

participating partners in its consecration either in the founding act of the company or in a subsequent statutory reform. In this regard, and in order to give the due caveats, it is appropriate to indicate that this jurisprudential thesis in the vast majority of cases is expressed by way of prior exception rather than in the ruling instance, which is why it must be weighed the appropriateness of these pronouncements in order to consider or not the same as a source of law.

Organization: Superintendencia de Sociedades (Superintendency of Corporations)

Radication: Auto 2021-01-325511

Date: May 14, 2021

Consideration: The Superintendence of Corporations when examining a case associated with the appropriateness or not of the arbitration clause agreed by the bylaws against a partner not participating in the consecration of the same and belonging to a company of the corporate type corporation, considered that it is not appropriate, since although there is incorporation in the statutory text, the arbitration clause is independent of it and therefore is not covered by the adherence of the partner to the corporate text, that is, with ontic independence from a legal business perspective. (Case Tuberías Válvulas y Filtros Ltda, 2021).

At this point of dissertation and in order to give clarity to the subsequent recitals, it is appropriate to indicate that this consideration is applied by the Superintendence of Corporations to corporate types other than the Simplified Joint Stock Company where there is jurisprudential support that fundamentally settles any dissonant position with the adherence of the new partner to the corporate bylaws containing the arbitration clause, this jurisprudential reference will be addressed later.

Organization: Superintendencia de Sociedades (Superintendency of Corporations)

File: 2018-800-371

Radication: Auto 2019-01-314202

Date: August 23, 2019

Consideration: The Superintendence of Corporations, when examining whether or not the arbitration clause is applicable to partners who expressly did not participate in its formation and who hold the status of administrators, considered that there cannot be unicity from the teleological perspective of the aforementioned conflict resolution mechanism, since it goes beyond acting as administrator and arbitration jurisdiction is only applicable if there is express acceptance of the same to conflicts not corporate, but expressly with administrators.

This means that, for the case in question, there is no enabling principle that gives the green light to arbitral intervention and the absence of such principle results in the ineffectiveness of the effectiveness of the arbitration clause so that the dignities of partner (aware of the statutory provision of arbitration) and that of administrator concur in the same natural person. (Pollo Plus C.I. S.A. Case, 2019)..

In summary, the pronouncement of the Superintendence of Corporations splits the manifestation of the will associated with the statutory text from that required for the effective proceeding of the arbitration jurisdiction, thus demanding two express and separate manifestations of the will, one with respect to the rigor of the corporate rule and the other with respect to the submission to arbitration of corporate disputes and in a derivative sense, of controversies with administrators when they have the quality of partners and with respect to their actions as administrators exclusively, that is, a restrictive and rigorous application of the consecration of the arbitration agreement is made, requiring express and unequivocal manifestations of acceptance in an individual and detailed manner, to say the least. (Peña Díaz, 2017).

In order to emphasize the support of this jurisprudential position, it is appropriate to refer to previous pronouncements of the Superintendence of Corporations, which seeks to decant the thesis of the autonomy of the arbitration clause at all costs, a position that is not applicable in this paper but which is presented for the sake of effort and argumentative academic debate, to which effect the following reference can be cited *"the*

arbitration clause is not subject to the rules governing the incorporation and operation of corporate legal entities. This is due to the fact that, as explained by the most authoritative doctrine, the arbitration agreement is not an accessory element of the corporate contract, but rather, an autonomous legal business (Case 2015-800-165, 2015).."

Now, if there are clearly pronouncements such as the above, it is no less true that there are pendular movements in the thesis of the Superintendence of Corporations that temper the hardness of its jurisprudential position and tend to recognize the binding nature of the bylaws against new partners, this including what concerns the arbitration clause, to that effect, The Delegation of Commercial Procedures of this entity in recent years has given signs of turning towards the promotion of corporate arbitration, since as has been stated throughout this dissertation, to consider the contrary generates an affectation in a commercial traffic that should always and in all cases have a vocation for simplicity and efficiency in its institutions, mechanisms and legal institutions. (Alvarez, 2020).

One of the first references to be considered on this point is the one contained in the Auto of February 2018 where the aforementioned Delegation of the Superintendence of Corporations indicated the following: *"On the other hand, according to the information available in the file, it is clear that Oro Black Corp. And Royal Green Ressources Limited adhered to the corporate agreement as partners of Green Mine Ltda. after the very act of its incorporation (...) So, once they freely adhered to the corporate agreement, it is clear that the arbitration clause generates binding effects with respect to Oro Black Corp. and Royal Green Ressources Limited"*.

In addition to the above reference, we find the provisions of Official Communication No. 220-057228 of May 13, 2021 of the Superintendence of Corporations, in which the entity provides a broad consideration on the applicability of the arbitration clause to new partners, This indicates the applicability of the same with regard to these, since the will of association entails the adherence to this alternative mechanism of conflict resolution, as well as its concordance with the original considerations of the Code of Commerce regarding the subscription of shares, which has already been the subject of previous references.

Within this instrument there is mention to Official Communication 220-020367 of February 26, 2015 which states *"On the other hand, the persons with the intention of joining the SAS after the approval of the private document containing the bylaws, will have to carefully evaluate whether the existence of the arbitration clause in them is sufficient reason to refrain from joining the company, or if they consider it as a positive component of the same, or if it is an indifferent element. In any case, there is an element of voluntariness that the jurisprudence of the Constitutional Court has established as inherent to arbitration justice. This possibility of expressing the enabling will does not exist in the Commercial Code regime (...)"* (Calle Gallego, 2021)

In agreement with the pendulum positions referred to in the precedence and in coherence with the shift that could be predicted from the positions of the Superintendence of Companies, it can be considered as a milestone, although not primordial, if not historical, the official notice No. 220-042557 of April 30, 2013, which begins to consider the binding nature of the arbitration clause in the face of the incoming partners to the company and who were alien to its stipulation, this thesis reaffirms the character of unity of the corporate bylaws, its function in the commercial traffic and the relevance of the importance of a healthy and consistent corporate governance, to this effect the aforementioned office considers the following: *"Therefore, the clauses initially foreseen and those that are subsequently introduced as a result of reforms introduced to the corporate contract are of mandatory compliance and observance by those who not only participated in its initial drafting but imperative for those who during the existence of the legal entity are linked to the same, through a subscription of shares; alienation, transfer or award of social quotas or shares, for example. On the subject "the manifestations of the will of individuals become true legal norms, endowed with the attributes proper to them, including obligatory nature, by virtue of which the parties are bound by their own acts, as they would be if the obligations, they freely stipulate were imposed by the legislator itself"*.

Jurisprudential References Associated With Other Courts

IDENTIFICATION OF THE JUDGMENT

Bureau: Supreme Court of Justice, Civil Cassation Chamber

Speaking Jurisdicator: Dr. Margarita Cabello Blanco

File: STC6742-2015

Radicación: 11001-02-03-000-2015-01053-00

Date: May 28, 2015

Consideration: We proceed to the review of the applicability or not of the arbitration clause duly agreed upon in the corporate bylaws with respect to the managing partner but with respect to his acts of administration, since there is a consideration alleged by the appellant in the sense of the non-application of the aforementioned clause due to the reason and quality of administrator of the managing partner, that is to say, the same does not apply to his activities as corporate administrator (and does apply to his activities as proprietary partner).

In this regard, the Court in dismissing the case under study proceeds to indicate that, in the particular case of the managing partner, the nature of administrator and legal representative is connatural and derived from the quality of partner and, therefore, the acts of administration derive in the applicability of the compromissory clause intended for the partners, since there is a practical situation of inseparability of the actions of partner from those of administrator. In other words, *"the liability of the managing partner as administrator vis-à-vis the partners and the company constitutes a corporate controversy"* (Decision of tutela against La Rioja). (Tutela Judgment against Arbitration Award M. S. LÓPEZ & CÍA S. EN C., 2015).."

Likewise, and in order to resolve the legal problem formulated, the Court warns that the actions of a managing partner in reference to acts of administration, are acts that far from being contrary to the corporate bylaws regarding the resolution of disputes through arbitration, certainly include the arbitration clause, since this action of the administrator directly impacts the other partners and can be framed within the conflict between partners previously considered in the statutory texts.

Identification Of The Judgment

Body: Constitutional Court

Speaking Jurisdicator: Dr. Mauricio González Cuervo

File: C 014/10

Location: D-7784

Date: January 20, 2010

Consideration: In this ruling, the Constitutional Court considers it completely relevant and viable that the fact of acquiring the status of partner, by subtraction of matter, implies acceptance and compliance with the bylaws, including the eventual arbitration clause embodied therein, to the effect and with complete clarity it qualifies the partners not participating in the drafting of the arbitration agreement as "new" and as subject to the rule of the bylaws, which leaves a clear definition regarding the acceptance of the arbitration mechanism when acquiring the status of partner without any distinction or differentiation.

For the purpose of the clarity sought in this point of analysis, the following paragraph of the aforementioned ruling is quoted: *"The expression of will in favor of the arbitration clause can also be predicated of those persons, natural or legal, who become shareholders **after the incorporation of the corporation, or at the time when the statutory reform that incorporated it was perfected.** In such case, the person interested in becoming a shareholder, in exercise of its constitutional freedom of association, will be aware of the existence of the arbitration clause in the bylaws, **and will evaluate whether to accept it or not.** In case of not accepting it, also in exercise of the negative aspect of his freedom of association, which exempts him from the obligation to become a member, he may abstain from becoming a member of the association. **But by freely deciding to join, it is understood that he freely and voluntarily accepts the rules established in the bylaws, including, if applicable, the compromissory clause (...)***

The fragment under attack authorizes access to arbitration justice as long as it has been so agreed in the bylaws of the respective SAS, and given that unanimity is required for the arbitration clause to be incorporated in them, all shareholders, minority or

*majority, original **or new**, will have expressed, in that statutory consent, the enabling will required by the Charter (underlining and boldface of the undersigned.) (Study of constitutionality of Article 40 of Law 1258 of 2008, 2010). ."*

Thus, both the conceptual changes of the Superintendence of Corporations and the jurisprudential precepts of the Constitutional Court and the Supreme Court of Justice indicate that the commercial activity deserves institutions that facilitate the process of wealth production and generate a status of legal certainty within its corporate governance, making the bylaws integral and unitary as well as their application to the partners who join the company and are not participants in the deliberations where its structures, scope and recitals are discussed. (Kohler Lizarazo, 2016).

The position with which this dissertation effort closes, although it cannot be considered as complete and decanted in its entirety, is in accordance with the postulates and assumptions of contemporary commercial law, which in order to be grounded in the social structures, demands an easy, quick and expeditious resolution of conflicts, as is the case of arbitration, and this by definition, leads to a healthy commercial activity with the vocation of generating virtuous circles within the economic circuits.

CONCLUSION

Having made the above dissertations and done the applicable jurisprudential validation exercises, it is appropriate then, as a corollary of this work, to establish the following conclusions, without failing to indicate that the subject under study is far from being considered as finished and that, given the importance of the commercial company as a factor of generation and circulation of wealth, it will not be of little importance or alien to the debate an aspect as relevant as the entry of arbitration justice in the face of partners who know of it by adherence to the statutes already existing at the time of acquiring their status as partners.

In this regard, the conclusions of this academic effort can be summarized as follows:

The partners within a commercial company, especially in the current scenarios of almost vertiginous commercial traffic thanks to the new information and telecommunications technologies, as a general rule and in view of the element of generation and mobilization of wealth that commercial activity entails, seek the resolution of their disputes beyond the procedural channels provided by the state jurisdiction, for which they resort to figures such as arbitration, which in most cases is provided for within the statutory rule that regulates the commercial company individually considered. (Molina Sandoval, 2005).

The entry of a partner into a commercial company implies, according to the notions of general corporate law, the subjection to the provisions of the bylaws in their entirety without distinction of the clauses or provisions contained therein, when the manifestation of his will and the free will of the same are materialized in the possibility of entering or not to enter the company, for example, with or without the existence of an arbitration clause. This situation is much more relevant in massive and automated contracting scenarios such as those evidenced in the current transactional forms of the stock market or electronic contracting or the immaterialization of shares, to cite one of many examples.

The arbitration clause considered within the corporate bylaws is not easy to conceive or consider as a legal business autonomous from the bylaws that contain it, since this subsumes premises that would make the commercial traffic tedious, to say the least, would make the corporate governance relations extremely complex and could lead to dichotomies in procedural ways of resolving controversies that could be contradictory, dissimilar in time, form and scope and that could lead to the blockage of the productive activity and by definition, to the blockage of the essence of the associative effort.

There are several jurisprudential criteria tending to the definition of the applicability or not of the arbitration clause to partners who did not participate in its drafting and consecration, however, there is a tendency of jurisprudence that indicates that it is completely applicable to these partners, since despite their "new" character, they fully accept the bylaws and are subject to their scope, among them, those alluding to alternative dispute resolution mechanisms. (Vita Marco, 2019).

Arbitration has made a career within the Colombian corporate framework, to such an extent that even technical bodies such as the Chambers of Commerce suggest it in their proformas and within their business pedagogy processes, therefore, it is necessary to make a heartfelt reflection on the pragmatism and the utilitarian nature of arbitration as a mechanism for business promotion and as a manifestation of the need for a technical and expeditious justice for the resolution of social disputes, This with full respect for its forms and institutions, but with special emphasis on the need to preserve the sources of wealth as drivers of the productive apparatus and the circulation of goods and services necessary to guarantee social subsistence.

The arbitration clause has solid theoretical and jurisprudential bases to be considered as incorporated into the corporate bylaws and therefore as enforceable against partners who join the company and were not present when it was agreed upon.

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