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Arbitration

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Introduction

Arbitration is a private justice. The parties to a contract agree to submit disputes relating to this contract to an arbitrator or an arbitral tribunal. The arbitrator is a private person, lawyer or recognized expert in the technical field of the contract in question, which will be invested with judicial power by the will of the parties to hear a dispute between the parties relating to the contract between them. Arbitration is known in almost-all legislation worldwide. It has become a method of dispute resolution widely used in the practice of international trade.

The basic idea of arbitration is to respect the will of the parties: the procedural and substantive (law applicable to the contract) are dominated by the autonomy of the parties. In addition, the arbitrator derives its legitimacy from the will that it should ignore any price. Despite the importance of the will of the parties, the arbitration shall not absolve themselves of control of the award made by the state courts. Finally, even if the arbitrator exercises a judicial function, it lacks the authority which is proper to state court. The sentence makes it so different from domestic judgments: it will certainly have the authority of juicier, but it will not be directly enforceable. To make it enforceable, it will be necessary to go through an exequatur procedure (Lew et al., 2003).

In fact, many disputes arise due to weaknesses or avoidable errors. These failures have affected the judicious exercise of the will of the parties, it will be mainly:

- Lack of integration of the various aspects of trading: technical, commercial, financial, legal, under the strict control of the final decision maker, ultimate responsibility for the project;
- Without fundamental balance in the reciprocal obligations of the parties, sometimes from the abuse of a position of strength results in sometimes drastic conditions, conversely, by so-called trade concessions, sometimes bearing intolerable risks and the company that wins a contract "at any price";
- Visceral distrust of many negotiators with regard to dispute settlement clauses perceived as inherently contrary to the positive spirit which is stamping the conclusion of contracts;
- Inadequate perception of cultural differences between the prospective contractors and the effect of these differences on the understanding of the commitments and the execution thereof;
- Inadequate in the update of the contract, once it occurred.

This last point deserves a short development. The contract, which is sometimes forgotten, is a living being. It is likely to evolve over its execution due to changes in circumstances, extension or revision of economic projects that underlie them. Failure to take into account such changes may cause discrepancies between the reality on the ground and contractual stipulations.

Q1. Arbitration is a process of a judicial nature. This is to settle a dispute and the arbitrator's why with certain powers and some powers are those of the state courts. However, the referee derives its legitimacy from the will of the parties. There can be no arbitration if the parties did not want. In this context, arbitration is contractual. We can say that arbitration is a judicial process that is born of a desire to contract execution.

The United Nations Commission on International Trade Law (UNCITRAL) has published in 1985 the model law dealing specifically with international commercial arbitration. There is a law on arbitration, written in very simple terms, easy to understand, which is a valuable tool for the parties, if they choose to use it. The Model Law has been adopted by some countries, with the exception of England, which has its own full and clear arbitration system, embodied in the Arbitration Act 1996.

It is recommended in most cases to include in the arbitration clause a first phase of settlement. This clause is too often limited to the expression a little wave of goodwill at the stage of intention. It is best to give it some consistency, especially stipulating a deadline beyond which it may be referred to arbitration itself. Ad hoc arbitration may be recommended for some disputes that fall within a fairly homogeneous geographical or professional environment. However, it requires detailed specific contractual organization, which may put off some negotiators. In addition, some hiccups occurring in the implementation of this type of arbitration cannot be resolved by resorting to judicial proceedings. The parties may, however, deal with the first problem by providing the use of a set of existing rules, such as those contained in the UNCITRAL Rules.

The arbitration clause mentioned remains valid under all laws because by entering into the plant, after reading the clause means the person is agreed to the clause and he or she has no objection to be arbitrated under the clause mentioned at the entry point of the plant. Under such circumstances, it looks quite reasonable to believe that the clause mentioned at the entry point of the plant remained valid under all laws and under all circumstances.

Q2. Arbitration is a private, formal and binding procedure available to the parties to a contract to resolve disputes fairly and impartially without delay and excessive costs. It leads to a binding arbitration award enforceable in court and can be appealed. Contracts should provide a remedy in the event of a dispute over the contract term. Arbitrations are held on the basis of an "arbitration agreement".

For contracts subject to English law, it must be in the form of a written document prepared by the parties to the signing of the contract or at a later date. Arbitrations are conducted by people with experience and expertise of trading, and are conducted in private, the parties agree to appoint a sole arbitrator or each his own choosing to act on their behalf and in their name. The arbitrators are not lawyers of their respective parties, they must act with impartiality.

Although an arbitration contract has not been signed between the concerned parties, however, they signed an agreement that all the standard terms in the industry will apply. As arbitration is also a standard practice in contracts, thus, there is no need to have a separate arbitration contract and the rules of arbitration are applied on this contract also.

Q3. Arbitral awards can be reviewed by judiciary and this judicial review can act as a risk management technique. In most of the countries, the judiciary, after reviewing the case and decision of arbitrator, do have the authority to revert the decision if the decision was unlawful, unethical or does not fulfill the standards of fairness. The decision can also be reverted if the proper lawful practices and procedures have not been followed. The court also has the authority to allege such arbiters who did not follow the ethical, fair and lawful standards, practices and procedures.

In many countries court can also monitor the performance of the arbitration process and correct the errors in the legal execution of the arbitration award. Parties involved in the arbitration process have been given opportunity to review the whole contract by the court and then court should decide the case on the merits of the dispute.

Q4. The impartiality of arbitrators is one of the basic requirements of the arbitration. The referees cannot indeed be prejudiced on questions of law submitted to them or have special relationships with any of the parties likely to affect their "free will". This requirement is justified by the nature of the function of the arbitrator is of a judicial nature. The Paris Court of Appeal has held that the independence and impartiality are "the essence of the judicial function, by exclusive nature of any relationship of dependence on particular parts and prejudice" (Trakman, 2007).

It is universally accepted that arbitrators must be independent and impartial and stay during the procedure. To ensure compliance with this principle, it is usually requires arbitrators to disclose to the parties any matter likely to cast doubt on their independence or impartiality. Article 1452 of the French Code of Civil Procedure (applicable to domestic arbitrations) provides inter alia that the arbitrator shall disclose to the parties before accepting the mission, cause to justify his disqualification.

The law therefore requires today that arbitrators do not present circumstances likely to suspect a predisposition to them. The law not only requires that arbitrators be independent but also they give every appearance. It is not enough that the arbitrator be independent or impartial. Must still he has all the appearances and that is why the arbitrators may be challenged if a situation creates an appearance of bias as evidence of bias itself is not provided.

The International Bar Association for its part, adopted a text entitled "IBA Guidelines on Conflicts of Interest in International Arbitration" which is a basic rulebook guiding situations occurring most often in the field. These "guidelines" analyze the main causes of challenge that arise in practice and fall into three different categories, according to their severity (red, orange, green), having identified the general principles applicable to this type of situation. These Guidelines, if they do not have legally binding by themselves (unless the parties do give them), often provide guidance to arbitrators or arbitration institutions when they have to decide on an application recusal.

It must be remembered the difference between independence and impartiality in arbitration. Impartiality refers to the possible relationships between the referee and the questions of law referred to it. To avoid any suspicion of bias, it is often recommended in particular that the arbitrators will not be made public statements on a question of law referred to them as part of a deal. Independence does it refer to the lack of connection between the arbitrators and the parties or, in some cases with the advice. It goes without saying that such arbitrator cannot be in obedience to a party or have a relationship with her as she suggests or create a bias in the referee. Arbitration is a "small world", in which the main actors crisscrossed regularly, the authorities in charge of applications for recusal when dealing with requests for recusal on the relationship between referees and advice are therefore relatively mild.

This case therefore reiterates that the requirements of independence and impartiality of the arbitrator is not limited to the phase of designation of the arbitral tribunal and maintained during the entire procedure. This is an attitude of hostility to the referee in respect of one of the parties during the arbitration is a sign of lack of impartiality to justify not only the challenge but

the referee also invalidate the sentence as well as the implementation of the responsibility of the referee.

It is however certain that the arguments advanced by the parties during the arbitration proceedings are intended to influence the referee's decision to come. It is therefore natural that it loses its neutrality on the question as to judge and as the facts and the laws are presented. It should in fact that it passes the impartial arbiter status devoid of prejudice informed the referee whose duty is to judge.

The party which wants to complain about how the other party applying or interpreting the collective agreement may submit a formal complaint (grievance) to arbitration. The majority of collective agreements provides for an internal grievance mechanism, prior to a hearing by an arbitrator. Thus, the parties may decide, in the collective agreement, the grievance procedure shall apply to the settlement of any dispute that a grievance. In addition, a dispute relating to the maintenance of working conditions giving rise to the grievance procedure or disagreement related to the recall of a party at the end of a conflict.

Commercial arbitration in the international arena is an important process for resolving disputes. Its flexibility allows it to be combined with other methods of payment as may be, depending on the circumstances, more appropriate. It is unfolding in time and at reasonable cost depends largely on the attitude of the parties. Frequently, however, the parties prefer to rely from the beginning or at the time of the dispute, to predetermined rules, contained in an arbitration agreement like in international commercial arbitration, the United Nations Commission for International Trade Law (UNCITRAL) adopted by the General Assembly of the United Nations on 15 December 1976. Such regulation may also be developed by an institution, which is also

responsible to bring to arbitration administrative support, particularly in the selection of arbitrators and the conduct of the proceedings. We then speak of institutional arbitration. Like other institutional arbitration, the arbitration by the International Chamber of Commerce (ICC) provides the parties a settlement and a highly developed administrative framework. At the national level, arbitration institutions also exist.

There are two major differences exist between the judge's decision that the referee. The judge, organ of public authority, derives its authority from the state law that defines its powers. Failing voluntary by the unsuccessful party execution, the judge's decision may be enforced by compulsion, but abroad, where the judge must obtain permission from the relevant local jurisdiction. The referee, in turn, derives its authority from the will of the parties designate. If the parties do not run spontaneously, the arbitrator's decision will not be implemented by the constraint that subject, in all cases, the approval of the competent local court.

The intention of the parties plays a key role in the organization and conduct of the dispute by arbitration in the international field. Willingness to resort to arbitration may be present at the negotiation of the contract, if it contains an arbitration clause, or speak when the matter has already been born, through a special agreement. The exercise of autonomy of the parties may, however, take a ruler or libertarian. Its limits are:

- Respect of international public policy that imposes particular the rejection of corruption, violence, fraud;
- Public order provisions of the country where, if applicable, the award may be canceled (the country where the arbitration, for example) or should be performed in a binding manner, after authorization (exequatur) of the competent court of the place of execution;

- The ability of parties to engage on their own (legal capacity), the credentials of their representatives, or the non-arbitatory of certain disputes both in terms of the people of the material.

The scope of autonomy of the will of the parties remains particularly wide in the organization and conduct of the dispute by arbitration. One might therefore reasonably expect that the parties avail themselves of this freedom to carefully organize their relationships legally. The very real difficulties of certain negotiations in harsh conditions, the need sometimes invoked to maintain ambiguity about the scope of certain commitments to achieve in the negotiations, do not explain the full extent of this finding.

The parties will not go to court but try to solve their dispute through arbitration process because Indeed, the arbitrators shall be and remain independent vis-à-vis all parties throughout the process. The International Court of Arbitration of the ICC will not accept to appoint or confirm if they do not attest to that independence. They could be challenged by themselves or because of the circumstances they were to lose their independence. This is first, and naturally, a state of mind, but also, in practice, the lack of any relationship, family, work, financial or otherwise, which could reasonably be, in the eyes of the parties, affect its independence.

Q5. Delicate is also the selection of the seat of arbitration, that is to say, the place where, in law, arbitration is supposed to take place. The legal consequences of this choice are important because it is likely to significantly influence the course of the arbitration proceedings. In some cases, special rules of procedure require the Parties. In any case, they are required to comply with local rules of public order. In addition, it is with the competent courts of the seat of arbitration to a possible action for annulment against the award may be brought.

The fact is, however, that in many cases, the choice of the place of arbitration apparently responded to other concerns. Its fixation may be, for example, the result of a bargain against the language of the arbitration: an English part and a French party will agree, in this perspective, to arbitration in English in Paris.

Rationally, the choice of the seat of arbitration should meet the objectives of neutrality of the environment of the procedure and openness of local laws to the specific needs of international arbitration. Other factors, quite concrete, must be taken into consideration: ease of access, the presence of adequate infrastructure especially with regard to communications, the record of the proceedings, translation of statements and documents .. . and the cost of these facilities.

This is particularly to address this concern for cost that is often provided (ICC regulations also contain provisions to this effect) that hearings and meetings can be held in places other than the seat of arbitration.

In the above mentioned case the arbitrator could start hearing legitimately, because the parties wish the arbitrator or arbitrators forming the tribunal. Independent, of course, but the arbitrators are aware of the interest, legitimate by definition, the party that appointed. Competent in law, certainly, but open to corrections of the right to the name of fairness, at least according to the design of each party thereto (Buhring-Uhle et al., 2006).

In practice, the choice of the parties will initially focus on determining the number of arbitrators. Psychologically it is easier to propose a number of three arbitrators. Each party feels reassured if it could mean "his" will, assimilated often, but wrongly, a second lawyer. Taking into account these factors, in the above mentioned case, the parties choose three arbitrators with

each party having its own. The third arbitrator, who shall chair the arbitral tribunal, shall be appointed by the LCIA, unless the parties have agreed to another procedure. Although Robert Graham owns three companies, but one arbitrator is enough to take care of his case.

Q6. The prototype are the main evidence and basis of the whole conflict so it has to be preserved under arbitration laws of all countries. Freeze Drink has to request to the arbitrator to make this prototype as a part of evidence for this case and so it becomes arbitrator's responsibility to preserve it. When arbitrator appreciate and accept the importance of the prototype they will make a ruling to preserve the prototype and include it in the hearing.

Q7. The choice of applicable law in the settlement of disputes by arbitration, both as regards the merits that the procedure to resolve, is for the contracting of particular importance. The rule of law is often perceived by the parties as a constraint to them outside, if foreign. It is therefore necessary to emphasize that the first rules of law governing the contract provisions are themselves of it, which the parties agreed in form and substance. These conventional rules may be extended, additionally, by the relevant international trade practices. The substantive provisions of the contract may, however, organize everything. In addition, the determination of the precise content uses involves uncertainty.

It can therefore be very useful, especially for the sake of predictability, additionally make reference to a body of predetermined rules of national origin or other rules intended to supplement or clarify the legal framework of the contract. The arbitrator must choose the law under which the basic contract was signed.

Q8. The observation indicates that in practice the vast majority of cases the parties choose a law of national origin. Such a choice may be the subject of tough negotiations between

the parties, considering that each would benefit from what the law is applicable it knows best, the national law more often. Moreover, the choice of the parties on this point is often the result of a compromise with other elements of the organization's dispute settlement, namely the determination of the seat of arbitration and the language in which place thereof.

The express agreement of the parties, and subject to the provisions of international law and order, the arbitral tribunal may be exempted from applying the rules of law. It statue "equity" or ex aequo et bono ". Such agreement of the parties requires a special confidence in the arbitral tribunal's predictability that this approach has explains the frequent reluctance to her.

It is very common that the parties determine in their contract rules of law applicable to merits, such choice is much less common on the rules of procedure. The contractual organization of the called procedure to govern any disputes often put off, in fact, the negotiators. The use of institutional arbitration has on this point a significant advantage because it allows the parties to take advantage of the rules of procedure laid down by the institution chosen.

For points of the arbitration proceedings not covered by the regulation, it is recommended that the parties chose the rules of complementary law (Dugan et al., 2005), referring, for example, the law of arbitration in international affairs of the country where the arbitration . Where the parties cannot agree, the regulation provides mechanisms proxy decision (the intervention of the arbitral tribunal in most cases) that avoid blocking the process.

Q9. In my opinion, it is better for Bottlers Franchising Ltd. To not accept the Sharia Law and ask the arbitrators to award damages according to arbitration laws. In that case, the company will be able to receive interest on the damages. On the other hand, cannot be discriminated on the basis of religion.

Q10. I think the opinion of Dutch court is more feasible. However, I doubt that the decisions of UKgarian court or Dutch court have any impact on the application to enforce the award in any country. However, if Ukgarian court had really rejected the application to set aside the award on the basis of Sharia law then it has passed a message of religious discrimination which will not be appreciated and accepted.

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