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Résumé de l'article

Réunis à La Malbaie du 5 au 7 août 1990, une trentaine de juristes et d'économistes européens, nord-américains et africains ont échangé sur l'évolution du droit international économique.

Ce premier colloque organisé par la SDIE (Canada) en collaboration avec la SDIE (France) aborde les aspects historique, théorique, pratique et éthique de ce secteur du droit qui couvre l'organisation de la production et du commerce, les relations monétaires et financières, le droit du commerce international, la gestion des ressources et la protection de l'environnement.

Le présent dossier reproduit, en français ou en anglais, les principaux exposés. Les deux premiers textes traitent de questions générales et du cadre dans lequel se développe le droit international économique. Les exposés suivants présentent divers aspects de ce secteur du droit en cours de transformation.

NOTES, INFORMATIONS ET DOCUMENTS

Société de droit international économique (SDIE)* Colloque international de La Malbaie (1990) sur la transformation du droit international économique

International Economic Law Society (SDIE)* La Malbaie International Colloquium (1990) on Transformation of International Economic Law

RÉSUMÉ

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ABSTRACT

In the course of a meeting held in La Malbaie (Québec, Canada) on August 5th to 7th, 1990, thirty european, north-american and african jurists and economists exchanged ideas on the evolution of international economic law.
This first colloquium organised by the SDIE (Canada) in cooperation with the SDIE (France) covered historical, theorical, practical and ethical aspects of this sector of

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* We would like to express our thanks to Philips & Vineberg, Mes Bruno Deslauriers, Godin, Raymond, Harris, Thomas and Jolicoeur, Lacasse, Simard, Normand & associates for the financial support in publishing these acts Mr. Jacques Paquet and to Mr. Ernest Caparros of the *Revue générale de droit*.

du droit qui couvre l'organisation de la production et du commerce, les relations monétaires et financières, le droit du commerce international, la gestion des ressources et la protection de l'environnement.
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law which covers the organisation of trade and production, monetary and financial relations, international trade law, resources management and environmental protection.
The present document reproduces the texts submitted by the speakers in their original language. The first two papers aim at giving a general perspective of the variables of International Economic Law. The following papers focus on specific areas of international economic law where changes are taking place.

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The Constitution of the Arbitral Tribunal

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It has always been advocated as one of the main advantages of arbitration over litigation that the parties are free to constitute an arbitral tribunal which fulfills their particular needs. In other words, they are able to select "judges" of their own choice.

This freedom is particularly important when the nature of the dispute is technical or sophisticated and requires an expertise which parties are not assured to find with a national judge. As well, in an international context, each party will feel more comfortable before an arbitral tribunal chosen according to his will than before a national judge (and a system of court) of the country of his opponent. Hence, when negotiating the contract, the parties often rely on arbitration as a mean of settling future disputes.

When negotiating an arbitration clause, the parties must, already at that early stage, think of a mechanism to select their arbitrators. The constitution of the arbitral tribunal is an important step of any arbitration. The choice of a competent, neutral and available arbitrator(s) will often condition the conduct and the outcome of the proceedings.

The parties could select the arbitrator(s) at the time of the drafting of the contract in their arbitration clause but without knowing the nature of the future dispute or the ability of the arbitrator to act at the time of the dispute. They could wait until an actual dispute arises, but without the assurance of their mutual consent. Faced with these difficulties, along with the impossible task of setting up *ad hoc* arbitration rules, the parties often rely on a set of arbitration rules (institutional or not) which will invariably contain provisions as to the constitution of the arbitral tribunal. However, in so doing, the parties may surrender part of their freedom.

In fact, not all arbitration rules give the parties an entire freedom to select arbitrators of their own choice. One will find in the arbitration rules various approaches as to the constitution of the arbitral tribunal. Consequently, a close reading of the proposed set of arbitration rules is necessary to find

1. This text is a digest of a paper elaborated by the author while he was *stagiaire* at the Court of Arbitration of the International Chamber of Commerce. The author would like to thank Mr. Guillermo Aguilar Alvarez, General Counsel of the ICC Court.

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out if it is suitable to the case and the parties. A few questions should be asked: Will this arbitration rule recognise the choice made by the parties of the arbitrator or of the method of selection of the arbitrator(s)? When the rules do not recognise their choice or when such choice is not made, who will select the arbitrator(s) and which method of selection will he use under the rules? Why an arbitrator will be chosen over another? What are the criteria in this regards?

Supplementary vs *mandatory rules*

In reading a set of arbitration rules, one should always question at the outset their mandatory or supplementary nature. Even if arbitration is a consensual process, once the parties have agreed on a set of arbitration rules which contain mandatory provisions, they may not waive or modify them. On the contrary, the parties may waive or modify any provision which is supplementary as this provision will only apply in case the parties did not agree otherwise.

Lex loci arbitrii

One must always be cautious of the *lex loci arbitrii* (the law of the place of arbitration) which can limit the choice of the Parties by setting a mandatory requirement as to some quality of the arbitrator, such as: 1) to be a lawyer, ii) to be a citizen of the country where the arbitration is taking place, iii) to be a Moslem, iv) to be a physical person. Fortunately, the Quebec Province is now in line with the Model Law on International Commercial Arbitration (UNCITRAL — 1985) which favors as much as possible the agreement of the parties (see art. 940 *Code of Civil Procedure*).

I. Number of Arbitrators

Usually, the arbitration rules will respect the choice of the parties as to the number of arbitrators. In practice, an arbitral tribunal will either have one or three arbitrators. This is understandable as an even number of arbitrators could lead to a deadlock in the decision process; as well, a number of arbitrators greater than three (*i.d.* five) would increase the costs.

This practice is reflected in the arbitration rules. When the parties did not specifically agree on the number of arbitrators, the arbitration rules provide for a preferential number of arbitrators (either one or three). This preferential number can be automatically applied whatever the circumstances of the particular case; or it can be an indication to the

Institution[2] which will have the discretion to fix the number of arbitrators. The Institution may look, *inter alia*, at the amount involved, the parties' arguments, the complexity of the case and the national origin of the parties. In so doing, the Institution is trying to balance two opposite goals: provide a lower cost arbitration with one arbitrator against having arbitrators with different background reflecting the importance and the international dimension of the arbitration.

II. CHOICE OF ARBITRATORS: WHO SELECTS AND HOW WILL THE SELECTION BE MADE?

A. THE PARTIES

Most arbitration rules recognise the right for the parties to choose the arbitrator(s) that suits them or to select the method of selections of the arbitrator leading to such appointment. Some rules will do so without imposing any limitations on the parties' freedom subject to the mandatory criteria of independence and impartiality.

Many, although recognising that the parties have a choice, will impose some form of limitations. For instance, they may require that the choice of the arbitrator(s) by the parties be made from a List or Panel of arbitrators. Likewise, many Institutions have the right to confirm the nomination of the arbitrator made by the parties or another entity. For example, in an ICC arbitration, the Court of the ICC confirms the proposal made by the Parties (art. 2(1)).[3] Also Article 3.3 of the LCIA rules[4] provide that the Court may refuse to appoint such nominees if it determines that they are not suitable. This power of the Institution reveals the concern that the arbitrators be likely capable of conducting properly and rapidly the arbitration and of rendering an enforceable award meeting the criteria of the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards.

Many arbitration rules are more restrictive on the will of the parties when the arbitrator is to be the chairman. For example, the LCIA provides that the chairman is "designated" by the Court and is not a party-nominated arbitrator (art. 3.3).

The selection of an arbitrator by agreement of both Parties can seem sometimes an impossible task. After the dispute has arisen, parties are in a conflictual position; any proposal in good faith of one of the parties may

2. "Institution" is used as a generic term to designate the body who, according to the arbitration rules, is responsible to supervise the constitution of the arbitral tribunal.

3. ICC rules: *International Chamber of Commerce Rules of Conciliation and Arbitration* having effect on 1-01-1988;

4. LCIA rules: *London Court of International Arbitration Rules* having effect in 1985;

appear suspicious to the other. The ICC's experience show clearly that parties have great difficulty to agree either on the choice of a sole arbitrator or of the chairman.

B. WHEN THERE IS NO PARTIES' AGREEMENT OR WHERE THERE IS NO RECOGNITION OF SUCH AGREEMENT: WHO APPOINTS AND HOW WILL HE MAKE HIS SELECTION?

In such a case, one can find broadly 5 entities that may select the arbitrator(s) under the arbitration rules: 1. the party unilaterally; 2. the co-arbitrators; 3. the Parties and the Institution by using the List Procedure; 4. the appointing authority; 5. the Institution.

1. The party unilaterally

The arbitration rules may ask each party unilaterally to appoint an arbitrator who acts as a co-arbitrator in a Panel of three arbitrators. The co-arbitrator is often called a party appointed arbitrator. This does not mean that he acts as a representative of the party who nominates him or adopts his position in the case. But it is often important for the parties to have a voice (or a least have the impression of having a voice in the arbitral tribunal) whose cultural and juridical background is similar. In theory, the party could choose any person that suits him, subject to the requirement of independence and impartiality.

2. The co-arbitrators

The co-arbitrators are often called upon to agree on the selection of a third arbitrator who will act as chairman. This has the advantage of ensuring that the Chairman will be respected by the two co-arbitrators; they will have chosen him because they both believe he has the skill, competence and judgement to handle the matter before them.

3. The Institution and the Parties under the List Procdure

The Parties and the Institution are both involved in the selection process under the List Procedure. The Institution first makes a preliminary list of names that will be submitted to both parties for consideration; each party will cross out the undesired candidates and indicate to the Institution an order of preference among the remaining names; the Institution will compare each party's choice and match as closely as possible their will. The

List Procedure is primarily used by the UNCITRAL inspired rules[5] in the selection of the sole arbitrator or the chairman.

4. The Appointment Authority

The concept of appointing authority is used mainly by the UNCITRAL inspired rules. Because UNCITRAL is destined to *ad hoc* arbitration, it was necessary to provide for an appointing authority to act in the constitution of the arbitral tribunal in replacement of the Institution. Beware that when you use the UNCITRAL rules in an *ad hoc* arbitration, it is necessary for the parties to designate an appointing authority failing which the Permanent Court of Arbitration of the Hague will be asked to designate one (art. 6(1)).

5. The Institution

All arbitration rules (except UNCITRAL) created an Institution to provide assistance to the parties in the arbitral process and to administer the rules. The Institution may be called to appoint the arbitrators. Especially when everything else has failed, the fall back procedure for the constitution of the arbitral tribunal usally involves the Institution.

Most Institutions will choose the arbitrator among a List of arbitrators or a Panel of arbitrators that has been set up under the arbitration rules. For some Institutions, it is mandatory; for some others, it is optional. It is legitimate to ask ourselves: how do these arbitrators get on the Panel or the List in the first place and once there, how is the choice made by the Institution?

What are the criteria that influence the choice of the Institution in the selection of an arbitrator?

a) How do arbitrators get on the Panel(s) or List set up by the Institution?

The entity who appoints an arbitrator on the List is significantly most of the time not the Institution. Some of the arbitration rules do not provide for any indication as to the criteria used by the entity to include a

5. UNCITRAL rules: *United Nations Commission on International Trade Law Arbitration Rules* (U.N. Resolution 31/98 having effect on 15-12-1976); Following the adoption of the UNCITRAL rules, a number of Institutions have modeled their rules on UNCITRAL, for example: the Hong Kong International Arbitration Centre, the Cairo regional Centre and the Inter-American Commercial Arbitration Commission.

person in the List or Panel. Some do have criteria such as: citizenship or link to a region of the world; capacity; experience and knowledge in the dispute settlement procedure or/and in a particular field of expertise; professional capacity (*e.g.* lawyer, judge, diplomat).

b) How is the choice made by the Institution?

When the Institution must choose an arbitrator what criteria will it apply in its selection of a particular arbitrator to a particular case?

(i) Independance and Impartiality

These requirements are so important that they may be considered at the appointment stage, before the arbitrator has even acted in a manner which proves his dependence or partiality. This emphasis the importance of the appearance of independence and impartiality.

Either implicitly or explicitly, the Institution will take into account the independence of the person it would appoint as arbitrator. A partial or dependent arbitrator would be challenged by the adverse party thus annihilating the Institution's effort. To guarantee such independence or impartiality, many arbitration rules provide for a disclosure procedure. For example, under the ICC rules (art. 2(7)):

> a prospective arbitrator shall disclose in writing to the Secretary General of the Court any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties.

(ii) Nationality

Nationality of the arbitrator may be taken into account when the parties are themselves of different nationality. The goal is to avoid the appearance of partiality of the arbitrator because he is of the same nationality as one of the parties but not the other.

(iii) Other Factors

Although most rules do not provide for any specific guidelines in the appointment of an arbitrator, some do give indications that the Institution must be used in the appointment of the arbitrator. For example, the LCIA rules (art. 3.3) underscores the importance of the nature of the contract, the nature and circumstances of the dispute and the nationality, location and language of the parties.

In any event, an Institution or a party(ies) should try to choose an arbitrator(s) which is i) conversant with the laws that may potentially apply, ii) proficient in the languages of the arbitration, iii) professionnally qualified to hear and decide the type of dispute for which he is appointed iv) available to hear the case and v) able to manage an arbitration.

With all these qualifications and qualities of the arbitrators, the parties will certainly find in the arbitral process a satisfying mean of settling their dispute.