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Arbitration and the International Trade field

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“Arbitration is a simpler process that is governed according to the rules of a neutral arbitration organization that has often been selected by means of a clause inserted into the international agreement or transnational contract”¹

¹ MICCIOLI, Gloria. ‘A Selective Guide to Online International Arbitration Resources’. Published on June 21, 2004 by Legal and Technology Articles and Resources for Librarians, Lawyers and Law Firms.

I. Introduction

Arbitration is a method used to solve disputes in a non-judicial setting, which consists in a process where a neutral third party renders a final decision.

This presentation begins with the history of arbitration in the world, from the old civilization to the present day.

In the auto-guardianship time, primitive societies used to resolve their litigations only by using strength. Since the end of this period, the arbitration may be found in almost all civilizations: from ancient Greece to maritime customary law in medieval Europe.

This paper also analyzes the reasons of the extraordinary growth of arbitration on the international trade field, instead of the three-instance lengthy process in state court institutions.

One of these main reasons is certainly the fact that arbitration follows the rules of an impartial organization with international recognition and whose arbitrators were previously agreed upon by both parties.

Moreover, arbitration is considered a highly recommended procedure to parties who need confidentiality for the terms of its settlement. Informations related to cases brought before state courts institutions are certainly much more accessible by the media or the general public.

This presentation will also point out the Geneva Protocol on Arbitration Clauses, and the Geneva Convention on the Execution of Foreign Arbitral Awards, signed respectively in 1923 and 1927, which were replaced by the

New York Convention, promoted by UNCITRAL at the UN General Assembly of 1966 in order to improve unity in the international trade field.

Finally, this paper will analyze the importance of International bodies on arbitration, such as International Chamber of Commerce; International Centre for the Settlement of Investment Disputes; Permanent Court of Arbitration, and International Court of Justice.

II. Arbitration in History

In the old civilization, there were no States and no Courts. The litigations used to be decided by the parties according to its strength and its power.

Indeed, the auto-guardianship was the method found by primitive people to solve these litigations. Therefore, the idea of justice was completely different than it is nowadays.

The disputes, which inevitably arise, were resolved by violent prosecution, considered the normal way to achieve justice.

With the development of our society, a new concept of 'justice' has appeared and litigations started to be solved without the exclusive use of strength.

The development brought the idea of solving the disputes by choosing a reputable member of the community to act as a mediator or an arbitrator, a choice that belonged to both parties. The use of this method was allowed by the State, which would indicate an arbitrator only if the parties had not made their choice. This State procedure is called *manu militarii*.

However, after this stage, the State had taken to itself the responsibility of resolving the litigations, so that the mediation and the arbitration would no longer be the main method of deciding controversy.

Then, on June 26th 1945, it was signed in San Francisco the United Nations Charter, at the conclusion of the United Nations Conference on International Organization. On its Article 33, the Charter lists the methods for the pacific settlement of disputes between States:

'Article 33. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'

Arbitration, one of the methods listed above, was already found in ancient Greece, in the early Islamic World and in maritime customary law in medieval Europe.

“The modern history of international arbitration is, however, generally recognized as dating from the so-called Jay Treaty of 1794 between the United States of America and Great Britain. This Treaty of Amity, Commerce and Navigation provided for the creation of three mixed commissions, composed of American and British nationals in equal numbers, whose task it would be to settle a number of outstanding questions between the two countries which it had not been possible to resolve by negotiation.

Whilst it is true that these mixed commissions were not strictly speaking organs of third-party adjudication, they were intended to function to some extent as tribunals. They re-awakened interest in the process of arbitration. Throughout the 19th century, the United States and the United Kingdom had recourse to them, as did other States in Europe and the Americas”.²

For these reasons, arbitration is one of the oldest methods for the resolution of litigations between parties.

² International Court of Justice. ‘A guide to the history, composition, jurisdiction, procedure and decisions of the Court’. 5th Ed., 2004, The Hague, The Netherlands, p. 15

III. Arbitration Procedure

The choice of arbitration as an alternative to state litigation is becoming each time more common, especially on international commercial disputes. Due to the extraordinary growth and expansion of the world business communities, it is essential for companies to have an established method of solving litigations efficiently and faster.

Moreover, arbitration is quite useful in international business transactions because parties are hardly ever familiar with foreign legal systems. Most of the time, the party does not accept to take the risk of being submitted to a decision rendered in a foreign Court, according to the rules of another state, which may be partial to the party native to that Court.

For this reason, both parties agree to have the decision to its litigation rendered by an impartial forum. Indeed, in the arbitration procedure, no party enjoys a home court advantage.

“In the international context, the reason (for choosing the arbitration) is that usually neither party is happy at the prospect of finding itself in home courts of the other party and so they agree on a forum not identified with either party”.³

“Perhaps most important of all is that arbitration gives the parties a neutral decision-maker operating on neutral territory. Without suggesting that judges in most countries will in fact be more sympathetic to their countrymen

³ SHERMAN, Frederick E. ‘Sophisticated Arbitration’ in ‘Arbitragem Interna e Internacional’, Ed. Renovar, 2003, Sao Paulo, Brazil, p. 57

than to foreigners, that perception is common, and in some cases no doubt with good reason”⁴.

In addition to that, Arbitration Courts settle disputes much faster than the three-instance lengthy process in State Court Institutions. The effects of the arbitration decision start immediately.

Moreover, the confidentiality is one of the most appreciated advantages provided by arbitration and “may also be a major incentive for international parties to a dispute. Private parties often need to preserve business reputation, protect trade secrets and company records, maintain the secret of investment plans or other sensitive information, or resolve their dispute in private to facilitate ongoing relations”.⁵

“One of the essential requirements for resolution of a dispute through arbitration is the existence of an arbitration agreement between the parties. An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement. Various institutions engaged in arbitration have drafted arbitration clauses and incorporated them in their rules for adoption by the parties in their arbitration agreements”.⁶

⁴ RUBINS, Noah D. ‘Investment Arbitration in Brazil’ in ‘Arbitragem Interna e Internacional’, Ed. Renovar, 2003, Sao Paulo, Brazil, p. 100

⁵ RUBINS, Noah D. ‘Investment Arbitration in Brazil’ in ‘Arbitragem Interna e Internacional’, Ed. Renovar, 2003, Sao Paulo, Brazil, p. 101

⁶ AGARWAL Vinod K. ‘Alternative dispute resolution methods’. Published on March 2001 by United Nations Institute for Training and Research.

IV. International Agreements on Arbitration

IV.1 General Notes

The arbitration system was regulated by three international main agreements: the Geneva Protocol on Arbitration Clauses, signed on September 24th 1923; the Geneva Convention on the Execution of Foreign Arbitral Awards, dated September 26th 1927; and the Convention on the Recognition and Execution of Foreign Arbitral Awards of 1958, known as the New York Convention and signed on June 10th 1958.

After the end of the Second World War, the international trade has increased dramatically. The Geneva Protocol and the Geneva Convention were not able to regulate international litigations anymore, due to the fact that its rules were not complete or clear enough to resolve the increasing number of disputes.

For this reason, the New York Convention has substituted these two documents, in attempt to remove difficulties faced by the parties, such as the enforcement of foreign arbitral awards.

Indeed, the New York Convention can be considered a great evolution for the international arbitration system, so much, that over 130 Nations have adhered to it since its signature.

IV.2 The Geneva Protocol on Arbitration Clauses

The Geneva Protocol on Arbitration Clauses, signed at a meeting of the Assembly of the League of Nations on September 24th 1923, was ratified by 30 States.

However, due to the fact that its rules were considered incomplete, the Geneva Protocol had to be submitted to a reform four years later, by the Geneva Convention, on 1927.

IV.3 The Geneva Convention on the Execution of Foreign Arbitral Awards

The 'Geneva Convention on the Execution of Foreign Arbitral Awards' was signed on September 26th 1927 and amended the 'Geneva Protocol' in a matter of ways.

According to this Convention, the party interested in the enforcement of arbitral awards was responsible for proving the validity of the arbitration convention, by demonstrating, for example, that the award was in conformity with the law and that it has become final in the country in which it was made.

Therefore, the Geneva Convention was regarded as placing too high a burden on the party interested in the enforcement of the arbitration awards as well as making obstruction possible by the party resisting enforcement.

IV.4 The New York Convention

Since June 10th 1958, the date of its signature, more than 130 Nations all over the world have adhered to the New York Convention, which is considered nowadays as the main instrument for the International Trade Arbitration.

According to its Article VII 2:

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

The two main points of the New York Convention are to establish that (i) the competent authorities of the adherent countries will cease the continuation of a judicial process if there is an arbitration convention concerning the same subject of the process, even if this arbitration convention is being developed under a foreign country law system and (ii) the competent authorities will also establish the recognition and enforcement of arbitral awards made in a foreign state.

The ceasing of the continuation of a process related to the subject of the arbitration convention can be considered its 'terminal effect' and it is regulated on Article II of the 'New York Convention'.

On the other hand, the recognition and enforcement of arbitral awards are the 'continuative effects' of the arbitration convention, which are regulated on Articles III to VI.

This Convention was promoted by UNCITRAL, the United Nations Commission on International Trade Law, a Commission established by an UN General Assembly 1966 resolution in order to promote harmony in international trade.

"While it does not administer arbitration disputes, UNCITRAL has produced arbitration rules in accordance with which parties may choose to arbitrate. These rules may be used by any public or private entity. In addition,

UNCITRAL has issued a Model Law on International Commercial Arbitration that has influenced the national arbitration legislation of more than 45 countries.”⁷

The New York Convention certainly “gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedures. It attempted to remove the difficulties faced by the parties in the enforcement of foreign arbitral awards. The New York Convention reduced and simplified the requirements with which the party seeking recognition or enforcement of an award had to comply”.⁸

For these reasons, this Convention can be considered an extraordinary development for International Trade Arbitration.

IV.5 Other Agreements on Arbitration

Another international agreement related to arbitration is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, signed in Washington on March 18th 1965 and also known as ICSID Convention.

The main target of this document is the creation of facilities for voluntary settlement of litigations related to investments through conciliation or arbitration procedures.

However, considering that this agreement is specifically related to disputes concerning investments, its analysis is meaningless for this presentation.

⁷ MICCIOLI, Gloria. ‘A Selective Guide to Online International Arbitration Resources’. Published on June 21, 2004 by Legal and Technology Articles and Resources for Librarians, Lawyers and Law Firms.

⁸ AGARWAL Vinod K. ‘Alternative dispute resolution methods’. Published on March 2001 by United Nations Institute for Training and Research.

Moreover, there are some regional agreements and conventions, such as the 'European Convention on International Commercial Arbitration', signed in 1961 and the 'Inter-American Convention on International Commercial Arbitration', dated 1975 and commonly known as 'Panama Convention'.

V. International Bodies on Arbitration

V.1 International Chamber of Commerce

The International Chamber of Commerce, located in Paris and commonly known as the ICC, is certainly the most important and oldest institution in the field of arbitration.

Through its Commission on Arbitration – the International Court of Arbitration (the ICA), the ICC does not settle litigations, but provides necessary facilities for the resolution of disputes by arbitration.

The International Court of Arbitration, established in 1923, “aims to create a forum for experts to pool ideas and impact new policy on practical issues relating to international arbitration, the settlement of international business disputes and the legal or procedural aspects of arbitration. The Commission also aims to examine ICC dispute settlement services in view of current developments, including new technologies”.⁹

In addition to that, arbitrations are confidential and the parties can choose the arbitrators, place, rules and languages of the arbitration procedure.

For these reasons, the ICC calls itself “the world's leading organization in the field of international commercial dispute resolution”.

V.2 International Centre for the Settlement of Investment Disputes

The ‘International Centre for Settlement of Investment Disputes’ (the ICSID) is an institution of the World Bank group created in 1966,

⁹ The International Chamber of Commerce – World Business Organization web site

under the 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States'.

In spite of having links with the World Bank, the ICSID is considered an autonomous organization and it provides facilities for the conciliation and arbitration of investment litigations between member countries and individual investors.

V.3 Permanent Court of Arbitration

“The Hague Peace Conference of 1899 made provision for the creation for permanent machinery which would enable arbitral tribunals to be set up as desired and would facilitate their work”.¹⁰

For this reason, the Permanent Court of Arbitration was established in 1900, in The Hague.

This Court “administers arbitration, conciliation and fact finding in disputes involving various combinations of states, private parties and intergovernmental organizations”.¹¹

V.4 Permanent Court of International Justice

According to the Covenant of the League of Nations, on Article 14, a plan for the establishment of a Permanent Court of International Justice (PCIJ) would be formulated by the Council of the League:

¹⁰ International Court of Justice. 'A guide to the history, composition, jurisdiction, procedure and decisions of the Court'. P. 12, 5th Ed., 2004, The Hague, The Netherlands.

¹¹ The Permanent Court of Arbitration web site.

'Article 14. The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly'

Thus, after an important discussion on its terms, the PCIJ had its preliminary session in January 1922.

Several international litigations caused by the First World War were duly resolved by decisions of the PCIJ, which also contributed to the development of International Law by clarifying previous issues.

However, "the outbreak of War in September 1939 inevitably had serious consequences for the PCIJ, which had already for some years known a period of diminished activity. It was inevitable that even under the stress of the war some thought should be given to the future of the Court, as well as to the creation of a new international political order".¹²

The last session in The Hague was held by the PCIJ members in October 1945 and on January 1946, the judges of the Court resigned. The PCIJ was formally dissolved in April 1946.

¹² International Court of Justice. 'A guide to the history, composition, jurisdiction, procedure and decisions of the Court' 5th Ed., 2004, The Hague, The Netherlands, p. 17.

V.5 International Court of Justice

“On 30 October 1943, following a conference between China, The USSR, the United Kingdom and the United States, a joint declaration was issued recognizing the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, large and small, for the maintenance of international peace and security.”¹³

The International Court of Justice (ICJ) held its inaugural public sitting April 18th, 1946 and today it is the principal judicial organ of the United Nations.

ICJ main functions are to resolve legal litigations between States and to give advisory opinions concerning legal issues submitted to it by duly authorised international organs.

V.6 World Intellectual Property Organization Arbitration and Mediation Center

The World Intellectual Property Organization Arbitration and Mediation Center was established in Geneva, in 1994. This Center is specialized in solving litigations related to technology, entertainment and intellectual property.

The subject matter of disputes resolved by means of its procedures “has included both contractual (e.g. patent and software licenses, trademark coexistence agreements, distribution agreements for pharmaceutical products and research and development agreements) and non-contractual disputes (e.g. patent infringement)”.¹⁴

¹³ International Court of Justice. ‘A guide to the history, composition, jurisdiction, procedure and decisions of the Court’. 5th Ed., 2004, The Hague, The Netherlands, p. 19.

¹⁴ The World Intellectual Property Organization web site.

VI. Conclusion

Therefore, the choice of arbitration instead of the three-instance lengthy process in State Court Institutions has been increasing on international trade field.

The reasons for this growth are the benefits offered by arbitration, such as confidentiality for the terms of its settlement and the fact that it consists in a more efficient method for solving disputes.

In addition to that, arbitration follows the rules of an impartial organization with international recognition and whose arbitrators were previously agreed upon by both parties, so that no party is supposed to enjoy a home court advantage.

Finally, the New York Convention is considered an extraordinary evolution for the growth of arbitration on international relations. The recognition and enforcement of arbitral awards issued in a foreign state and the ceasing of a judicial process related to this same subject are certainly the best way to ensure that the arbitration decision will be duly respected.

VII. Bibliography

ALVIM, J. E Carreira. '*Direito Arbitral*'. Forense, 2004, Rio de Janeiro.

DOLINGER, Jacob. '*Direito Internacional Privado*'. Renovar, 1994, Rio de Janeiro.

FIGUEIRA JÚNIOR, Joel Dias. '*Arbitragem (legislação nacional e estrangeira) e o monopólio jurisdicional*'. Ltr, 1999, Sao Paulo.

MARTINS, Pedro A. Batista. '*Reflexões sobre arbitragem*'. Ltr, 2002, Sao Paulo.

_____. '*Aspectos Fundamentais da Lei de Arbitragem*'. Forense, 1999, Rio de Janeiro.

MICCIOLI, Gloria. 'A Selective Guide to Online International Arbitration Resources'. Published on June 2004 by Legal and Technology Articles and Resources for Librarians, Lawyers and Law Firms.

RUBINS, Noah D. 'Investment Arbitration in Brazil' in '*Arbitragem Interna e Internacional*', Renovar, 2003, Sao Paulo.

SHERMAN, Frederick E. 'Sophisticated Arbitration' in '*Arbitragem Interna e Internacional*', Renovar, 2003, Sao Paulo.

References on International Institution's web sites:

AGARWAL Vinod K. 'Alternative dispute resolution methods'. Published on March 2001 by United Nations Institute for Training and Research.

INTERNATIONAL Court of Justice website. 'A guide to the history, composition, jurisdiction, procedure and decisions of the Court'. 5th Ed., 2004, The Hague, The Netherlands.

INTERNATIONAL Chamber of Commerce World Business Organization web site

PERMANENT Court of Arbitration web site.