

PREVENTING AND MANAGING INTERNATIONAL

COMMERCIAL DISPUTES

(ROME – 28 . 29 SEPTEMBER 2007)

Track 8 : PROCEDURAL CHALLENGES

BRIEF INTRODUCTION OF CHAIRMAN : HABIB MALOUCHE

Ladies and Gentlemen,

I was glad that Proff De Paolo and his team has invited me to preside this track and I believed that they are good friends. On thinking it over they are murderers (assassini) for to have organized this important international meeting in Ramadan and programmed my own presidency in the afternoon at the time of my traditional nap.

-Fortunately they provide a high level panel which composed of Christian New Mark as rapporteur and leader of the debates, Stephan Kroll, Proff Amon Strachnov and last but not least the “bellissima Proff. Anna Maria” Giorgio Bernini daughter, Giorgio to whom I give my best regards.

-Now and for my intervention, you have to choose between “plague and cholera”, or I speak in Arabic, or in my bad English. As I think that you prefer the second solution I am not responsible of my French accent which will rasp most ears, thought I apologize for that.

-When French MOUTILSKY qualified arbitration as justice in an other manner « Justice autrement », I think that he means, less judicial uses and proceedings than before the courts, to favour the resolution of cases more easily, and try to be a success in an eventual conciliation of the parties during the debates, in award by consent before rendering the final settlement.

-This arbitral conception does suffer excessive proceedings, law rigorism nor rules dictatory, often adopted without sufficient knowledge, examination and discussions .

-A Syrian Author, (Antoine KASSIS) wrote twenty years ago that the best arbitration is an ad hoc one rendered exaquo, et bono, resolved in an amicable and faithful atmosphere between parties, having chosen arbitration for its real advantages, all the users engaging themselves to play seriously an honest game.

-This atmosphere was efficient during the last quarter of the past century, as arbitration was exempted from procedural tergiversations and incidents which are now infecting daily most arbitral cases in the world, obliging the users to look for alternatives ways of resolution.

-ADR, was expected as a solution to the deviousness of arbitration usances, however, some authors wrote without explanation, that they had demonstrated their limits to substitute for arbitration.

-The actual reality of arbitration with the numerous deviations, oblige users to find a possibility to remedy by the use of mediation culture for example.

-The important prejudice which interest our discussion was focused ten ycars ago by Bruno OPPETTI who wrote about excess of proceedings qualifying the arbitration resolution as

excessively "judicialisée et judiciarisée". Swiss REMOND speaks about "institutionalisation de l'arbitrage".

-Personally I think that arbitration resolution is going more and more, particularly in the south, to be a justice of low class with too expensive costs regarding services really rendered.

-About costs, French Dean LOQUIN and others said that the arbitration is made for resolving cases equitably and not to make arbitrator more rich.

-Unfortunately, arbitration is now considered more and more essentially as a business and a way to make more money by lawyers and judges (in the South) helped for that by some institutions.

-Such arbitration users, designated for their knowledge of court's proceedings, introduce in arbitration the courts uscs, which betray the traditional arbitration ethics and philosophy.

-Besides to abuse of proceedings, some arbitrators allow to themselves more power than the official judge imperium, and are more rigorist and severe than the courts, as there were no control of the proceedings during the process submission till the request of setting aside. The scrutiny of the draft of the award by some institutions is formal and inefficient.

-If some deviations are in favour of arbitrators and or institutions, they hurt the goal of arbitration and are against its development.

-Of course, the excess of proceedings and formalism, is often encouraged by the unfairness parties and representatives.

-The item of our commission is to try to answer the following question :

- Actual and dangerous deviations illustrated by excess of proceedings and misconduct of some arbitrators (power abuse ?) are they in favour of arbitration?
- Consequently the effective mediation culture is it able to save arbitration from its bad actual way ?

-They are many problems and challenges in the arbitration resolution. Among them is the unpleasant using of the proceedings which develop the challenge against awards and difficulties in the enforcement.

-Currently the increase of dilatory reservations and incidents before the opening of the proceedings and all along, added to an inexplicable conducts of some institutions and arbitrators, brings automatically difficulties and bad reactions, which oblige to review the formal contract of arbitration by explaining the rights and the obligations of all users, that contract which is now a sample adhesive convention, "contrat d'adhésion" avoiding arbitrators and institution's responsibility.

-The practice usually followed now, reproduces the disadvantages of proceedings before the courts, increased by others caused by the lack of competence of arbitrators and lawyers in the arbitration field.

The process begin often by :

- Recourses against the validity of the arbitration clause before courts.
- Challenge of the nomination of arbitrators.
- Challenge on qualification of the contract and on the arbitration case.

Recourses against the notification and the dates and delays.
Unpayment of arbitration advances of costs.

-After the constitution of the tribunal, there are often difficulties about nomination of arbitrators, applicable law, arbitral language, kompetanz - kompetanz, excess of procedural orders, and so on.

-About dates and delays, some arbitration institutions, acting for celerity, manage nevertheless their timetables with a commercial manner who cause delays of nomination during many years.

-In the same moment they punish a party for one day refusing the production of a written evidence document.

-The rigidity in application of arbitration dates seems to me unappropriated as more and more arbitrators favorise legal rigidity instead of equity and justice, and spend years and years for resolving a simple case.

-All that is far from ethics and arbitral philosophy, as I told it.

-It is evident that those excess are against the arbitral notion and its advantages, making of the commercial arbitration an arbitration trade.

-For remedy some propositions can be made :

1/ Revising deeply the arbitral institution, introducing more control on the merits and a lightening proceedings with more responsibility of arbitrators and institutions.

2/ Streamlining and managing disputes by effective use of mediation culture in arbitration. With regard to the usance, I don't understand why arbitration process does not make a profit of the unsuccessful mediation or conciliation, nor why that kind of resolution is not obligatory before going to arbitration regarding the normal fairness of parties and their real will of conviviality.

-I hope as old arbitrator and mediator that ADR can constitute the right way to assist the renewal of efficient arbitration and if necessary to substitute for it.
For that, ADR have to demonstrate its possibilities and real advantages which is the goal of our meeting.

H. Malouche

Conclusion

-After having heard to our rapporteur, to the three panelists and the participant's discussions and remarks, I have to close a so interesting debates by referring to N. Antaki who concludes his excellent paper on "ADR in Business" writing that "an excess of law, and I add rules and regulations, intoxicates justice, while a lack thereof dehydrates it".

-That is true for resolution by arbitration and ADR.

-An excess of proceedings and the troubles of resolution are against equity and the legitime expectation of parties, calling for a good and equitable process.

-The actual lack of confidence in arbitration use, brings unsuccessful resolutions, challenges and set aside.

-An efficient way is to find new solutions which guarantees justice, equality in the process and an executable settlement.

-Such solution can be found into the arbitration process with the cooperation of other ADR, which are not in competition.

-I hope that we have exposed some ways forward to develop ADR use, and help arbitration to regain strength and well establish new vitality.

-Of course that needs experienced and honest arbitrators and mediators ables to resolve litigations without calculation and selfish motives. Any one can be lawyer ; he does not be necessary a good arbitrator, as arbitration is a science, a practice and some times an art to resolute.

-Is Mediation needs to be a science and an art ? the question is still open.

-Thank you for your attention and congratulations for having animate our track.