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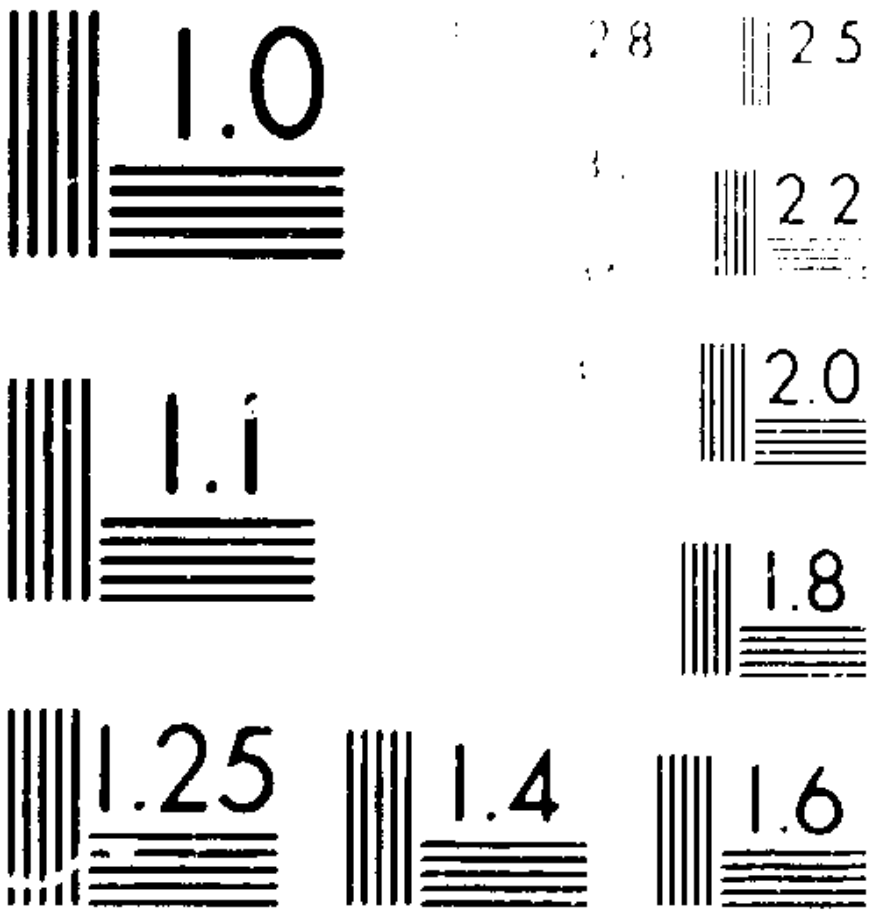
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ARBITRATION IN CASE OF NON-FULFILMENT OF WARRANTIES

by Marc Besso

In this paper we shall examine whether arbitration is the better way to settle claims for the non-fulfilment of the warranted or guaranteed perfcrmance. However, for the benefit of the readers with little legal experience, we shall provide a few introductory remarks on arbitration.

1. Generalities

Arbitration is a jurisdiction established by agreement between the parties of a contract to settle private law litigations in replacement of the judicial authority of the state.

The arbitration judges do not dispense justice in the name of the state and the arbitral tribunal is not a public authority. However, the arbitral jurisdiction is not a purely private law institution but, without using the public power is also part of the juridicial system of a state, with authority to render judicial decisions as results

from the various national procedure laws.

The limitations to which arbitration is subject is generally settled in the relevant national laws ruling the arbitration; however, basing on private autonomy, arbitration cannot expand beyond the legal limits of such autonomy: can only be subject of arbitral jurisdiction objects over which the parties are allowed to dispose and which are not exclusively reserved, due to overwhelming public interests, to state jurisdiction. The arbitrators are bound to the law governing the contract and arbitration rules. In general arbitral decisions cannot be enforced if they are contrary to the public order and the law of the country of the concerned party.

It would lead too far in the present paper to enter more deeply into the rather difficult subject of the legal nature of arbitration and the conclusions to be drawn therefrom. Arbitration has become an important tool of the international and national business world because it is considered to be the "friendly" way to settle disputes. In fact, not only are there institutions who carry arbitration among their tasks as the International Chamber of

Commerce in Paris, the American Arbitration Association and many others; also international conventions on arbitration have been concluded between numerous states either bilaterally or multilaterally, the object of these conventions being the enforcement of the arbitration awards. The most important multilateral international treaties are:

1. the Protocol of Geneva of September 24, 1923, concerning arbitration agreements and arbitration clauses;

2. the Geneva Convention of September 26, 1927, concerning the acknowledgement and enforcement of foreign arbitral awards;

3. the New York Convention of June 1958, on the acknowledgement and enforcement of foreign arbitral awards;

4. the European Convention of Geneva of April 21, 1961, on international commercial arbitration;

whereby the two last ones today are playing the most important part.[1)]

There are various arbitration rules which are today applied. In international technology transfer contracts

1. the Rules of Conciliaton and Arbitration of the International Chamber of Commerce in Paris (June 1, 1975);

2. the Commercial Arbitration Rules of the American Association of Arbitration, New York (January 1, 1980);

3. the United Nations Commision on International Trade Law (UNCITRAL) Arbitration Rules (December 15, 1976);

4. the Zürich Chamber of Commerce Arbitration Manual (November 3, 1976);

are commonly used in international contracts. There are of course quite a number of other such

1) See "LES Arbitration and The Licensing Process", Clark Boardman, New York, 1982, part 3 "Enforcement of Arbitral Awards".

rules prepared by other bodies which can be used as well, such as:

5. the Arbitration Rules of the London Court of Arbitration (September 1, 1978);

6. the Commercial Arbitration Rules, the Japanese Commercial Arbitration Association (February 1, 1971);

7. the Rules of the Netherlands Arbitration Institute (April 1, 1973);

8. the Rules of the Court of Arbitration of the Hamburg (FRG) Chamber of Commerce (December 9, 1948/September 4, 1958);

9. the Rules of the Court of Arbitration attached to the Chamber of Foreign Trade of the GDR (February 1, 1975);

10. the Rules of Procedure of the Interamerican Commercial Arbitration Commission (May 1, 1978).

The LICENSING EXECUTIVES SOCIETY (USA) Inc. recommends the rules known as the

11. Licensing Agreement Arbitration Rules (May 1, 1978)

which are specifically oriented towards technology licensing.

There are also specialised arbitration rules for disputes between individuals and states, such as

12. the Convention on the Settlement of Disputes between States and Nationals of other States submtited by the Executive Directors of the International Bank of Reconstruction and Development (March 18, 1965).

2. Choices

The decision as to whether choose arbitration or state courts, which law shall rule the contract and which rules of arbitration shall apply is complex and requires full knowledge of the specific situation under which the contract is concluded, the laws with their advantages and disadvantages, and for the rules of arbitration their strengths and weaknesses. There are numerous institutions active in international commercial arbitration which can be consulted as to the right choice. In most countries there ist at least one body which can, based on its members' experience help the parties either with advice or at least with reference to qualified local or foreign specialists to make proper decisions and draft proper arbitration clauses.

The most experienced bodies are certainly the International Chamber of Commerce in Paris, the American Arbitration Association, the International Bank of Reconstruction and Development and the various local chambers of commerce, as well as national arbitration associations.

There are various points of view which can constitute the basis of the choice, such as purely legal considerations, or what I would venture to consider more appropriate the need to settle differences of opinion in a sensible way and find solutions in problematic situations which are as far as possible acceptable to both parties.

Warranty and Guaranty cases are generally of complex nature. The subject of warranty in technology transfer seems at first sight simple, well defined: e.g. either the test run shows the fulfilment of the warranted results or it does not. The difficulty resides in the fact that black and white situations occure rather seldom and what complicates matters is the fact that the parties in need to solve an accruing problem may not be in the most suitable mood to do so due to the failure to perform as warranted in the contract, perhaps several times in a row. In other words: when arbitration comes into the picture, both parties, due to their psychologic involvement are not any more in best shape to overcome their personal pressures.

The rather rigid state court system is rarely in position to act in such a situation, since the

state courts have to concentrate on the purely legal appreciation of the case. They define who is the "good guy" and who is the "bad guy" and protect the "good guy" and punish the "bad guy". Another draw back of the state courts is that the judges are generally imposed irrespective of their specific experience and have to be assisted by hordes of specialists which results in very long lasting procedures.

Opposited to this: in arbitration, as the word himself says, there should not be such a thing as "bad guy" or "good guy", but two parties in difficulty trying honestly to save as much of the China as can be saved: all if possible. The arbitration tribunal is generally composed by ad hoc experts having the trust of the parties whose primary task is not only to decide about the award in the legal sense but also to act as "aimable compositeurs" and also to help the parties to negotiate a solution to their problems. At this point, I wish to draw the attention to a serious problem wich may arise if the parties are implying that the arbitrators they choose are their attorneys to represent their case. The arbitrator chosen by a party is a judge and only a judge, however, a trusted judge.

Another advantage of the arbitration tribunal is in general its ability to reach a decision in less time than state courts need due to the ad hoc constitution of the arbitration tribunal the case has not to wait until being called up.

Under these conditions, it seems to me that arbitration is the answer to solve warranty cases, speed is one of the important elements together with relevant specialists and skilled negotiators to avoid degradation of the relationship between the parties involved and to restore the spirit of cooperation in an atmosphere of trust for the benefit of continuing collaboration.

However, if both parties have reached the degree of unsurmountable opposition and all China is broken beyond possibility of repair, then there is no advantage for arbitration over state courts to warrant the much higher cost of arbitration.

We now come to the choice of the law ruling the contract. Although this choice is as a rule not critical from the perspective of arbitration, we shall nevertheless comment shortly on the subject.

Sometimes in an effort to compromise, the parties agree to accept a neutral law to rule the contract. The result is that the parties are going to negotiate the terms of the contract under a law which is familiar to neither of them. This operation which is performed with a view to eliminate a minor source of friction during negotation is more than often a matter of prestige rather than real need; a time bomb built into the system: the source of major misunderstandings has crept into the contract without the parties involved being aware of. Most of the modern laws contain proper protection for both recipient and supplier of technology. Perhaps the industrialized countries have a more developed practice of the courts and case law which may result to be advantageous to both parties if international contracts are considered.

Since we refer in this paper to the warranty aspects which results in the acquiror having a claim against the supplier, it would seem to us that it should be more convenient to choose the jurisdiction of the supplier's country meaning that the laws of his country shall apply and that the arbitration should be held there. Under the circumstances, the local procedural laws would generally prevail with a bet-

ter chance to enforce the award and with fewer risks for a successful appeal being entered in a local state court if the local law on arbitration allows for such appeal.

It must be said here that appealing contractual final arbitral decision is fundamentally in contradiction with the essence and the spirit of arbitration. In some countries such possibilities of appeal, however, do not exist and are sometimes used. If this happens, generally the state courts wind up the whole procedure from scratch.

Last but not least, in some countries the award of the aribtration tribunal must be registered with a local court to become enforceable.

3. The Clauses

In general, there are two types of arbitration clauses: a very simple one indicating clearly the contractual intent that all issues are subject to arbitration and law, arbitration rules and place of litigation, such as:

"Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof which cannot be amicably settled shall be finally resolved by arbitration according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The contract shall be governed by the laws of Switzerland and the place of litigation shall be Geneva (Switzerland)."

It is also possible to draw according to circumstances a more complex clause providing for example that only a specific part of the contract is subject to arbitration, leaving the rest of the contract to the competence of state law, such as:

"Any dispute, controversy or claim resulting out of or relating to this contract referring to war-

ranties are to be settled by arbitration. The arbitration tribunal is consisting of 3 (three) judges, two of them being designated by either party, which two judges then designate the presiding judge of the tribunal. If one of the parties fails to designate within 60 (sixty) days after the injunction of the other party to do so, the first circuit court (tribunal de premièreinstance) of the Canton of Geneva shall designate the judge instead of the failing party within 30 (thirty) days. The same applies if the judges cannot agree on the designation of their presiding judge. The place of litigation shall be Geneva.

All other dispute, controversy or claim resulting out of or relating to this contract or the breach, termination or invaldity thereof which cannot be settled amicably shall be finally settled by the courts of Geneva.

Swiss law shall rule the contract."

Such dual court clauses are useful in such cases where not all litigations may be subject to resolution by arbitration.

4. The Litigation

Once the parties have decided to revolge themselves to arbitration and the arbitral tribunal has been designated, the proceedings are similar to all civil litigations. Evidence must be collected and objectives ascertained.

In technology transfer, we face several possible warranties:

1. Warranty that the product is conform to specification, legal or not.

2. Warranty of capacity for production unit.

3. Warranty of raw material adn utilities consumption.

4. Warranty that neither process nor product infringe third party patent rights.

5. Warranty that licensor is entitled to license product and manufacturing process.

Newly, other forms of warranty have come up:

6. Warranty that effluents aer conform to legal specifications.

7. Warranty that the product can be marketed (commercially).

Another type of warranty is the pledge by the acquiring party to maintain secret the information received from the licensor regarding manufacturing process, construction of equipment, marketing data etc.

Whatever the objects of the warranty are, they have something in common: they must be clearly stipulated in the contract. But the clear stipulation alone is not sufficient: mechanisms should be ruled if practicable in the contract to produce the evidence of failure to meet the warranted obligation.

In the way of an example: The case of the license together with the construction of a manufacturing plant: we shall discuss such methodology divided between functions:

- the licensor who provides the process;

- the builder (engineering contractor) who designs and builds the manufacturing unit;

- the manufacturer of the equipment;

- the operator of the plant.

For each one of these functions the obligations have to be properly defined:

- The licensor warrants that the supplied process is capable of producing the specified product. He can prove this best in having himself an operating plant. He may also have to prove that the information he supplied was adequate to enable the builder to construct, procure and erect the plant and that the instruction provided to the operator's personnel is sufficient to carry out its duties. In general, licensor is releaved of his obligation after successful test running and acceptance of plant.

- The builder warrants that he layed out and constructed the plant, designed, choose, procured and assembled the equipment according to the process data supplied by the licensor. The

builder's obligation ends normally after acceptance of plant. However, some of supplier's warranties may have to be handled by builder until the end of such warranties.

- The supplier warrants the "hard ware" (this is the mechanical and electrical equipment) he manufactures against mechanical defects. This warranty is generally provided for one year.

- The operator has normally the obligation towards licensor and builder to define the geographical and climatic and technical environment in which the plant will be operated and furthermore has to supply raw materials and utilities in quality and quantities sufficient to run the plant, to provide sufficient qualified plant operating personnel for training and subsequently to run the plant.

To ascertain whether the plant is functioning as warranted, a test run is scheduled of generally 72 hours duration. If the warranties are not met, one or two more tests are scheduled after the defect has been removed. Since in general the cost are to be borne by the failing party, the arbitrators

will have to establish clearly the responsibilities which, due to the numerous interrelations, is sometimes very complex and arduous. Also the arbitrators will have to evaluate the damage resulting to the buyer of the plant if the warranties are not met. Examples of such calculations are given in my paper on "Damage Liquidation Provisions: Liabilities, Penalties, Direct Loss Provisions, Consequential Loss Provisions". Generally, even if assessing the damage carefully, the damage will never be covered in full due to the fact that it is practically impossible to determine the real loss which is the base for awarding the damage. Therefore, very often liquidated damages are settled in advance in the contract.

The arbitrators must carry in their minds that the main interest of the acquiror of the plant is less to collect damage payments rather than have an operating plant. To obtain this, the arbitrators acting as "aimable compositeurs" may have to be inventive and produce original suggestions: After more than two test run failures it becomes obvious that at least one of the partners is not in position to locate or overcome the cause of the failure. The arbitrators may then constrain the faulty

party to seek assistance from a qualified specialized consultant to resolve the problem and to carry the cost resulting therefrom.

It is, however, not always possible to define the responsible party or parties; in such a case, the risk is normally borne by the acquiring enterpreneur. He may possibly want to underwrite the risk and conclude an insurance. However, the premiums for this kind of insurance are in general fairly high.

5. The Conclusion

Since arbitration is the private method to seek just resolution of a differend between partners, the award may never become public and the reasoning of the arbitrators may never become known. It is therefore impossible to establish with arbitration the practice of the arbitration courts and case law other than through appeals against arbitration awards through state courts this is even more so due to the fact that the parties in general under the influence of the arbitrators usually come to a negotiated solution. Under these circumstances, the qualification of the arbitrators is of paramount importance and a very schematic ideal profile would give the following picture:

- highly qualified negotiator;
- qualified technical specialist;
- commercial flair;
- profond legal knowledge and understanding;
- experienced in arbitration.

As always, the problem is that there are only few people who reunite these qualities and therefore are difficult to find. This is the reason why the arbitrators choser by a party must not be considered as representatives of the choosing party. Together as an arbitration tribunal they must be as close as possible to the ideal.

The advantage to both parties to choose arbitration to resolve the litigation is evident: if they need to continue their relationship, confidence can be restored at least to an acceptable working level or if the partners wish to divorce, an organized retreat can be negotiated permitting in the future the establishment of new working relationship between the parties. We have to remember our world is small and although competition exists, the parties may on a future occasion need each other again.

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