

Introduction to International Commercial Arbitration

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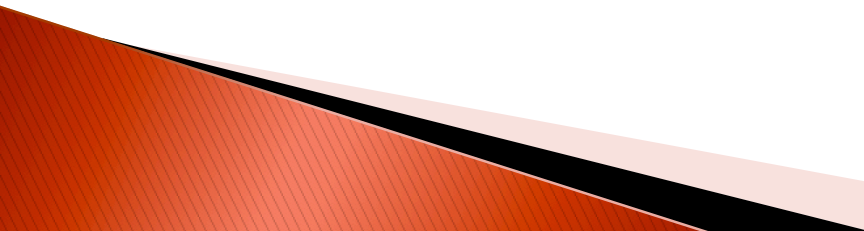


The Arbitration Tribunal and the Arbitrator

Lesson n.6



Establishment of an Arbitral Tribunal

- ▶ Differently from a national court, the Arbitral Tribunal must be established
 - ▶ Usually an arbitration is considered to start *before* the Arbitral Tribunal is established (it is important: *e.g.* statute of limitation)
 - ▶ Institutional / *Ad Hoc*
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Establishment of an Arbitral Tribunal

- ▶ The method to appoint the Arbitral Tribunal could be set forth (one or more):
 - By the agreement (*ad hoc*)
 - One arbitrator/three arbitrators. What happens if a party does not cooperate?
 - By an arbitral institution
 - Mechanism in the rules. Services as appointing authority
 - Through a list system
 - Each party indicates some names

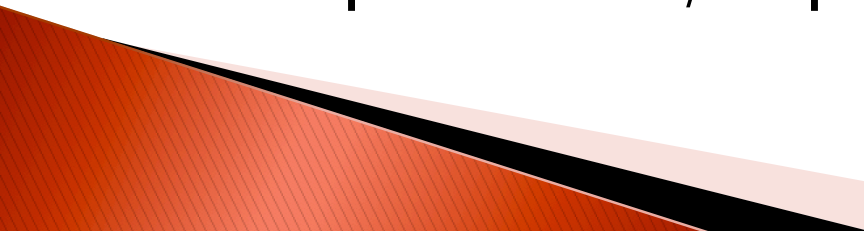
Establishment of an Arbitral Tribunal

- The chair by co-arbitrators
- By a professional institution or a trade association
 - *E.g.* IATA
- By a national court
 - Either under the rules of procedure or as appointing authority

Qualities required in International Arbitrators

- ▶ In principle, the parties are free to determine the qualities their arbitrators should have, but:
 - Some institution may put limits (*e.g.* closed list)
 - Some national laws may put limits (*e.g.* old Spanish law; Saudi Arabia)

Qualities required in International Arbitrators

- ▶ Professional expertise
 - Lawyer/technical expert
 - ▶ Language
 - Translations
 - ▶ Experience
 - Freshman vs. experienced
 - ▶ Nationality
 - Institutions/1–3 arbitrators/applicable law
 - ▶ Specific experience in arbitration
 - ▶ Independence/Impartiality → next lesson
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Special requirements

- ▶ Choosing too complex or detailed requirements may result in questioning the validity of the arbitration agreement
 - ▶ Remember the English-speaking Italian lawyer with a French law degree and a knowledge of Middle-East construction contract?
- ▶ The Jivraj vs. Hashwani case (will comment on that)

The Administrative Secretary

- ▶ The Arbitral Tribunal (also in administered arbitration) may want to avail itself of the help of an Administrative Secretary
- ▶ Why is it useful also in administered procedures? Many tasks are not covered by the institution
 - Taking notes; checking and filing documents; preparing drafts; taking note of the procedure; assisting witnesses
- ▶ Who is appropriate to appoint?

Powers of the Arbitral Tribunal

- ▶ The Arbitral Tribunal may draw its powers from basically two sources:
 - The parties, whether directly (*ad hoc*) or indirectly (administered)
 - The applicable law
- ▶ Sometimes the law put some tighter requirements

Powers of the Arbitral Tribunal

- ▶ Determine the procedural rules in detail
 - Usually laws are very broad (due process, basically). Regulations are quite broad, too (how many hearings? Where?)
- ▶ Determine applicable law and seat
- ▶ Determine the language of arbitration
- ▶ Govern document production
 - Which documents? When?

Powers of the Arbitral Tribunal

- ▶ Summoning witnesses / administering oaths
 - Is it possible for the Arbitral Tribunal to require the presence?
- ▶ Appoint experts
- ▶ Issue interim measures (but...)
 - Some laws do not provide for such power
 - The enforcement needs cooperation from national courts
- ▶ Ask for the assistance of state courts
 - Witnesses, interim measures

«*Kompetenz/Kompetenz*»

- ▶ What happens if a party challenges the jurisdiction of an Arbitral Tribunal?
- ▶ It is generally accepted that the Tribunal has the power to decide on its own jurisdiction. This principle is internationally known as «*Kompetenz/Kompetenz*»
- ▶ This is the general principle but:
 - Some national laws do not accept it
 - The decision by the Arbitral Tribunal may nevertheless be challenged before a national court (when? How?)