

PAR CES MOTIFS :

Sur le rapport de M. le conseiller Lemontey, les observations de Me Luc-Thaler, avocat de M. Orri, de Me Foussard, avocat de la Société des Lubrifiants Elf Aquitaine, les conclusions de M. Gaunet, avocat général

M. MASSIP, conseiller doyen faisant fonctions de président.

FOR THESE REASONS,

Upon the report of Mr Lemontey, conseiller, the observations of Mr Luc-Thaler, counsel for Mr. Orri, of Mr Foussard, counsel for Lubrifiants Elf Aquitaine, and the opinion of Mr Gaunet, Advocate General.

President: Mr. Massip, *conseiller doyen*, acting as Presiding Judge

Eisemann, F.: Pathological clauses, excerpt from “La clause d’arbitrage pathologique” in Commercial Arbitration Essays in Memoriam Eugenio Minoli (Torino: Unione Tipografico-editrice Torinese, 1974)

Four essential elements of an arbitration clause:

“(1) The first, which is common to all agreements, is to produce mandatory consequences for the parties,

(2) The second, is to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award,

(3) The third, is to give powers to the arbitrators to resolve the disputes likely to arise between the parties,

(4) The fourth, is to permit the putting in place of a procedure leading under the best conditions of efficiency and rapidity to the rendering of an award that is susceptible of judicial enforcement”.

Pathological clauses examples

1. “[Parties undertake] to have the dispute submitted to binding arbitration through The American Arbitration Association [hereafter: AAA] or to any other US court. (...) The arbitration shall be conducted based upon the Rules and Regulations of the International Chamber of Commerce (ICC 500).” – (Failed – X v Y)
2. “Any dispute, controversy or claim arising out of or relating to this Agreement, its breach, termination or validity, shall be settled by arbitration in the Geneva International Chamber of Commerce Court of Arbitration in accordance with its Rules. The number of arbitrators shall be one. The venue of arbitration shall be Geneva. The language of arbitration shall be English.” (Upheld by ICC Tribunal)
3. “In the event of any unresolved dispute, the matter will be referred to the International Chamber of Commerce” – (Failed – rejected by the ICC)

4. “*In the case of dispute (contestation), the parties undertake to submit to arbitration but in the case of litigation the Tribunal de la Seine shall have exclusive jurisdiction*” – (Failed, see Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (3ed., Oceana, 2000), p. 128)
5. “The Unified Terms of the German Grain Trade as well as the arbitral tribunal of the purchaser shall apply.” (Upheld – the arbitration provisions of the Unified Terms deemed to be incorporated into the agreement, see Munich Higher Regional Court, Docket No. 34 SchH 12/11)
6. “English law – arbitration, if any, London according ICC Rules” (Upheld – Arab-African Energy Corp Ltd v Olieprodukten Nederland BV [1983] 2 Lloyd’s Rep 419)
7. “Any dispute or difference arising out of or relating to this contract or the breach thereof which cannot be settled amicably without undue delay by the interested parties shall be arbitrated in the third country under the rules of the third country and in accordance with the rules of procedure of the International Commercial Arbitration Association.” – (Upheld, Lucky-Goldstar v Ng Moo Kee Engineering [1993] 1 HKC 404)
8. “[the Parties] shall proceed to litigate before the Arbitration Court of the International Chamber of Commerce in Paris with the seat in Zurich“ (failed the Hamm Court of Appeal in Germany, see R. Doak Bishop, “Drafting the ICC Arbitration Clause” at fn 15).
9. “Any dispute...between the Parties arising out of or relating to this Agreement which cannot be settled amicably shall be referred to and determined by arbitration in the Hague under the International Arbitration Rules” (Failed – PCA declined to accept the matter; see also US Court’s refusal to compel arbitration pursuant to this clause in Marks 3-Zet-Ernst Marks GmbH & Co KG v. Presstek Inc., 455 F.3d 7 (1st Cir. 2006).
10. “All disputes arising in connection with the present agreement shall be submitted in the first instance to arbitration. The arbitrator shall be a well-known Chamber of Commerce (like the ICC) designated by mutual agreement between both parties” (failed, see Law and Practice of International Commercial Arbitration (4ed) at [3-69])..
11. “In case of any disputes deriving from the [Sales] Contract, the parties agree that it should be competence of the Arbitration Court of the International Chamber of Commerce of Zürich in Lugano. The language of arbitration will be Italian. The law applied will be Swiss law” (Upheld as an ICC arbitration clause and not as a Zurich Chamber of Commerce clause, see Decision of the Swiss Federal Supreme Court of 5 December 2008, DFT 4A_376/2008, more details here.)
12. “7. Law and Jurisdiction
It is agreed that this Policy will be governed exclusively by the laws of Brazil.
Any disputes arising under, out of or in connection with this Policy shall be subject to the exclusive jurisdiction of the courts of Brazil.
12. Arbitration
In case the Insured and the Insurer(s) shall fail to agree as to the amount to be paid under this Policy through mediation as above, such dispute shall then be referred to arbitration under ARIAS Arbitration Rules. [...] The seat of the arbitration shall be London, England.”
(English Court of Appeal held that the governing law of the above arbitration clause was English law, see Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others, [2012] EWCA Civ 638)