

THE ISSUE OF THIS PRESENTATION IS:

« **WHAT CRITERIA FOR IDENTIFYING THE BEST SUITED ARBITRATOR IN A DISTRIBUTION RELATED DISPUTE ?** ».

SO THE QUESTION IS HOW WOULD ONE CHOOSE AN ARBITRATOR IN A DISTRIBUTION DISPUTE?

THE ANSWER INCLUDES TWO CONSIDERATIONS:

A GENERAL CONSIDERATION REGARDING ANY ARBITRATION CASE

AND A SPECIFIC CONSIDERATION PRECISELY RELATED TO THIS PRESENTATION WHICH CONCERNS THE ARBITRATION OF A DISTRIBUTION DISPUTE

THE GENERAL CONSIDERATION LEADS TO A RELATIVELY EASY ANSWER BECAUSE THE BASIC QUALITIES REQUIRED FROM AN ARBITRATOR HAVE BEEN VERY WELL ANALYZED AND SO ARE VERY WELL KNOWN.

BRIEFLY I WILL JUST RECALL THE THREE BASIC CRITERIA USUALLY AND GENERALLY USED TO CHOOSE AN ARBITRATOR WHATEVER THE CASE OR THE SITUATION MAY BE.

THIS CHOICE SHOULD FOCUS ON :

A SPECIALIST WHO IS ABLE,

WHO CAN SPEND MUCH OF HIS TIME ON THE CASE

AND WHO CANNOT BE CONTESTED AND EVEN MORE SUSPECTED OF PARTIALITY OR BIAS BY THE OTHER PARTY.

SO THREE QUALITIES ABILITY... AVAILABILITY... IMPARTIALITY.

FIRSTLY ABILITY. ABILITY DEMANDS A STRONG SPECIALIZATION IN THE FIELD INVOLVED IN THE DISPUTE.

IT IS THE FRUIT OF KNOWLEDGE BUT ALSO THE FRUIT OF EXPERIENCE;

NOT NECESSARILY A GREAT EXPERIENCE IN ARBITRATION BUT AT LEAST AN EXPERIENCE IN THE MATTER IN QUESTION.

SECONDLY AVAILABILITY. AVAILABILITY IMPLIES:

LIMITING THE NUMBER OF CASES IN WHICH THE POTENTIAL ARBITRATOR IS INVOLVED

OR MORE GENERALLY HAVING ENOUGH TIME TO DEDICATE TO THE ARBITRATION.

THIS IS OFTEN A DIFFICULT REQUIREMENT TO SATISFY BECAUSE THE BEST ARBITRATORS ARE NORMALLY AND LOGICALLY IN HIGH DEMAND AND SO VERY BUSY AND NOT VERY OFTEN AVAILABLE

THIRDLY IMPARTIALITY. IMPARTIALITY IS THE LAST ESSENTIAL REQUIREMENT. IMPARTIALITY REQUIRES THE LACK OF TIES OR LINKS WITH THE PARTY WHO APPOINTED THE ARBITRATOR.

IT IS A VERY SENSITIVE POINT TODAY BECAUSE THERE ARE MORE AND MORE CLAIMS BASED ON THIS ARGUMENT SINCE

OBVIOUSLY THE PARTY GENERALLY KNOWS HIS ARBITRATOR BEFORE APPOINTING HIM

IRONICALLY ONE CONSEQUENCE COULD BE THAT EACH PARTY SHOULD NOT KNOW HIS ARBITRATOR OR SHOULD CHOOSE AN ARBITRATOR ACCEPTED BY OR EVEN SUGGESTED BY THE OTHER PARTY.

I WILL NOT DEVELOP THESE WELL KNOWN CRITERIA AND I WILL FOCUS ON THE CRITERIA REQUIRED FROM AN ARBITRATOR IN A DISTRIBUTION DISPUTE

THE BASIC QUESTION IS : ARE THERE SOME SPECIAL CRITERIA REQUIRED IN THIS MATTER?

ASIDE FROM AN ADEQUATE KNOWLEDGE OF DISTRIBUTION LAW, DISTRIBUTION CONTRACTS, DISTRIBUTION ACTIVITIES AND PRACTICES .

IN OTHER WORDS AND MORE PRECISELY ARE THERE SPECIAL CHARACTERISTICS IN THE ARBITRATION OF A DISTRIBUTION DISPUTE ?

THE ANSWER IS CATEGORICALLY YES.

CATEGORICALLY IN THE FIRST AND ELEMENTARY SENSE OF THE WORD CATEGORY USED BY ARISTOTLE TO IDENTIFY THE BASIC OPERATION OF LOGIC AND WHICH WAS USED IN GREECE AT THAT TIME TO IDENTIFY THE NATURE OF THE CLAIM.

INDEED DISTRIBUTION CONTRACTS ARE PART OF A NEW SPECIAL CATEGORY OF CONTRACTS.

CLASSICALLY THE LAW AND JUDGES DISTINGUISH TWO CATEGORIES OF CONTRACTS ONLY :

THE LARGEST CATEGORY COVERS SELFISH OR SELF-SERVING CONTRACTS IN WHICH EACH PARTY LOOKS OUT FOR FOR HIS OWN INTEREST LIKE A SALES CONTRACT FOR EXAMPLE WHERE THE INTERESTS OF BUYER AND SELLER ARE CLEARLY IN OPPOSITION,

THE OTHER CATEGORY COVERS UNSELFISH OR DISINTERESTED CONTRACTS IN WHICH A PARTY LOOKS ONLY FOR THE INTEREST OF THE OTHER PARTY LIKE A CLASSICAL MANDATE FOR EXAMPLE WHERE THE REPRESENTATIVE IS ACTING NEVER IN HIS OWN BEST INTEREST BUT IN THE INTEREST OF THE PRINCIPAL

REGARDING DISTRIBUTION CONTRACTS THE JUDGES SINCE THE END OF THE 19 CENTURY AND CERTAIN LAWS SINCE 1990 HAVE IDENTIFIED A NEW CATEGORY OF CONTRACTS BASED ON THE COMMON INTEREST OF BOTH PARTIES THAT IS TO SAY EACH PARTY PROFITS WHEN AND TO THE SAME EXTENT THAT THE OTHER PARTY PROFITS: IT IS A WIN-WIN SITUATION. THE PARTIES SHARE IN A CERTAIN WAY PROFITS AND CONSEQUENTLY AND UNFORTUNATELY LOSSES FROM THEIR ACTIVITIES.

THE MORE THE DISTRIBUTOR RESELLS THE MORE THE SUPPLIER SELLS;

THE MORE THE PRINCIPAL SELLS THE MORE THE AGENT EARNS COMMISSIONS;

THE MORE THE FRANCHISEE SELLS THE MORE THE FRANCHISOR EARNS ROYALTIES

SO ANY DISPUTE WILL BE CHARACTERIZED BY THIS SPECIAL AND CLOSE RELATIONSHIP BASED ON "COMMON INTEREST" AND CONSEQUENTLY IN CASE OF A DISPUTE THE SITUATION CAN SEEM LIKE A MARRIAGE WITH A 7 YEAR ITCH AND WITH VERY COMPLICATED ISSUES : WHO IS RIGHT? WHO IS WRONG ? WHO WILL HAVE THE CAR? WHO WILL KEEP THE DOG ?

THEREFORE THE ARBITRATOR SHOULD HAVE EXPERIENCE AND SPECIAL SKILLS NOT NECESSARILY IN MATRIMONIAL CASES BUT IN THIS TYPE OF DISPUTE.

THIS CHARACTERISTIC WAS PRECISELY REVEALED BY A STUDY AT THE UNIVERSITY OF MONTPELLIER CONCERNING AWARDS RENDERED IN DISTRIBUTION DISPUTES. THIS PARTICULAR FIELD WAS CHOSEN JUST BECAUSE THERE ARE LEADING EXPERTS IN THIS MATTER AT THIS UNIVERSITY .

THE IDEA WAS TO COMPARE ARBITRAL AWARDS AND JUDICIAL DECISIONS IN THE SAME KIND OF CASE OBVIOUSLY TO ASSESS IF THERE WAS A MORE EFFECTIVE WAY TO SOLVE A DISPUTE.

THE RESULT OUT OF 300 CASES AND PUBLISHED AWARDS WAS THAT THE SOLUTIONS LEGALLY WERE -FORTUNATELY- APPROXIMATELY THE SAME BUT IN PRACTICE WERE SLIGHTLY BUT SIGNIFICANTLY DIFFERENT

THIS DIFFERENCE LIES IN A MORE FLEXIBLE CONSIDERATION OF THE CASE BY THE ARBITRATORS WITH THE RESULT THAT ACTUALLY THE AWARDS WERE MORE SUITED TO THE RELATIONSHIP THAN THE COURT DECISION. NOT ONLY BECAUSE OF THE CONCEPTION OF EQUITY INSPIRING THE ARBITRATORS BUT ALSO BECAUSE OF THE COMMON INTEREST BETWEEN THE PARTIES WAS MORE SUBTLY APPRECIATED BY ARBITRATORS.

IT IS NOT A CRITICISM OF THE JUDGE BUT IT IS THE ACKNOWLEDGMENT OF THE SUPERIORITY OF THE ARBITRATION IN THIS MATTER BECAUSE THE ARBITRATORS CAN SPEND MORE TIME ON THE CASE AND THEY HAVE A MORE PRAGMATIC APPROACH.

SO THE ARBITRATOR CAN UNDERSTAND THE DISPUTE AND SOLVE THE DISPUTE WITH MORE PRECISION AND SUBTLETY.

FIRSTLY HE CAN UNDERSTAND THE REASON FOR THE DISPUTE AND THE KEY ARGUMENTS BEHIND THE SUBMISSIONS FROM THE PARTIES AND EVEN BEYOND THEIR EXPLICIT CLAIM.

FOR EXAMPLE IS IT A SIMPLE AND NORMAL CRISIS IN A CLOSE AND LONG-STANDING RELATIONSHIP OR IS IT AN IRREVERSIBLE SITUATION LEADING TO AN IRREVOCABLE BREAKDOWN ?

WHAT IS THE DEEP-SEATED AND REAL INTENTION OF EACH PARTY : ARE THEY LOOKING FOR ANOTHER PARTNER OR DO THEY WANT BETTER CONDITIONS IN THE EXISTING RELATIONSHIP ?

SECONDLY THE ARBITRATOR CAN FIND THE OPTIMAL SOLUTION WHICH GOES BEYOND THE STRICT APPLICATION OF THE LAW.

FOR EXAMPLE HE CAN GIVE TO THE PARTIES A COOLING-OFF PERIOD TO PRESERVE THE CONTINUATION OF THEIR RELATIONSHIP OR CONVERSELY STOP THE RELATIONSHIP IN A SHORT SPACE OF TIME TO MAINTAIN THE INTERESTS OF EACH PARTY AFTER THE BREAKDOWN OF THEIR RELATIONSHIP AND THE END OF THEIR COMMON INTEREST.

THEREFORE THE CHOICE OF AN ARBITRATOR IN THIS FIELD SHOULD LIE IN COMPLEMENTARY QUALITIES SUCH AS :

NOT ONLY BEING ABLE TO DEAL WITH A DISPUTE IN THE DISTRIBUTION FIELD BUT ALSO BEING AWARE OF THE ECONOMIC ENVIRONMENT AND CONTRACTUAL OR LEGAL CONTEXT OF THE DISPUTE;

NOT ONLY BEING AVAILABLE BUT ALSO BEING ATTENTIVE TO AND MINDFUL OF ANY SENSITIVE INFORMATION ABOUT THE RELATIONSHIP IN QUESTION;

NOT ONLY BEING IMPARTIAL BUT ALSO UNDERSTANDING AND BEING OPEN TO THE ARGUMENTS OF BOTH PARTIES.

BEYOND THE LIMITS OF THE LAW AND EVEN BEYOND THE LIMITS OF EQUITY THE ARBITRATOR IN THE FIELD OF DISTRIBUTION DISPUTES HAS TO BE ABLE TO LOOK NOT ONLY FOR A JUST DECISION BUT ALSO A DECISION SUBTLE ENOUGH TO APPRECIATE AND TO ADJUST TO THE INTERESTS OF THE PARTIES.

FOR ME, IT SOUNDS BETTER IN FRENCH : AU DELA DE LA JUSTICE, LA JUSTESSE ...