

JUSTITIA ET PACE  
INSTITUT DE DROIT INTERNATIONAL

**Session of  
Santiago de Compostela - 1989**

**Arbitration Between States, State Enterprises,  
or State Entities, and Foreign Enterprises**

*(Eighteenth Commission, Rapporteur : Messrs Eduardo Jiménez de Aréchaga  
and Arthur von Mehren )*

*(The English text is authoritative. The French text is a translation.)*

*The Institute of International Law,*

*Whereas* the Institute, at its Amsterdam Session in 1957, adopted a Resolution on Arbitration in Private International Law and, at its Athens Session in 1979, adopted a Resolution on The Proper Law of the Contract in Agreements between a State and a Foreign Private Person ;

*Whereas* these Resolutions have implications for- but do not systematically treat -a subject of great practical as well as theoretical importance, namely, arbitrations between States, state enterprises, or states entities, on the one hand, and foreign enterprises, on the other ;

*Whereas* statement of a coherent body of principle regarding the arbitrator's role and obligations in such arbitrations will clarify certain fundamental questions and contribute to legal security ;

*Whereas*, while there are many principles that apply to international arbitrations in general, this Resolution also draws attention to other principles which are of special importance to arbitrations between States, state enterprises, or state entities, on the one hand, and foreign enterprises, on the other ;

*Whereas* an arbitral tribunal's duty to act pursuant to the agreement from which its authority derives sets the limits within which concern for the award's enforceability in a given jurisdiction can appropriately influence the result to be reached ; and

*Noting* that this Resolution is without prejudice to the applicable provisions of international treaties ; and

*Noting* further that this Resolution has in view only the authority and duties of arbitrators in arbitrations between States, state enterprises, or state entities, on the one hand, and foreign enterprises, on the other,

*Adopts* the following Articles :

*Article 1*

Arbitrators derive their authority and powers from the parties' agreement providing for arbitration. An arbitrator shall neither exceed his powers nor do less than is required to exercise his authority completely; and he shall exercise his functions impartially and independently.

*Article 2*

In no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community.

*Article 3*

Unless the arbitration agreement provides otherwise, the following general principles apply :

- a) The arbitration agreement is separable from the legal relationship to which it refers ;
- b) The tribunal determines the existence and extent of its jurisdiction and powers ;
- c) A party's refusal to participate in the arbitration, whether by failing to appoint an arbitrator pursuant to the arbitration agreement, or through the withdrawal of an arbitrator, or by resorting to other obstructionist measures, neither suspends the proceedings nor prevents the rendition of a valid award ;
- d) Should it become unduly difficult to carry on an arbitration at the agreed place, the tribunal is entitled, after consultation with the parties, to remove the arbitration to such place as it may decide ;
- e) The obstructionist measures of an arbitrator, including a refusal to discharge his functions, shall not unreasonably delay the proceedings. Where the other arbitrators agree that the delay has become unreasonable, the appointing party or authority should act to replace the arbitrator responsible for the delay. Should the aforesaid fail to act within a reasonable period of time, the other party to the arbitration is entitled to take the necessary steps to have the arbitrator replaced by a competent authority. In case of replacement, the arbitration proceedings need not be repeated if a majority of the tribunal rules that an adequate record of the proceedings has been maintained and that there are strong reasons why repetition is undesirable. Unless the parties agree to the contrary or the applicable rules provide otherwise, the arbitration shall proceed even though no replacement is made.

#### *Article 4*

Where the validity of the agreement to arbitrate is challenged, the tribunal shall resolve the issue by applying one or more of the following : the law chosen by the parties, the law indicated by the system of private international law stipulated by the parties, general principles of public or private international law, general principles of international arbitration, or the law that would be applied by the courts of the territory in which the tribunal has its seat. In making this selection, the tribunal shall be guided in every case by the principle in *favorem validitatis*.

#### *Article 5*

A State, a state enterprise, or a state entity cannot invoke incapacity to arbitrate in order to resist arbitration to which it has agreed.

#### *Article 6*

The parties have full autonomy to determine the procedural and substantive rules and principles that are to apply in the arbitration. In particular, (1) a different source may be chosen for the rules and principles applicable to each issue that arises and (2) these rules and principles may be derived from different national legal systems as well as from non-national sources such as principles of international law, general principles of law, and the usages of international commerce.

To the extent that the parties have left such issues open, the tribunal shall supply the necessary rules and principles drawing on the sources indicated in Article 4.

#### *Article 7*

Agreement by a state enterprise to arbitrate does not in itself imply consent by the State to be a party to the arbitration.

#### *Article 8*

The requirement of exhaustion of local remedies as a condition of implementation of an obligation to arbitrate is not admissible unless the arbitration agreement provides otherwise.

#### *Article 9*

Denial of the tribunal's jurisdiction based on a State's sovereign status is not admissible in arbitrations between a State, a state enterprise, or a state entity, on the one hand, and a foreign enterprise, on the other.

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(12 September 1989)