

**DECISION OF THE COUNCIL No. 331**

**117<sup>th</sup>/118<sup>th</sup> Sessions - June 2011**

**SETTLEMENT OF DISPUTES**

HAVING REGARD to Article IX, Section 24, of the Annex to the Convention establishing a Customs Co-operation Council,

THE COUNCIL DECIDES :

- (i) to rescind Council Decision No. XXXIII of November 1954; and
- (ii) to adopt the following modes of settlement of disputes arising out of contracts or other disputes of a private character to which the Council is a party and of disputes involving any official of the Council who, by reason of his/her official position enjoys immunity, if immunity has not been waived in accordance with the provisions of Sections 19 and 21 of the Annex to the Convention establishing a Customs Co-operation Council.

**I. Mode of settlement of disputes between  
the Customs Co-operation Council and third persons  
(other than its officials), arising out of contracts**

All contracts or agreements, in any form, entered into by the Customs Co-operation Council (the "**Council**") shall contain an arbitration clause by which the Council and the other Party (or Parties) to the contract undertake to refer to a tribunal of arbitrators, which shall reach its decision by application of law and without appeal, any disputes involving the Council regarding the interpretation or fulfilment of the contract they have entered into.

Unless otherwise specified, in any contract or agreement entered into by on the one hand, the Council, and on the other hand, one or more States and/or one or more international organizations, the said arbitration clause shall be worded as follows :

**(1) Settlement of disputes by arbitration**

Any claim or dispute regarding the interpretation or fulfilment of this contract shall be settled by a tribunal of three arbitrators (the "**Arbitral Tribunal**"), who shall render a majority decision, reached by application of law and without appeal.

## **(2) Initiation of the arbitral proceedings**

### *(i) Notice of damage*

In order for its claim to be admissible, each Party to the contract shall, within a period of six (6) months from the date when it became aware of the damage sustained, or an absolute time limit of two (2) years beginning on the day after the day when the incident which caused the damage occurred (the action shall be time-barred as soon as one of these time limits has expired), give notice of the claim, by registered letter (with acknowledgment of receipt), to any other Party to the contract against which it wishes to file a claim (the “**Notice of damage**”).

The Party initiating the Notice of damage shall be called “**the Claimant**”, and the Party which receives the Notice of damage shall be called “**the Respondent**”.

### *(ii) Mandatory conciliation*

Beginning on the date when the Notice of damage is sent, there shall be a period of mandatory conciliation between the Parties lasting thirty (30) calendar days (the “**conciliation period**”).

### *(iii) Notice of arbitration*

In the event that the Parties have not been able to reach an amicable agreement by the end of the conciliation period, it shall be up to the Claimant(s) to notify the Respondent(s) of his/her/their desire to initiate arbitral proceedings by sending a registered letter (with acknowledgment of receipt) (the “**Notice of arbitration**”) no later than ten (10) calendar days after the end of the conciliation period.

The Notice of arbitration shall, on pain of invalidity, include at least the following :

(i) appointment of an arbitrator, (ii) reference to the arbitration clause invoked, (iii) reference to the agreement or relationship out of or in relation to which the dispute arises, (iv) the relief sought and, where appropriate, an estimate of the amount claimed.

Within twenty (20) calendar days following the sending of the Notice of arbitration, the Respondent(s) must select his/her/their own arbitrator and notify the Claimant(s) and the arbitrator already selected by the latter of his/her/their choice. At the same time, the Respondent(s) shall make any counter-claims.

If the Respondent(s) fail(s) to appoint an arbitrator within the time allowed, that arbitrator shall be appointed by the Secretary-General of the Permanent Court of Arbitration (PCA) within thirty (30) calendar days following a request by the Claimant.

Where there is more than one Claimant and/or more than one Respondent, the Claimants jointly shall appoint one arbitrator and the Respondents jointly shall appoint one arbitrator.

### **(3) Composition of the Arbitral Tribunal**

#### *(i) Appointment*

The two arbitrators appointed by the Claimant(s) and the Respondent(s) shall, by common agreement, select a third arbitrator who shall chair the Arbitral Tribunal *de jure*.

If the first two arbitrators fail to appoint the third arbitrator within fifteen (15) calendar days of notification of the appointment of the second arbitrator, the third arbitrator shall be nominated by the Secretary-General of the Permanent Court of Arbitration (PCA) within thirty (30) calendar days following a request by the first Party to take action or the arbitrators selected by the Parties.

The three arbitrators thus appointed shall constitute the Arbitral Tribunal.

#### *(ii) Independence and impartiality of the arbitrators*

Only persons who are independent of the Parties and of their legal counsel may serve as arbitrators.

Each arbitrator shall sign a declaration of independence in which he/she undertakes to abide by the rules of good conduct set out therein and sets out, in writing, any facts and circumstances that could lead any of the Parties to doubt his/her independence. The Parties shall have twenty (20) calendar days following receipt of each arbitrator's declaration of independence to make any comments.

Moreover, an arbitrator shall immediately disclose in writing to the Parties any facts or circumstances of a similar nature to those referred to in the preceding paragraph which may arise during the arbitration.

#### *(iii) Challenge and replacement of arbitrators*

##### a. Challenge

Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his/her impartiality or independence.

A Party who intends to challenge an arbitrator shall send notice of his/her challenge within twenty (20) calendar days after the declaration of independence of the challenged arbitrator has been notified to the challenging Party or within twenty (20) calendar days after the circumstances referred to in paragraph (3) (ii) § 3 above became known to that Party.

The challenge shall be notified to the other Party, to the arbitrator who is challenged and to the other members of the Arbitral Tribunal. The notification shall be in writing and shall state the reasons for the challenge.

When an arbitrator has been challenged by one Party, the other Party may agree to the challenge; in that case the arbitrator shall be required to withdraw. The challenged arbitrator may also withdraw voluntarily. In neither case does this imply acceptance of the validity of the grounds for the challenge.

If the other Party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge shall be a matter for the Secretariat of the Permanent Court of Arbitration. The Court shall decide on the admissibility and on the merits of the challenge after it has afforded an opportunity for the arbitrator concerned, the other Parties and the other members of the Arbitral Tribunal to comment in writing within a specified period of time. Such comments shall be communicated to the Parties and to the arbitrators, who may respond to them within the time period specified by the Secretariat of the Permanent Court of Arbitration.

b. Replacement

In the event of an arbitrator's death, challenge, accepted withdrawal, resignation, or if there is a cause preventing him from fulfilling his duties, or upon request of all Parties, the arbitrator shall be replaced.

Any new arbitrator shall be nominated by the Secretariat of the Permanent Court of Arbitration within thirty (30) calendar days following a request by the first Party to take action or the remaining arbitrators.

**(4) Procedural rules**

*(i) Terms of Reference*

The Arbitral Tribunal shall draw up its Terms of Reference, signed for acceptance by the Parties and the arbitrators, and including at least the following :

- (i) rules of procedure setting out the procedural rules expressly stipulated herein, and also setting out procedural formalities not expressly provided for under the terms of this Decision;
- (ii) a summary of the facts and claims of each Party;
- (iii) the arbitrators' signed declarations of independence.

If the Arbitral Tribunal finds it necessary, during the proceedings, to take decisions regarding their organization (by means of "**Procedural orders**"), the Arbitral Tribunal shall take the decision it deems most appropriate with a view to the sound management of the proceedings, whilst ensuring that the Parties are treated equally and that each Party is given the opportunity of presenting his/her case. However, under no circumstances, except with the agreement of the Parties, shall there be any derogations from the rules expressly stipulated under the terms of this Decision.

*(ii) Place of arbitration*

The Arbitral Tribunal shall meet at the headquarters of the Customs Co-operation Council in Brussels (Belgium).

*(iii) Law applicable*

The Arbitral Tribunal shall decide the dispute or claim by application of the standards laid down by the WCO and, failing that, by Belgian law or, if appropriate, the law designated by application of the rules of private international law as applied in Belgium.

The Parties agree that under no circumstances shall the Arbitral Tribunal take its decision on the basis of equitable principles, assume the powers of an *amiable compositeur* or decide *ex aequo et bono*.

*(iv) Language of the arbitration*

The arbitration proceedings shall take place in one of the official languages of the WCO (English, French), as determined by the Parties.

*(v) Witness statements and experts*

If either Party so requests, at any appropriate stage of the proceedings the Arbitral Tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument.

*(vi) Interim measures of protection*

The Arbitral Tribunal may, at the request of either Party, take any interim measures it deems necessary to preserve the respective rights of either Party or in respect of the matter in dispute.

Such interim measures may be established in the form of an interim award. The Arbitral Tribunal shall be entitled to require security for the costs of such measures.

A request for interim measures addressed by either Party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

*(vii) Settlement during proceedings*

If, before the award is made, the Parties agree on a settlement of the dispute, the Arbitral Tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both Parties and accepted by the Tribunal, record the settlement in the form of an arbitral award on agreed terms.

*(viii) Costs and expenses of arbitration*

a. Advance(s)

An advance payment shall be made in respect of the costs of arbitration; it shall be estimated by the Arbitral Tribunal on the basis of the amount of the principal claims and of any counterclaims, according to the Scale of Arbitration Costs of the Belgian Centre for Arbitration and Mediation (CEPANI) in effect on the date of Notice of arbitration.

b. Attribution

The Arbitral Tribunal shall decide upon the final amount of the costs of arbitration in the framework of the final award, in the light of the services rendered and the costs incurred.

Unless the Parties agree otherwise, in principle the costs of arbitration shall be divided equally between the Parties. However, the Arbitral Tribunal may decide on a different apportionment of the costs if it determines that this is reasonable taking into account the circumstances of the case, provided however that it states the reasons for this decision.

Unless the Parties agree otherwise, each Party shall bear the costs it has incurred for legal representation and assistance. However, the Arbitral Tribunal, taking into account the circumstances of the case, shall be free to determine which Party shall bear such costs or may apportion them between the Parties if it determines that this is reasonable, provided however that it states the reasons for this decision.

*(ix) Confidentiality*

The Parties and the arbitrators undertake to ensure the confidentiality of the arbitral proceedings.

**(5) Arbitral Award**

*(i) Final award, stating the reasons on which it is based*

No later than three (3) months after the closing of the proceedings, the Arbitral Tribunal, by majority decision, shall render its final award, stating the factual and legal grounds on which it is based, and communicate it to the Parties.

The Parties agree to accept the arbitral award rendered in accordance with the foregoing provisions as constituting final settlement of the claim or dispute.

The award may be made public, in whole or in part, only with the consent of both Parties unless the Arbitral Tribunal decides otherwise, stating the reasons for its decision, following a specific request made by a Party in the framework of the arbitral proceedings.

*(ii) Interpretation of the award*

Within twenty (20) calendar days after receipt of the final award or of the corrections made thereto in application of paragraph 5 (iii) below, either Party, with notice to the other Party, may request that the Arbitral Tribunal give an interpretation of the award.

The interpretation shall be given in writing within twenty (20) calendar days after receipt of the request. The interpretation shall form part of the award.

*(iii) Correction of the award*

Within twenty (20) calendar days after receipt of the final award or of the interpretation given thereof in application of paragraph 5 (ii) above, either Party, with notice to the other Party, may request the Arbitral Tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of a similar nature. The Arbitral Tribunal may, within twenty (20) calendar days after the communication of the award to the Parties, make such corrections on its own initiative.

**(6) Privileges and immunities**

The Council declares that no provision contained in the present arbitration clause will be considered by it as a waiver, either explicit or implicit, of any privilege or immunity which it may enjoy in law or by virtue of its statute.