

INTERNATIONAL COMMERCIAL ARBITRATION

2014/2015 Autumn Semester

Faculty: Simon Greenberg and Dr. Galina Zukova

ASSIGNMENT No. 2

Instructions:

1. **Answer the questions below:** Read the instructions carefully, as this will affect what is expected in terms of both the form and substance of your answer. Please be concise in your answers.

Do not assume the existence of facts or information relevant to any question. However, you may draw logical inferences from the information provided. If you consider that certain information is missing from a question (it might be deliberately omitted), you should say so and indicate what it is that you would need to know in order to answer the question further.

2. **Citations:** There is no need to set out rules, articles, case citations *etc.* in full. A short reference, indication or abbreviation is fine, as long as it is understandable.
3. **Length:** Your total answer for all questions must not exceed a maximum of 5 pages (12 font Times New Roman, 1.5 line spacing, or equivalent). To the extent that any part of your answer is relevant to more than one question, please say so rather than repeating it. You may answer questions in point form rather than full sentences where convenient.
4. **Submission:** Deadline: 23:59 CET, 16 November 2014
Send to: Alja.Romsak@CliffordChance.com

Please make sure that you correctly attach your Assignment and send it off in due time. Points will be deducted in case of a late or incomplete submission.

Question 1

(5 marks)

Comment on whether the parties have agreed on the place of arbitration.

“All disputes relating to this contract shall be resolved by the ICC Court in Paris under its Rules of Arbitration.”

“All disputes arising out of or relating to this contract shall be resolved by arbitration under the ICC Rules of Arbitration utilizing the hearing facilities in Times Square, New York.”

“Any disputes arising from the interpretation of this contract shall be resolved by ICC arbitration in Paris. Language: English. Number of arbitrators: 3. Venue: to be agreed by the parties or, failing agreement, London.”

Question 2

(8 marks)

a. Background to question

Modelville is the capital city of Modelania, a small, prosperous country in Eastern Europe. Modelania has a neutral image as a growing financial centre and has business facilities (including hotels, an airport and an arbitration hearing centre). Local lawyers claim that there are about 5-8 international arbitrations seated there per year.

Modelandia enacted its first Arbitration Act in 2000, when it also ratified the ICSID Convention. Section 4 of the Arbitration Act provides that the UNCITRAL Model Law on International Commercial Arbitration has effect in Modelania. The Arbitration Act was subsequently updated so that it now includes the 2006 amendments to the Model Law and the choice of Option II for Article 7.

Section 5 of the Arbitration Act provides: *“the functions of the court or other authority referred to in Article 11(3) or (4) of the UNCITRAL Model Law are to be performed by the MAFIA.”*

Section 17 of the Arbitration Act provides: *“(a) Parties to an arbitration agreement who have agreed that the arbitrator(s) shall decide in accordance with the law, may agree that the award shall be subject to appeal in case there is a fundamental mistake in applying the law. (b) Where an appeal on the award has been filed to the court, the court shall not entertain an application for setting aside the award, and in the appeal the parties may raise arguments concerning the setting aside of the award pursuant to any of the grounds as set out in Article 34(2) of the Model Law.”*

Also in the year 2000, Modelania established its own arbitration administering institution, called the Modelania Association For International Arbitration or “MAFIA”. MAFIA has arbitration rules in force as of 2011, which are essentially the 2010 UNCITRAL Arbitration Rules with some amendments to make MAFIA the relevant appointing authority and for it to provide some basic administration services such as managing the arbitrators' fees.

b. The question

A Canadian construction company asks your advice on whether to choose Modelania as the place of arbitration for a deal it is negotiating with a Turkish governmental authority specifically set up for the project in question. The deal involves the Canadian company building a state run cement factory in Southern Turkey.

The Canadian company asks you (i) whether Modelville is a suitable place of arbitration for this deal, (ii) whether it is necessary to choose an arbitral institution for an arbitration seated in Modelville and the advantages/disadvantages of doing so, (iii) which arbitration institution(s) can be chosen for an arbitration seated in Modelville, indicating which one you recommend and why, (iv) whether it is possible to opt out of all recourse against the award in Modelania and, if so/if not, what recourse there will be against the award, (v) what would be a suitable alternative seat of arbitration for this deal and what advantages might such place have over Modelville, (vi) any tips you have for what the arbitration clause for this specific deal might include, and (vii) any other comments or advice you have arising out of the facts provided.

Question 3

(7 marks)

Article 25 of a fictitious country's Arbitration Law provides as follows:

“Unless otherwise agreed between the parties to the dispute, the award shall be in the Arabic language; otherwise, the award, shall at the time of filing, be accompanied by a legalized translation thereof.”

In an arbitration being administered under the ICC Rules, the parties have not agreed on the language of arbitration (either in their arbitration agreement or subsequently, following prompts by the Arbitral Tribunal). The contract containing the arbitration agreement is in English. The Claimant is German and the Respondent is from Qatar. The dispute concerns a sale of commercial properties in Modelania. The Claimant requests that English be the language of the arbitration, whereas the Respondent insists on Arabic, referring to Article 25 of the Arbitration Law.

Comment on whether the Arbitral Tribunal is empowered to rule on the question of language, and if so whether it may and should rule that English, Arabic or another language shall apply.