
Assignment No.2

16 November 2014

Question 1:

“The place of arbitration is one of the most important matters to be addressed in an arbitration clause”, notes M. Holmes. The seat provides the *lex arbitri*: the *“legal location of an arbitration”,* which must be distinguished from the *“physical location”*(S. Greenberg, C. Kee, R. Weeramantry). The terms *“seat”* or *“place of arbitration”* shall not be confused with the venue of the hearings, or with the *“seat of the arbitral institution”* (E. Gaillard, P. Fouchard and B. Goldman). As noted by S. Greenberg, C. Kee, R. Weeramantry, the best way to record an agreed seat is to use simple and clear language specifying both the city and country. Guideline 4 of the *IBA Guidelines for Drafting International Arbitration Clauses* (**“the IBA Guidelines”**) recommends: *“the place of arbitration shall be [city, country]”*. However, as there is no mandatory form of wording, it is acknowledged that other language -even vague- will usually suffice, unless there are conflicting locations in the clause. Arbitrators or courts often read *“pathological clauses”* (containing a defect liable to disrupt the arbitration) in light of the effective interpretation principle, to give full effect to the parties' intentions.

The first clause specifies the dispute *“shall be resolved by the ICC Court in Paris under its Rules of Arbitration”*. Doubts may arise as whether Paris is meant to be the seat of the arbitration, the place of the hearing or a mere detail as to the location of the ICC headquarters. However, as underlined by E. Gaillard, P. Fouchard and B. Goldman: *“the arbitration agreement refers to arbitration under the auspices of the ICC “in Paris” or “of Paris”, the Court considers that the parties have indirectly chosen Paris as the seat of their arbitration”*. Indeed, *“as there is only one International Chamber of Commerce, the words “in Paris” or “of Paris” are unnecessary for the purpose of identifying the arbitral institution”*, and thus, can be interpreted as providing an indication of the location of the seat. Accordingly, Paris should be considered as the seat of arbitration chosen by the Parties.

The second clause specifies the Parties' wish to *“utiliz[e] the hearing facilities in Times Square, New York”*. In the absence of any supplementary information, and, with regards to the distinction between the legal location and the physical location, one must conclude that the Parties have failed to designate the seat of arbitration. However, as provided by guideline 4: *“an arbitration clause that fails to specify the place of arbitration will be effective”*. Clause No.2 states all disputes *“shall be resolved by arbitration under the ICC Rules of Arbitration”*. Therefore, in order to remedy to the Parties' failure to designate a seat, one must refer to article 18 of the ICC Rules providing that in such a case: *“the place of the arbitration shall be fixed by the Court”*.

The third clause provides for the dispute to *“be resolved by ICC arbitration in Paris”* and for the venue *“to be agreed by the parties or, failing agreement, London”*. Thus, even though one might argue it is uncertain whether Paris is meant to be the seat, or, the institution location, it results from the analysis of Clause No.1 that the Parties selected Paris as the seat of arbitration.

Question 2:

(i) Whether Modelville is a suitable place of arbitration for this deal

In light of Guideline 4(22) of the IBA Guidelines, three elements shall be considered as to whether Modelville is a suitable place of arbitration for this deal. Firstly, one should note the information at our disposal doesn't specify whether Modelania is member party to the 1958 New York Convention (**"the NYC"**) and when visiting the NYC website, Modelania does not appear among the members listed. One could therefore reach the conclusion Modelania is not a party to this Convention. Secondly, as Section 4 of the Arbitration Act in Modelania gives effect to the UNCITRAL Model Law, one could conclude Modelania's law is supportive of arbitration. Furthermore, article 1(3)(a) of the Model Law defines an arbitration as international if "*the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States*". Therefore, it can be asserted that Modelania's law does permit arbitration of the subject matter in the present transaction. Finally, with regards to the third requirement under Guideline 4(22), we do not dispose of sufficient elements to determine whether Modelania's courts have a track record of issuing unbiased decisions that are supportive of the arbitral process. Thus, in light of IBA Guideline 4(22), Modelville does not fulfil the requirements and cannot be qualified as a suitable place.

(ii) Whether it is necessary to choose an arbitral institution for an arbitration seated in Modelville and the advantages/disadvantages of doing so,

As provided by the first IBA Guideline, if the Parties choose *ad hoc* arbitration, they will benefit from a broad flexibility and be able to tailor the proceedings to meet their needs and answer the specificities of their case. *Ad hoc* arbitration also has the advantage to offer greater confidentiality. Finally, non-administered arbitration is particularly recommended in two cases: (i) when the risk of obstruction of the respondent is inexistent and (ii) when the dispute has already started. If the Parties opt for *ad hoc* arbitration, they can refer to certain rules such as the UNCITRAL Rules and to an institution.

However, as stated by the IBA Guidelines, "*the burden of running the arbitral proceedings falls entirely on the parties*". Therefore, in most business transaction, institutions are the safer and most efficient choice. Indeed, the arbitral institution will provide an administrative support and will assist the Parties with practical matters such as organizing hearings, handling communications and payments to the arbitrators. The institution will also provide a recognized set of rules and may even assist the Parties when they failed to anticipate an issue when drafting the clause. Another advantage is that administered arbitration ensures less risk of obstruction of the parties. In terms of enforceability: the scrutiny of the institution can also improve the quality of the award. Finally, as way of illustration of the practice, a recent PwC study found that 86% of awards rendered over the last ten years were drafted under the rules of an arbitration institution, while 14% were under *ad hoc* arbitrations.

(iii) Which arbitration institution(s) can be chosen for an arbitration seated in Modelville, indicating which one you recommend and why,

Guideline 1 provides that Parties “*should seek a reputable institution*”, taking into account that “*major arbitral institutions can administer arbitrations around the world*”. In that sense, G. Born notes that Parties often rely on few institutions to avoid uncertainty that comes from inexperienced ones.

Established in 2000, MAFIA “*has arbitration rules in force as of 2011, which are essentially the 2010 UNCITRAL Arbitration Rules with some amendments*”. Despite the apparent reliability of MAFIA, several inconveniences can arise from that choice. Firstly, if the amendments made to the UNCITRAL Arbitration Rules do not seem to impact the overall set of rules, it could be useful to examine more closely these changes. More importantly, it appears from the facts and the recent creation of MAFIA, that this institution does not have an established track record of administering international cases and still lacks experience and recognition. Finally, the information at our disposal reads: “*Modelania established its own arbitration institution called MAFIA*”. Thus, one could be reticent to choose this institution as it could lack autonomy and independence from the state of Modelania.

In this light, I would rather recommend the ICC International Court of Arbitration (“ICC”). The ICC remains the world’s leading international commercial arbitration institution and has extensive experience in administering arbitration seated anywhere in the world. Among the other leading institutions, one can refer to the London Court of International Arbitration (“LCIA”), second most popular European institution, or, the American Arbitration Association (“AAA”). Finally, given that the Canadian company is negotiating with a Turkish governmental authority, and, that Modelania ratified in 2000 the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, one could also advise the Parties to opt for the International Center for the Settlement of Investment Disputes (“ICSID”). ICSID is an autonomous institution considered to be the leading institution in investor-State dispute settlement. Further examination of this transaction would help us choosing the arbitral institution that best fits the Parties’ needs and expectations.

(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,

According to point 7(a) of the *Explanatory Note by the UNCITRAL secretariat*, the term “*recourse*” shall be understood as “*the means through which a party may actively “attack” the award*”.

In principle, arbitration leads to a final award without appeal. In some countries such as Israel or New Zealand, it is possible to opt into an appeal to national courts in second instance. Similarly, according to Section 17 of the *Arbitration Act*, Modelania allows Parties to agree “*that the award shall be subject to appeal in case there is a fundamental mistake in applying the law*”. The use of the word “*may*” in Section 17(b) also allows Parties to agree the award shall not be subject to appeal. In such an

event however, as exposed by Lew, Mistelis and Kro'Il, “[i]n principle, court control over an arbitration award in challenge proceedings can never be excluded”. Indeed, Article 34 of the ML provides for “*application for setting aside as exclusive recourse against arbitral award*” to the exclusion of any other recourse regulated in any procedural law of the State in question. As explain by S. Greenberg, C. Kee, R. Weeramantry, even though Article 34 of the ML is “*considered mandatory*”, “*some jurisdictions do [...] allow parties to limit the power of courts to set aside awards*”. Indeed, as provided by the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, divergent court decisions have been rendered regarding “*the determination of the non-mandatory character of certain provisions*”, and in particular regarding “*the possible exclusions or limitations of the right to apply for the setting aside of an award*”. For instance, a Canadian Court¹ held article 34 is mandatory, while a court in New Zealand² took the contrary view. Thus, the possibility to opt out of the recourse provided by Article 34 of the Model Law depends of the *lex arbitri* of Modelania. If Article 34 of the ML is mandatory in Modelania, the Parties will not be able to opt out of all recourse against the award, if it is not, they will indeed be able to do so.

(v) What would be a suitable alternative seat of arbitration for this deal and what advantages might such place have over Modelville,

As exposed previously, the IBA Guideline 4(22) provide for three criteria to be considered when selecting the seat of arbitration. With regards to the important legal consequences of the *lex arbitri* such as the enforceability of the award, selecting the seat of arbitration is a crucial issue. Thus, one can fairly assert that any place of arbitration meeting the requirements provided for in Guideline 4(22) is a suitable alternative seat of arbitration for this deal. In selecting the seat according to 4(22), Parties should also consider geographic and infrastructure convenience, as well as, neutrality of the place from the Parties. In this regard, it is generally acknowledged that the “*classic, safe and popular*” seats of arbitration are: Paris, London, Geneva, Zurich, Singapore, Hong Kong, New York and Vienna.

(vi) Any tips you have for what the arbitration clause for this specific deal might include,

The arbitration clause is at the core of the dispute settlement: it conveys the Parties willingness to arbitrate, and contains key aspects of the process. In this regard, the IBA Guidelines *for Drafting International Arbitration Clauses* are designed to help drafting effective arbitration clauses: ensuring the Parties tackled the essential elements and highlighting the pitfalls to avoid. Parties should refer to the model clauses drafted by institutions or the UNCITRAL. In line with the previous comments on this transaction, the parties could opt for the following clause: “*All disputes arising out of or in connection with the present contract shall be finally resolved under [the ICC Rules] by one or more arbitrators*”

¹ Noble China Inc. v. Lei Kat Cheong, Ontario Court of Justice, Canada, 4 November 1998

² Methanex Motunui Ltd. v. Spellman, Court of Appeal, Wellington, New Zealand, 17 June 2004

appointed in accordance with the said rules. The place of arbitration shall be [Paris, France]. The number of arbitrators shall be [one/three]. The language of the arbitration shall be [English].”

(vii) Any other comments or advice you have arising out of the facts provided.

The Canadian company being negotiating with a Turkish governmental authority specifically set up for the project in question, it would be advisable to examine further the role of the State and, if possible and practicable, obtain its consent to arbitration and waiver of its sovereign immunity.

Question 3:

This arbitration is administered under the ICC Rules and Parties have not agreed on the language of arbitration. Under Article 20 of the ICC Rules, *“in the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract”*. The Arbitral Tribunal is thus empowered to rule on the question of language.

Claimant requests English to be the language of the arbitration, whereas Respondent insists on Arabic referring to Article 25 of the Arbitration Law of “fictitious country”. Under Article 20 of the ICC Rules, when deciding on the language, the Arbitral Tribunal shall examine *“all relevant circumstances, including the language of the contract”*. G. Born highlights *“it is possible that national law in the arbitral seat would impose language requirements on the award. If this is the case, the award would be exposed to annulment or non recognition if it were not in the required language”*. In this regard, under Article 25 of the Arbitration Law: *“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”*. Nevertheless, the facts at our disposal do not inform us of (i) the seat of arbitration, (ii) the place of enforcement, (iii) nor does it specify whether the fictitious country is Modelania.

Given that English is the language of the contract, the Arbitral Tribunal may rule it shall apply to the present arbitration with regards to Article 20 of the ICC Rules. Consequently, *“the language of the arbitration [...] will impliedly extend to the arbitral award”*(G. Born). However, as noted by E. Gaillard, P. Fouchard and B. Goldman, *“when enforcement is sought, the award may have to be translated into the language of the country where it is to be enforced”*. Therefore, if we presuppose Article 25 of the Arbitration Law of fictitious country is a mandatory provision of the *lex arbitri*, or, of the place where the award is to be enforced, then, the award shall be in Arabic or *“at the time of filing, be accompanied by a legalized translation thereof”*. Thus, to ensure the enforceability of the award in fictitious country, at the time of filing, the award shall be accompanied by a *“legalized translation”* in Arabic.

Bibliography

Institutional writings:

- *IBA Guidelines for Drafting International Arbitration Clauses*, adopted by resolution of the International Bar Association Council, 7 October 2010: referred as the “*IBA Guidelines*” throughout this assignment.
- *UNCITRAL, Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006*, Part II of the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.
- *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*

Articles and Books

- E. Gaillard, P. Fouchard and B. Goldman, *International Commercial Arbitration*, Gaillard and Savage, 1999
- G. Born, *International Commercial Arbitration*, Kluwer, 2009
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