**Assignment No.2**

16 November 2014

**Sophia Allouache**

**100024462**

**Question 1**:

The Guideline 4 of the *IBA Guidelines for Drafting International Arbitration Clauses* provides “*the parties should select the place of arbitration*”[[1]](#footnote-1). As explained by S. Greenberg, C. Kee, R. Weeramantry[[2]](#footnote-2), the best way to record an agreed seat of arbitration is to use simple and clear language specifying both the city and country. However, as there is no mandatory form of wording, other language, “*even vague*”, will usually suffice unless there are conflicting locations in the clause. In this regard, careful attention shall be given to the distinction between on the one hand “*the seat or the place of the arbitration*” and on the other hand “*the place of hearing*”. As provided by Guideline 4 “*by designating only the place of the hearing, the parties leave it uncertain whether they have designated the ‘place of arbitration’ for the purposes of applicable laws and treaties*”[[3]](#footnote-3).

**As with regards to the first clause**, one shall underline that even though Paris is mentioned, the language is subject to debate. Indeed, when reading the clause there can be doubts as whether Paris is meant to be the seat of the arbitration, the place of the hearing or a mere detail as to the localisation of the headquarters of the ICC. This uncertainty is reinforced by the confusing language used: the dispute “*shall be resolved by the ICC Court*”, whereas according to Article 1(2) of the ICC Rules: “*the Court does not itself resolve disputes*”.

**As with regards to the second clause**, the Parties specified: “*utilizing the hearing facilities in Times Square, New York*”. As there is a distinction between the seat and the venue, *it is “uncertain whether they have designated the ‘place of arbitration’*”.Therefore, one must reach the conclusion that the Parties have failed to designate the seat of arbitration.

**As with regards to the third clause**, one could assert that as the venue is expressly referred to, there is no confusion possible between the seat and the hearing location. However, as the language does not clearly states “*the place of arbitration shall be [city, country]*” as recommended by Guideline 4, it is confusing whether Paris is meant to be the seat of the arbitration, or, if is a mere precision as to the localisation of the headquarters of the institution.

If one could argue clause No.1 and No.3 designate Paris as the seat of the arbitration, uncertainty prevails. As the choice of the seat is crucial and has important legal consequences, it results from the above analysis that the three arbitration clauses fail to specify the place of arbitration. However, according to Guideline 4, “*an arbitration clause that fails to specify the place of arbitration will be effective, though undesirable*”. Thus, the clauses being effective and designating the ICC as the arbitral institution, failing agreement between the Parties, “the place of the arbitration shall be fixed by the Court” under article 18 of the ICC Rules.

**Question 3**:

With regards to the available facts, the present arbitration is administered under the ICC Rules and the Parties have failed to agree on the language of the proceedings. However, 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 a fictitious country.

Under Article 20 of the ICC Rules, when deciding on the choice of language, the Arbitral Tribunal shall examine “*all relevant circumstances, including the language of the contract*”. In this case, Gary Borne underlines that “*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 available information (i) does not provide us with the seat of arbitration, (ii) the place of enforcement, (iii) nor does it specify the country where the “Arbitration Law” is implemented, and, more precisely, whether this fictitious country is Modelania. If we presuppose that Article 25 of the Arbitration Law of fictitious country is the law of the seat of arbitration, or, a mandatory provision 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*”.

It results from the facts English is the language of the contract. However,

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. However, to ensure the enforceability of the award, at the time of filing, the Arbitral Tribunal and the Parties shall remind, the award should be accompanied by a “*legalized translation*”.

**Question 2**:

1. **Whether Modelville is a suitable place of arbitration for this deal**

Guideline 4 of the *IBA Guidelines for Drafting International Arbitration Clauses* provides for three criteria for the Parties to set the place of arbitration

The IBA Guideline provide at Guideline 4 that “*as a general rule, the parties should set the place of arbitration in a jurisdiction (i) that is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (ii) whose law is supportive of arbitration and permits arbitration of the subject matter of the contract, and (iii) whose courts have a track record of issuing unbiased decisions that are supportive of the arbitral process*”. Firstly, the information at our disposal does not specify whether or not Modelania is a member party to the 1958 New York Convention and when visiting the New York Convention website, Modelania does not appear among the States listed as member party. One could draw the conclusion that Modelania is not a party to the 1958 NYC. Secondly, as the section 4 of Arbitration Act in Modelania gives effect to the UNCITRAL Model Law, one must presuppose the law of Modelania 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 the enforceable law of Modelania permits arbitration of the subject matter of the present contract. Nevertheless, as with regards to the third requirement under Guideline 4, we do not dispose of sufficient elements as to determine whether Modelania’s courts have a track record of issuing unbiased decisions that are supportive of the arbitral process. Thus, with regards to the criteria of the IBA Guidelines, Modelania does not fulfill the requirements and cannot be qualified as a suitable place.

1. **Whether it is necessary to choose an arbitral institution for an arbitration seated in Modelville and the advantages/disadvantages of doing so,**

The first guideline contained in the IBA Guidelines *for Drafting International Arbitration Clauses*” provide that the “*parties should decide between institutional and ad hoc arbitration*”. Mainland China is an exception to this choice, as the Parties are required to designate an institution for the agreement to be valid.

If the Parties choose non-administered arbitration, they will benefit from a broad flexibility as they will be able to tailor-made the proceedings to meet their needs and answer the specificities of their case. Another advantage of ad hoc arbitration is to provide a greater confidentiality to the Parties. Ad hoc arbitration is particularly recommended in two cases: when the risk of obstruction of the respondent is inexistent and when the dispute has already started. Furthermore, if the Parties opt for Ad Hoc arbitration, they can refer to certain rules such as the UNCITRAL Rules and an institution can be involved for the choice of arbitrators as an appointing authority. However, as stated in the IBA Guidelines, “*the burden of running the arbitral proceedings falls entirely on the parties*”. Therefore, in most business situation, institutions are the safer and most efficient choice. Indeed, the arbitral institution will provide an administrative support and will assisting the Parties with practical matters such as organizing hearings and handling communications with and payments to the arbitrators. Furthermore, the institution will also provide a recognized set of rules and may even be able to assist when the parties have failed to anticipate something when drafting their arbitration clause. Another advantage is that arbitral institution allows less risk of obstruction of the parties. In terms of enforceability, the scrutiny of the court can improve the quality of the award.

Finally, to give to the Parties a more concrete view of the practice, a recent PwC study found that 86% of awards that were rendered over the last ten years were under the rules of an arbitration institution, while 14% were under ad hoc arbitrations.

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

As provided by the IBA Guidelines 1: “if parties choose administered arbitration, they should seek a reputable institution, usually one with an established track record of administering international cases”. Indeed, “the major arbitral institutions can administer arbitrations around the world, and the arbitral proceedings do not need to take place in the city where the institution is headquartered”. In that sense, Gary Borne underlines that Parties ordinarily rely on a few arbitral institutions in order to avoid uncertainty that comes from inexperienced arbitral institutions.

The MAFIA established in 2000 in Modelania “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 basics administration services such as managing the arbitrators’ fees”. However, several inconvenient can arise from that choice. Firstly, even though the amendments made to the 2010 UNCITRAL Arbitration Rules do not seem to impact on the proceedings itself, it could be useful to examine more closely these changes. More importantly, it appears from the facts and the recent establishment of MAFIA, that this institution does not have an established track record of administering international cases and still lack experience and recognition. Finally, the information at our disposal reads: “Modelania established its own arbitration institution called MAFIA”. Therefore, one could be reticent to choose this institution in order to avoid the underlying risk of interference of the state of Modelania, preventing a complete autonomy of the MAFIA.

Therefore, I would rather recommend to choose the International Chamber of Commerce International Court of Arbitration (“ICC”). Indeed, the ICC remains the world’s leading international commercial arbitration institution and has an extensive experience in administering arbitration seated anywhere in the world. Relying on its long experience, the ICC has promulgated new Rules in 2012 and its fees are based on the amount in the dispute. Among the other leading institutions that could be recommended, one can point the London Court of International Arbitration (“LCIA”), second most popular European institution in the field of international commercial arbitration, or the American Arbitration Association (“AAA”).

Furthermore, given that the Canadian company is negotiating with a Turkish governmental authority and that Modelania ratified in 2000 the ICSID Convention, it could also be advised to the Parties to opt for the International Center for the Settlement of Investment Disputes (“ICSID”). Indeed, ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. ICSID now counts over one hundred and forty member States and is considered to be the leading international arbitration institution devoted to investor-State dispute settlement.

Thus, a further examination of the facts would help us choosing the arbitral institution that best fits the Parties needs and expectations.

1. **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 the **Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 in its point 7(a)**, 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 the 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*”. In such an event, Section 17(b) of the Arbitration Act provides that “*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*”. Thus, it seems that the use of the word “*may*” allows the Parties to agree on an opposite provision stating that the award shall not be subject to appeal, even if there is a fundamental mistake in applying the law.

In such an event however, as exposed by Lew, Mistelis and Kro ̈ll, “*[i]n principle, court control over an arbitration award in challenge proceedings can never be excluded*”. In this regards, according to the **Explanatory Note by the UNCITRAL secretariat in its point 7(a)**, the Article 34 of the Model Law allows “*only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question*”.

Indeed, as explain by S. Greenberg, C. Kee, R. Weeramantry, even though Article 34 of the Model Law 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 “autonomy of the parties in determining the rules of procedure is of special importance in international cases”, therefore, divergent court decisions have been rendered regarding “the determination of the non-mandatory character of certain provisions”, and in particular regarding “of the possible exclusions or limitations of the right to apply for the setting aside of an award”. For instance, a Canadian Court[[4]](#footnote-4) held that the parties may agree to exclude any right they would otherwise have to apply to set aside an award under article 34, while a court in New Zealand[[5]](#footnote-5) held that a right to apply for a review of a violation of the rules of natural justice could not be excluded.

Therefore, even though the Parties opt out of the possibility to appeal in national courts in second instance under Section 17 of the Modelania Arbitration Act, the possibility to opt out of the recourse provided by Article 34 of the Model Law depends of the lex arbitri of Modelania. Thus, if Article 34 of the ML is a mandatory provision, the Parties will not be able to opt out, if it is not considered as such, they will be able to opt out of all recourse against the award.

Finally, the Parties should keep in mind that they will not be precluded from appealing to an arbitral tribunal of second instance if they have agreed on such a possibility.

1. **What would be a suitable alternative seat of arbitration for this deal and what advantages might such place have over Modelville,**

As exposed previously, Guideline 4 of the IBA Guideline for Drafting International Arbitration Clauses provide for three elements to be considered when selecting the seat of arbitration. In light of these criteria, Modelania appears not to be a suitable place for this transaction. Indeed, with regards to the important legal consequences of the lex arbitri and the enforceability of the award, it is particularly important for the seat of arbitration to be located in a jurisdiction that is member party to the 1958 New York Convention, *whose law is supportive of arbitration and permits arbitration of the subject matter of the contract, and whose courts have a track record of issuing unbiased decisions that are supportive of the arbitral process*”.

Thus, any place of arbitration that fulfills these criteria, in particular that is a suitable alternative seat of arbitration for this deal. In this regard, it is generally acknowledged that the “classic, safe and popular” seats of arbitration are: Paris, London, Geneva, Zurick, Singapore, Hong Kong, New York and Vienna.

1. **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 as it conveys the Parties willingness to arbitrate and to opt out of state justice, but also contains aspects of the process. Ensuring an effective arbitration clause reflecting the Parties’ expectations is a crucial step. In this regard, the IBA Guidelines *for Drafting International Arbitration Clauses* are designed to help drafting effective arbitration clauses ensuring the Parties have tackled the essential elements and highlight the pitfalls to avoid. Parties should refer to the model clauses drafted by arbitral institutions as well as UNCITRAL. Here, with regards to the previous comments, the parties could insert 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 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].”

1. **Any other comments or advice you have arising out of the facts provided.**

Last but not least, the Canadian company being negotiating with a Turkish governmental authority specifically set up for the project in question, one could advise to examine further the role of the State and the possibility to officially attract it in the negotiation as a Party to the arbitration agreement.

1. IBA Guidelines for Drafting International Arbitration Clauses, adopted by resolution of the International Bar Association Council,  7 October 2010. [↑](#footnote-ref-1)
2. Simon Greenberg, Christopher Kee, Romesh Weeramantry, International Commercial Arbitration: An Asia Pacific Perspective, Cambridge 2010. [↑](#footnote-ref-2)
3. This distinction can also be found in article 18(2) of the ICC Rules as well as in article 20(2) of the Model Law. [↑](#footnote-ref-3)
4. Noble China Inc. v. Lei Kat Cheong, Ontario Court of Justice, Canada, 4 November 1998 [↑](#footnote-ref-4)
5. Methanex Motunui Ltd. v. Spellman, Court of Appeal, Wellington, New Zealand, 17 June 2004 [↑](#footnote-ref-5)