ARTICLE 18

Place of the Arbitration

* 1  The place of the arbitration shall be fixed by the Court**, unless agreed upon by the parties**.
* 2  The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.
* 3  The arbitral tribunal may deliberate at any location it considers appropriate.
* Classic, safe, **popular seats**: S**ingapore, HK, Paris, Zurich, Geneva, Vienna, New York. London,** ok, but some risks.

The seat (or place) of arbitration is the jurisdiction in which an arbitration takes place legally. This must be distinguished from the location of any physical hearings or meetings that are held as part of the arbitration proceedings. The hearings or meetings do not necessarily have to be held at the seat of arbitration.

An arbitration will be conducted according to the arbitration law at the seat of arbitration (*lex arbitri*), even if hearings or other meetings are held elsewhere. Under no circumstances should the terms ‘seat’ or ‘place’ of arbitration be confused with the venue, location or place of hearings, as explained in the next section.

As noted above, the seat or place of arbitration is the primary legal jurisdiction to which the arbitration is attached. It is the *legal* location of an arbitration

Reliance on the choice of law rules of the seat–a prudent approach given the risk of actions to set aside before the courts of the seat, and one which has found favor in a number of somewhat dated instruments –may lead to inappropriate results. As the seat is chosen by the parties, they might locate the seat in a country whose choice of law rules lead to the application of a law recognizing the capacity of one of those parties. However, issues of capacity ought not to depend on the skill of the parties–one of whom may in fact require the protection of rules on capacity–in choosing the seat.

Another equally unsatisfactory approach is to apply the choice of law rules of the country where the arbitrators consider that the award may have to be enforced. In ICC arbitrations, this may be founded upon Article 35 of the ICC Rules (Art. 26 of the previous Rules) and, more generally, on the arbitrators' legitimate concern to avoid compromising the validity of *page "244"*their award. However, it can lead to bizarre results, as the capacity of natural persons might thus vary according to the location of their assets.

In practice, the risk is that arbitrators using the choice of law method may, when faced with the difficulties described above, simply apply the choice of law rule with which, as a result of their own background, they are most familiar, and which they therefore instinctively consider to be the appropriate choice.(16)

The difficulties facing arbitrators having to decide on these issues in choice of law terms are aggravated by the fact that, strictly speaking, arbitrators have no forum. As with the question of capacity, the Institute of International Law suggested in its 1959 resolution that the seat of the arbitration should be considered to be the arbitrators' forum, and the choice of law rules of the seat should therefore apply. However, this solution has the same flaws as those discussed above in relation to the issue of capacity.(27)

The results produced by the choice of law method are thus not sufficiently convincing or predictable to deflate the appeal of substantive transnational rules.(28)

GAILLARD:

In the same way as every other contract, an arbitration agreement must satisfy a number of conditions in order to be valid. To assess whether or not these conditions are met, in international trade one should consider not the requirements of a particular legal system, but rather those found over a broader spectrum, including international treaties, comparative law and arbitral precedents. This substantive rules approach was adopted as early as 1981 by one leading author, who examined the conditions of the validity of an arbitration agreement only in the light of comparative and international law requirements.(1) Since the 1993 decision of the French *Cour de cassation* in the *Dalico* case,(2) the French courts have followed the same approach when reviewing the existence, validity and scope of an arbitration agreement in an action to set aside or enforce an arbitral award. More importantly, arbitrators having to decide these issues often use similar reasoning, either as the basis, or at least the background, for their decision. We will therefore follow the same substantive rules methodology, with limited excursions into more traditional choice of law territory, when addressing in turn the issues of capacity and power (Section I), the existence and validity of the parties' consent (Section II), the arbitrability of the dispute (Section III), and the form and proof of the arbitration agreement (Section IV). All of these concepts are so widely accepted in comparative law that each needs to be studied in detail when considering the formation of the arbitration agreement

Section IV

the 1993 *Dalico* decision, in which the *Cour de cassation* ruled in the clearest possible terms that the existence and validity of an international arbitration agreement should be examined exclusively by reference to substantive rules accepted in international trade

**Part 2 : Chapter II - Formation of the Arbitration Agreement**

***§ 2. – The Degree of Certainty Required of the Parties' Consent***

483.  – The efforts of arbitrators and the courts to give full effect to the parties' intention to refer their disputes to arbitration appear clearly from an examination of pathological clauses (A), combined clauses (B) and arbitration agreements incorporated by reference (C).

***A. – Pathological Clauses***

484.  – The expression “pathological clause”was first used in 1974 by Frédéric Eisemann, then honorary Secretary General of the ICC. It denotes arbitration agreements, and particularly arbitration clauses, which contain a defect or defects liable to disrupt the smooth progress of the arbitration.(100) Arbitration agreements can be pathological for a variety of reasons.(101) The reference to an arbitration institution may be inaccurate or totally *page "262"*incorrect;(102) the agreement may appear to allow submission of disputes to arbitration to be optional;(103) it may contain a defective mechanism for appointing arbitrators in that, for example, the chosen appointing authority refuses to perform that function;(104) alternatively, the agreement might itself appoint arbitrators who have died by the time the dispute arises.(105) The agreement may stipulate that the tribunal is to comprise three arbitrators where the dispute involves three or more parties whose interests differ;(106) it may impose impracticable conditions for the arbitral proceedings (such as unworkable deadlines),(107) or provide that certain issues (such as the validity of the contract) are not to be dealt with by the arbitrators, despite the fact that such issues are closely related to the dispute which the arbitrators are called upon to decide.(108) Another example is an agreement that permits an appeal from the award before national courts in cases where the subject-matter is international.(109) At best, these defects will give rise to associated litigation, fueling the arguments of the party attempting to avoid arbitration and making the overall process more time-consuming and expensive. At worst, the defect will prevent the arbitration from taking place at all. This will be the case where it is impossible to infer an intention which is sufficiently coherent and effective to enable the arbitration to function.

These clauses will need to be interpreted by the arbitrators, and by the courts reviewing the existence of an arbitration agreement and ensuring that the arbitrators remained within the bounds of their jurisdiction. In most cases, the arbitrators or the courts–relying on the principle of effective interpretation more than on any rule *in favorem validitatis*(110) –will salvage the arbitration clause by restoring the true intention of the parties, which was previously distorted by the parties' ignorance of the mechanics of arbitration. We shall consider two examples: error by the parties in designating the arbitral institution, and “blank clauses.” *page "263"*

***1° Selecting an Institution Which Does Not Exist or Which Is Inadequately Defined***

485.  – Through the ignorance of the parties, or as a result of a clerical error, some arbitration clauses refer to an arbitration institution which is inadequately identified, or to one which does not exist at all.(111) If interpreted literally, these clauses would be ruled ineffective. However, if the institution can be identified with a significant degree of certainty, such clauses will remain effective.

In international arbitration, a relatively common mistake is to refer to the International Chamber of Commerce “in Geneva,”

“in Zurich” or “in Vienna,”(112) although the ICC's headquarters are in fact located in Paris. A number of arbitral awards have held arbitration agreements containing that kind of error to be valid, as they adequately reflected the parties' intention to refer their disputes to arbitration under the ICC Rules in the specified city.(113) Likewise, in ICC Case No. 5103, it was held that a clause referring to the non-existent “International Section of the Paris Chamber of Commerce” should be interpreted as a valid reference to the International Chamber of Commerce.(114) Similarly, the Arbitration Court of *page "264"*the German Coffee Association upheld its own jurisdiction on the basis of a clause which merely stipulated “arbitration: Hamburg, West Germany.”The Court's grounds were that it was the only organization in Hamburg which handled disputes concerning the quality of coffee, and that the standard-form contract to which the parties referred also stipulated that disputes were to be resolved under the auspices of the arbitration institution of the place provided for in the contract.(115) In addition, a tribunal sitting under the auspices of the Italian Arbitration Association held it had jurisdiction over a dispute relating to a contract referring to “The Italy Commercial Arbitration Association.”(116)

French case law has followed a similar course. Thus, for example, the Paris Court of Appeals held in 1985 that an arbitration agreement referring to an arbitration institution described as “the Tribunal of the Paris Chamber of Commerce” was valid and conferred jurisdiction on the “Arbitration Chamber of Paris.” This latter institution was the only arbitral body empowered by the Paris Chamber of Commerce, and was therefore necessarily the organization to which the parties had inaccurately referred.(117) Likewise, in 1983 the *Cour de cassation* upheld a Court of Appeals finding that the parties to an arbitration agreement referring to the “Yugoslavian Chamber of Commerce in Belgrade” in fact intended to refer to the “Foreign Trade Arbitration Court at the the Economic Chamber of Yugoslavia,” which had its headquarters in Belgrade.(118) Similarly, the Paris Court of Appeals held in 1994 that “the fact that the arbitration agreement refers to the Paris Chamber of Commerce rather than to the ICC is merely a clerical error.”(119) *page "265"*

The approach of the French courts is thus invariably to interpret pathological arbitration clauses so as to render them effective if at all possible.(120) The same trend can be found in other jurisdictions. For example, in the United States, a clause designating “the New York Commercial Arbitration Association” was interpreted as meaning the American Arbitration Association in New York.(121) In another case, a clause referring to “[the] Arbitration Court of [the] Chamber of Commerce in Venice (Italy)”was understood as a reference to the ICC.(122) Nevertheless, occasional court decisions are rendered which seize upon defects in arbitration agreements as a basis for disregarding them altogether, even in cases where more sophisticated courts would have held such agreements to be sufficiently clear and therefore valid and enforceable.(123)

***2° “Blank Clauses”***

486.  – A “blank clause”(*clause blanche*) is one which contains no indication, whether directly or by reference to arbitration rules or to an arbitral institution, as to how the arbitrators are to be appointed. This is the case where, for example, the clause merely states “Resolution of disputes: arbitration, Paris.” *page "266"*

In French domestic arbitration law, such clauses will be held ineffective. Article 1443, paragraph 2 of the New Code of Civil Procedure provides that the arbitration agreement must “either appoint the arbitrator or arbitrators or provide for a mechanism for their appointment,”failing which the clause is void.(124)

However, such clauses are valid in French international arbitration law. There is no French statutory provision requiring the parties to an international arbitration agreement to themselves specify a mechanism for appointing the arbitrators. Further, French case law has consistently confirmed that Article 1443 of the New Code of Civil Procedure “does not apply to international arbitration.”(125) In practice, the French courts will interpret such clauses as providing for *ad hoc* arbitration in which any difficulties with the composition of the arbitral tribunal will be resolved by the President of the Paris *Tribunal de grande instance*, under Article 1493 of the New Code of Civil Procedure.(126) Similar case law is found in Italy(127) and the United States.(128) That is not to say, however, that blank clauses are to be recommended.(129)

The pathological element of a blank clause really only emerges where the arbitration agreement contains no detail linking the blank clause, by the choice of a seat or a procedural law, to a country whose courts are able to appoint the arbitrators. An example will be a clause stipulating that “any disputes arising from the interpretation of the present contract will be settled by an arbitral tribunal sitting in a country other than that of each of the parties.”(130) It is not clear whether the French courts, for instance, would agree to rule on a request to appoint arbitrators if confronted with an arbitration agreement of that kind between two non-French parties, one of which sought to commence arbitration in France. *page "267"*In order for the courts to agree to carry out such an appointment, the clause would have to be interpreted as containing an agreement between the parties whereby, in the event of a dispute, the plaintiff would be entitled to choose the seat of arbitration. If France were the chosen seat, the courts would then be able to apply Article 1493 of the New Code of Civil Procedure,(131) which empowers the President of the Paris Tribunal of First Instance to rule on any difficulty encountered in the constitution of the arbitral tribunal. In the above example, this result could be obtained by an *a contrario* interpretation of the arbitration agreement, the parties having excluded the jurisdiction of the courts of each of their home countries. However, the courts' response to this line of reasoning remains uncertain.(132)

Question 2:

*Option II (As adopted by the Commission at its thirty-ninth session, in 2006)*

“Arbitration agreement” is an agreement by the parties to submit to arbitra- tion all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

* *Article 11. Appointment of arbitrators*

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

*(a)* in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, **the appointment shall be made, upon request of a party, by the court or other authority specified in article 6**;

*(b)* in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by **the court or other authority specified in article 6.**

(4) Where, under an appointment procedure agreed upon by the parties,

* *(a)*a party fails to act as required under such procedure, or
* *(b)*the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
* *(c)* a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request **the court or other authority specified in article 6** to take the necessary measure, unless the agreement on the appointment pro- cedure provides other means for securing the appointment.

*Article 6. Court or other authority for certain functions of arbitration assistance and supervision*

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER VII. RECOURSE AGAINST AWARD

*Article 34. Application for setting aside as exclusive recourse against arbitral award*

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

*(a)* the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not

*20*

*UNCITRAL Model Law on International Commercial Arbitration*



valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

* (ii)  the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceed- ings or was otherwise unable to present his case; or
* (iii)  the award deals with a dispute not contemplated by or not fall- ing within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
* (iv)  the composition of the arbitral tribunal or the arbitral proce- dure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

*(b)* the court finds that:

* (i)  the subject-matter of the dispute is not capable of settlement  by arbitration under the law of this State; or
* (ii)  the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal’s opinion will eliminate the grounds for setting aside.

**FACTORS TO CONSIDER IN CHOOSING A SEAT OF ARBITRATION**

* **Laws are most important**.
* **Party to NYC**, modern accessible arbitration law, arbitration friendly courts.
* **Geographic** (for all players) and infrastructure convenience are second most important criteria.
* **Neutrality.** You can choose a seat that is completely neutral, i.e. no connection to any party or to the dispute. In practice there is often zero connection.
* Classic, safe, **popular seats**: S**ingapore, HK, Paris, Zurich, Geneva, Vienna, New York. London,** ok, but some risks.

Modelania as the place of arbitration :

* laws are the most important
  + who are the Parties ?
  + Canadian company and Turkish governmental authority specifically

Additional remarks:

Avoid Arbitration in Turkey

Question 3:

ARTICLE 20

Language of the Arbitration

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.

* not only empowered but required to rule on the question of language
* take into account all the relevant circumstances:
  + including the language of the contract
    - English
    - + on peut presuppose que les correspondances entre les deux parties ont été faites en anglais
  + therefore laws of the place of enforcement
    - on presuppose que le fictious country is Modelania
      * Art 25: “unless otherwise agreed by the parties” => parties failed to reach an agreement
      * “the award shall at the time of filing be accompanied by a legalized translation thereof”
  + translation in Arabic of the award