Guideline 4 of the *IBA Guidelines for Drafting International Arbitration Clauses* (“**the IBA Guidelines**”) 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 “*the seat or the place of the arbitration*” and “*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’*”[[3]](#footnote-3).

**As with regards to the first clause**, even though Paris is mentioned, the language is subject to debate. When reading the clause doubts 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 localisation of the ICC headquarters. The confusing language used reinforces the uncertainty: 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 their will to “*utiliz*[e] *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, 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.

“The place of arbitration is one of the most important matters to be addressed and specified in an arbitration clause in an international transaction”, notes M. Holmes.

**Question 1**:

Guideline 4 of the *IBA Guidelines for Drafting International Arbitration Clauses* (“**the IBA Guidelines**”) provides “*the parties should select the place of arbitration*”[[4]](#footnote-4).

“The place of arbitration is one of the most important matters to be addressed and specified in an arbitration clause in an international transaction”, notes M. Holmes. Indeed, as explained by S. Greenberg, C. Kee, R. Weeramantry “an arbitration will be conducted according to the arbitration law at the seat of arbitration: the lex arbitri, even if hearings or other meetings are held elsewhere”. The seat of arbitration is the “legal location of an arbitration”, which must be distinguished from the “physical location” of hearings and other meetings. Under no circumstances should the terms seat of place of arbitration be confused with the venue, location or place of hearing.

S. Greenberg, C. Kee, R. Weeramantry[[5]](#footnote-5) underline the best way to record an agreed seat of arbitration is to use simple and clear language specifying both the city and country. In this light, Guideline 4 of the IBA Guidelines for Drafting International Arbitration Clauses (“the IBA Guidelines”) recommends to states “the place of arbitration shall be [city, country]”. However, as provided by the IBA Guidelines, “an arbitration clause that fails to specify the place of arbitration will be effective, though undesirable”. Indeed, as there is no mandatory form of wording, other language, even vague, will usually suffice unless there are conflicting locations in the clause. These “pathological clauses”, that is to say “which contain a defect or defects liable to disrupt the smooth progress of the arbitration, will need to be interpreted by the arbitrators of the courts relying on the principle of effective interpretation. Therefore, the clauses shall be interpreted such as to give full effect to the parties' intention to refer their disputes to arbitration.

The first clause specifies the contract “shall be resolved by the ICC Court in Paris under its Rules of Arbitration”. When reading the clause doubts 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 localisation of the ICC headquarters. The confusing language used reinforces the uncertainty: 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*”. However, with regards to the previous analysis, it seems that Paris should be interpreted as the seat of the arbitration.

The second clause specifies the Parties’ will to “*utiliz*[e] *the hearing facilities in Times Square, New York*”. With regards to the distinction between the seat as the legal location and the venue as the physical location, 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 in this clause.

The third clause provides the contract shall be resolved by ICC arbitration in Paris and that the venue has to be agreed by the parties or, failing agreement, London. Thus, even though one might argue as to whether Paris is meant to be the seat of the arbitration, or, a mere precision as to the localisation of the headquarters of the institution, on can fairly assert this clause does designate the seat of arbitration.

Thus, in clauses No.1 and No.3, Parties seem to have agreed on the place of arbitration to be Paris whereas, clause No.2 only provides for the physical location. However, as Clause No.2 designates the ICC as the arbitral institution which Rules provide a remedy to the Parties’ failure to select the place of arbitration. Therefore, under article 18 of the ICC Rules, “the place of the arbitration shall be fixed by the Court”.

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, a mere precision as to the localisation of the headquarters of the institution.

M. Holmes, How to Draft and Effective Arbitration Clause in an International Commercial Contract, September 2008

Part Two

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 Arbitration1985 with amendments as adopted in 2006.

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. IBA Guidelines for Drafting International Arbitration Clauses, adopted by resolution of the International Bar Association Council,  7 October 2010. [↑](#footnote-ref-4)
5. Simon Greenberg, Christopher Kee, Romesh Weeramantry, International Commercial Arbitration: An Asia Pacific Perspective, Cambridge 2010. [↑](#footnote-ref-5)