

The Place or ‘Seat’ of Arbitration (Possibility, and/or Sometimes Necessity of its Transfer?) – Some Remarks on the Award in ICC Arbitration n° 10’623

The Arbitral Tribunal which has rendered the above award¹ (all of its members being highly reputed and experienced international arbitrators) had to address and overcome a number of problems and issues recurrent in international arbitration: e.g. the possibility to convene hearings at venues outside the place of arbitration, interference by the courts of the country of origin of a party, necessity or absence of necessity to stay the proceedings in case of anti-arbitration injunctions issued by the courts at the place of arbitration, and the interpretation of potentially conflicting arbitration clauses. The arbitrators, in their findings, recall a number of rules which can be considered as ‘general principles of international arbitration’ and will no doubt attract proper practitioners’ attention. The present note is limited to briefly revisiting some issues relating to the place of arbitration, which, unfortunately, seem to continue to haunt international arbitrations.

Venue of hearing versus place of arbitration

The distinction between the place or ‘seat’ of arbitration and the actual location of the proceedings or deliberation is a trite one. Some participants inexperienced in international arbitration might initially be confused (and some more experienced sometimes *pretend* to be confused) about the fact that the place or ‘seat’ of arbitration is not the physical location but the link, the ‘rattachement’ or connecting factor to a given procedural order or ‘*lex arbitri*’ of the State where the ‘seat’ is situated. It is also an accepted principle that, for convenience or other reasons, hearings and deliberations may be held elsewhere than at the ‘seat’ of arbitration.²

In the above case the Arbitrators confirmed that the decision to hold a hearing in Paris and not at the place of arbitration in State X, party to the arbitration, was made for practical reasons, without prejudice to the venue of

¹ ICC Arbitration No. 10’623, Decision of 7 December 2001 (E. Gaillard, chairman, P. Bernardini, N. Bunni, arbitrators), note A. Crivellaro, ASA Bull. 1/2003, p. 59 and p. 82.

² E.g. Art. 14 ICC Rules; Art. 16 LCIA Rules, Art. 16 UNCITRAL Arbitration Rules. For recent case law: Australia: *Raguz v. Sullivan*, ASA Bull. 2/2002, p. 335 [Confirming that all TAS proceedings have their place of arbitration in Lausanne, Switzerland], 353, Switzerland: ASA Bull. 1991, p. 269. England: Privy Council, *The Bay Hotel and Resort Ltd. v. Cavalier Constructions Co. Ltd and Anr*, 16 July 2001, P.C. Lords Nicholls, Cooke, Clyde, Hutton and Millet, unreported; summarized by Stewart R. Shackleton, *Annual Review of English Judicial Decisions on Arbitration*, [2002] Int. A.L.R. 206, 213.

future hearings (see the summary of the award by A. Crivellaro). The opposition of the State party and, in particular, the motion to challenge and remove the Arbitrators was misplaced. On the other hand, arbitrators are well advised not to underestimate the importance of ‘non-legal’ factors, and ‘susceptibilities’. Especially when the place of arbitration is in the State of one party and when that State or an emanation of it is itself a party in the arbitration. ‘Comity’ considerations should also be put in the balance when fixing the venue of a hearing in a location distinct from the place of arbitration.

A caveat is that the *lex arbitri* may be less liberal than the procedural rules selected by the parties. Some national arbitration laws require that the proceedings or at least part of it take place physically in the territory of the state. Failing a sufficient connection of the proceedings with the State, the arbitration law might not be applicable, or only partially, and the award may not be accepted by the ‘host State’ as an award rendered on its territory. Such a-national award will encounter difficulties when enforcement is sought abroad.

Interference of the courts at the place of arbitration

In the above case, the courts of the State Party issued an injunction prohibiting the arbitration from proceeding. Were there possible remedies or escapes for the Arbitral Tribunal or was it at the mercy of these courts? Generally speaking arbitrators must defer to the ‘*lex arbitri*’. Under modern arbitration laws, the courts’ intervention will typically be limited to further assist the arbitration proceedings. Problems arise if no ‘*lex arbitri*’ exists, if the *lex arbitri* is not ‘arbitration-friendly’ and leaves room for court intervention, and when the law is arbitration friendly but the courts are not. Indeed, it may well be that, while the *lex arbitri* encourages arbitration and discourages and even prohibits interference by the courts, its application by the courts may lag behind. In a minority of cases parochialism or political pressure causes courts to deviate from such laws. This is often due to a lack of experience, lack of arbitration tradition, misconceptions about the nature of international arbitration, or lack of trust in arbitrators.

An Arbitral Tribunal might consider that it is bound by the *lex arbitri* provided it fully respects the parties’ choice for arbitration and – as an additional condition – provided that it is ‘properly’ applied. Such a ‘proper application test’ is a loophole which presents certain dangers, since it is in principle not for the arbitrators to judge the judges, but rather the other way

round. The Arbitral Tribunal and the parties are in principle bound by the rules of the *lex arbitri* and have to obey the decisions of the State that hosts the arbitration.

When taking the decision to disregard a decision of a local court, the Arbitral Tribunal will not content itself to examine in abstract terms whether there are incompatibilities between the *lex arbitri*, or its application, and what might be considered as accepted standards (or an ‘acquis’) in modern international arbitration. Rather, the arbitrators will have to establish the parties’ intentions and expectations when they entered into an arbitration agreement and they will also have to consider whether these expectations were legitimate in light of the *lex arbitri* and international public policy.

Trust that the Arbitral Tribunal will strive in a diligent manner to render an enforceable award is undoubtedly a legitimate expectation of the parties. As recalled by the Arbitral Tribunal in ICC arbitration no. 10’623, ICC arbitrators must render their award as expeditiously as possible (Crivellaro, par. 15.1(x)).³

Change of the agreed place of arbitration as a last (but possible) resort

Events subsequent to the signature may render the performance of an arbitration agreement partially or entirely impossible, e.g., the death or non-availability of an arbitrator named in the agreement, the disbanding of the selected arbitration institution, etc. Changed circumstances may also render the proceedings at the agreed place of arbitrations difficult or impossible. In certain cases, a change of hearing venue might be sufficient to bypass the difficulty, for instance, in cases where physical access to the location is difficult due to lack of infrastructure, civil unrest or wars, or where a member of the Tribunal, a party or its counsel is not allowed to be on the territory of the State. In other cases, removing the venue of a hearing may not be sufficient. Among these cases are situations where a State interferes, directly or through its courts, with the arbitration (to which it might be, directly or indirectly, a party). A change of the place of arbitration may have to be envisaged.

³ A case brought before the ECHR deserves to be mentioned in this context: *R v. Switzerland* (n° 10 881/84), see ASA Bull. 1991, p. 34, where a party complained about the long duration of the arbitration proceedings. Although the application was dismissed *in casu*, it is submitted that an Arbitral Tribunal should make every effort to render its award in a timely fashion.

From a contractual point of view, a change of the place of arbitration agreed by the parties leads inevitably to a clash between two fundamental principles of contract law : *pacta sunt servanda* and *rebus sic stantibus*. To the extent that the latter is widely considered as being the security valve and exception to the former, the question will boil down to whether the changed circumstances prevailing in a case justify the transfer of the agreed place of arbitration.

Most parties who choose to arbitrate a dispute do so primarily in light of the neutrality of the arbitration process. Thus, the essential part of an arbitration agreement is the parties' consent to settle their disputes before one or more independent and impartial arbitrators of their choice, as opposed to bringing the dispute before a state court. The place of arbitration will in these cases be a mere modality of the arbitration agreement, on the same level as the agreement on the applicable law, the language of the proceedings and other provisions implementing the parties' fundamental agreement to arbitrate. Even if the parties select a place of arbitration in a country of origin or domicile of one of the parties, this choice should not interfere with and not appear to impair the neutrality of the proceedings or that of the Arbitral Tribunal.⁴ While foreign investors entering into a State contract sometimes underestimate the consequences of agreeing on a 'non-neutral' place of arbitration, it would also be safe to assume that for both parties, including the State, that whatever the courts of the place of arbitration do is not frustrating and should not frustrate the parties' intention to arbitrate before an independent Arbitral Tribunal. The Tribunal in ICC arbitration 10'623 rightly recalled that a State or State entity cannot resort to the State's Courts to frustrate an arbitration agreement into which it freely entered (par. 156 ff.).

The issue is not a new one: that changed circumstances may alter the effect of a contract is an almost universally shared conception, recognised also by recent compilations of general contract principles (Art. 6.111 Principles of European Contract Law, Art. 6.2 UNIDROIT Principles; Art. VIII.1 CENTRAL List of *lex mercatoria* principles, rules and standards⁵). Significantly, the Vienna Convention on the Law of Treaties, whereby States agree on the binding effect, and its limits, of the treaties they conclude among each other, *also* reserves changed circumstances (Art. 62). The International Court of Justice has not hesitated to state that the fundamental change of the

⁴ Pierre Lalive, *The Transfer of Seat in International Arbitration*, in *Law and Justice in a Multistate World, Essays in Honor of Arthur T. von Mehren*, 2002, p. 515.

⁵ <http://www.tldb.de>

circumstances that induced a State to adhere to a treaty may justify a termination of the treaty if they lead to a radical transformation of the obligations under the treaty.⁶

The impact of changed circumstances on the place of arbitration or an agreed forum has also been a matter of discussion in the framework of the Iran-U.S. Claims Tribunal.⁷ It would appear from reported cases that problems regarding an agreed place of arbitration are a recurrent topic in international arbitrations. In one ICC case, the ICC Court of International Arbitration removed the place of arbitration it had previously fixed in Bangkok since it turned out that there were no laws on international arbitration and, thus, enforceability of an award rendered in Bangkok was not ensured.⁸ In another case, the ICC Court refused to follow the Arbitral Tribunal's proposal to transfer the seat in light of the interference of the courts at the agreed seat (Abu Dhabi).⁹

It is not surprising that the problem of changing circumstances and their impact on arbitration agreements has been picked up by the *Institut de Droit International*. In 1989 the Institute proposed the following resolution:

‘Should it become unduly difficult to carry on an arbitration at the agreed place, the tribunal is entitled, after consultation with the parties, to remove the arbitration to such place as it may decide.’¹⁰

Unfortunately, the ICC Court recently missed an opportunity to apply the rule proposed by the Institute - or to develop one of its own - and to send a clear signal to the users of ICC Rules that the choice of a place of arbitration should not jeopardise the integrity of the arbitration process.

⁶ *Fishery Jurisdiction*, Germany v. Iceland, 2 February 1973, ICJ Reports 1973, 49, 62-65 (*in casu* the existence of changed circumstances of the nature described were denied).

⁷ *In re Halliburton Co.* 1 Iran-US, CTR, 242 (The Tribunal admitted that it had the authority to decide whether as a result of changed circumstances a forum selection clause in favour of the courts of Teheran had become unenforceable. Judges Holtzmann and Mosk dissenting, the Tribunal held that *in casu* there were no such circumstances). See A.L. George, *Changed Circumstances and the Iranian Claims Arbitration: Application to Forum Selection Clauses and Frustration of Contract*, 16 *Geo. Wash. J. Int'l L & Econ* (1982) 335; Ted Stein, *Jurisprudence and Jurists' Prudence: the Iranian-Forum Clause Decision*, 78 *The American Journal of International Law* (1984) 1; Hakan Berglin, *Treaty Interpretation and the Impact of Contractual Choice of Forum Clauses on the Jurisdiction of International Tribunals: the Iranian Forum Clause Decision of the Iran-United States Claims Tribunal*, 21 *Texas International Law Journal* (1985) 39.

⁸ Reported by S. Jarvin, *Le lieu de l'arbitrage*, 7 *ICC Bulletin* 2/1996, p. 58.

⁹ *ASA Bull* 4/1987, p. 293.

¹⁰ The resolution was based on a text proposed by Arthur von Mehren: ‘If a State renders it unduly difficult to carry on an arbitration on its territory, the [arbitration] tribunal is entitled to remove the arbitration to such place as it may decide.’

In two recent ICC arbitrations¹¹, a U.S. company faced Serbian parties, among them the Serbian State. The arbitration agreement had been entered into in 1990 and provided for arbitration in Belgrade. In the year 2000, the U.S. corporation initiated arbitration asserting among other arguments that the Serbian State, through its judiciary, had expropriated the U.S. company of its shares in a local company. In the course of the proceedings the U.S. party requested that the place of arbitration be transferred from Belgrade to a neutral place, such as Geneva. In support of its request, the U.S. party argued that the circumstances which prevailed in 1990 when it had accepted to arbitrate disputes in Belgrade had fundamentally changed by 2000 when Mr. Milosevic and his clique put in place a dictatorial regime, which controlled and used the judiciary to their ends. Considering, moreover, the open conflict between the U.S. and Serbia, the fact that the person controlling the U.S. company was a well known critic and political opponent of S. Milosevic, and that the very judiciary which would be called to decide on any challenge of an arbitral award was entirely controlled by the Milosevic regime and had rendered the decisions expropriating the U.S. company, decisions at the heart of the arbitration, the U.S. company felt that it should not reasonably be requested to arbitrate in Belgrade where, moreover, the personal safety of a party and some witnesses could not be guaranteed.

Not surprisingly, the Serbian State objected to the description of the circumstances in Belgrade. It was also argued that as a principle an agreed place agreement could *never* be changed. Moreover, it maintained that the selection of Belgrade had been a *conditio sine qua non* of the agreement, and that, therefore, a change of the place of arbitration was inconceivable.

The ICC Court of International Arbitration was called to decide on the U.S. company's application. One could and should have expected that the ICC Court would consider that it had the power, and even the duty, to examine whether an arbitration under its auspices could proceed in such a changed environment. Indeed, in a prior case it had not hesitated to remove a place of arbitration it had previously fixed.¹² The Court chose, however, to leave the delicate question to the Arbitral Tribunal, inviting the latter to decide whether the 'clause fixing the seat in Belgrade was still binding'.

¹¹ ICC arbitrations nos. 10373 and 10439 (the facts of the cases are summarized, in more detail, in Pierre Lalive, *The Transfer of Seat in International Arbitration*, in *Law and Justice in a Multistate World*, Essays in Honor of Arthur T. von Mehren, 2002, p. 515).

¹² S. Jarvin, see above.

Similarly, the Arbitral Tribunal did not dare to change the place of arbitration, resorting to 'diplomatic' and problematic reasoning. Among other points it argued that even if its awards were annulled by the Serbian courts, they could still be enforced elsewhere in light of certain precedents (Hilmarton, Chromalloy). The Tribunal's reasoning seems questionable since these 'precedents' are controversial and have to be contrasted with other decisions of courts refusing to enforce a foreign award annulled at the place where it had been rendered (Baker Marin, Spier).¹³ The reasoning of the arbitrators also seems erroneous based on another ground: it is for the Arbitral Tribunal to ensure that its award is enforceable. No one will dispute that this is jeopardised when an award cannot be enforced in the State where it has been rendered. To elude this responsibility and defer to courts (which may or may not be inclined to enforce the annulled award) is avoiding the very mission entrusted to the Arbitrators.

On the other hand, the Arbitral Tribunal expressed its belief that it was totally independent from any Serbian authority and stated that none of its members was a Serbian national.

While one understands the hesitation to offend a State by a decision which amounts to a criticism of that State's government and its control over the judiciary, obvious reservations exist regarding this statement: the standard of independence is not subjective; what a party or the arbitrators believe is not relevant; what is decisive is whether a neutral, third person objectively and in good faith, could have legitimate doubts about the independence of the Tribunal. Justice must not only be done, but seen to be done. In this respect, could it be seriously maintained that an Arbitral Tribunal sitting in Belgrade during the period in question, within the reach of the institutions controlled by the totalitarian Milosevic regime, could be manifestly and publicly seen as totally independent, irrespective of the undoubted integrity of its members?

In summary, a change of the agreed place of arbitration should not be lightly accepted. The seat or place is part and parcel of the arbitration agreement (*pacta sunt servanda*). It should, however, go without saying that an arbitration agreement, just like any other contract, is and must be subject to interpretation. In most cases, proper interpretation will lead to the conclusion that the place of arbitration while being an important part of the arbitration agreement, was only one of a number of modalities (like, for instance, the applicable law, language of the proceedings, selection of

¹³ For a comprehensive discussion of case law see the recent study of H. Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award*, 2002.

arbitrators, etc.) of the parties' more general agreement: to arbitrate their disputes before an independent and impartial Arbitral Tribunal as opposed to litigate them in courts of law. As a further consequence of the contractual nature of the arbitration agreement, it must be admitted that this agreement is not immune from the rules which generally apply to contracts,¹⁴ in particular the rule of *rebus sic stantibus*; changed circumstances must be duly considered.

There is a panoply of possibilities available to an Arbitral Tribunal to stave off interference of the courts at the place of arbitration, including holding hearings outside the agreed place, or disregarding injunctions from the courts which would frustrate the parties' commitment to arbitrate. In many instances, these remedies will suffice, as the courageous award in ICC Arbitration no. 10'623 has shown.¹⁵ Sometimes, however, a change of seat would seem to be the only effective means to ensure that the parties' legitimate expectations and common intentions at the time they entered into the arbitration agreement are respected.

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¹⁴ In this context a decision of the Swiss Federal Tribunal in *Gübag Terminal AG v. Gübre Fabrikalari TAS* of 17 February 1999 (ASA Bull. 2.2000, p. 311) merits mention. The Federal Tribunal confirmed an arbitral award in which the Arbitrators had disregarded, as having been accepted under duress, a forum selection clause in favour of the Turkish courts and applied an earlier arbitration clause between the parties.

¹⁵ Another example where an Arbitral Tribunal considered that it was not bound by injunctions designed to halt the arbitration is reported in ASA Bulletin 1/2003, p. 120. In that case there were two purportedly conflicting arbitration agreements in a construction contract (based on the FIDIC model): One providing for arbitration in Jamaica before a panel appointed by a local organisation, the other providing for UNCITRAL arbitration. The claimant initiated UNCITRAL arbitration. The defendant obtained an injunction from the Jamaican courts prohibiting the claimant to proceed with the arbitration. The (UNCITRAL) Arbitral Tribunal refused to stop the arbitration and admitted that it had jurisdiction after a thorough interpretation of the arbitration agreements. The defendant challenged the award without success before the Swiss Federal Tribunal.