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ARTICLE 14—LANGUAGE

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If the parties have not agreed otherwise, the language(s) of the arbitration shall be that of the documents containing the arbitration agreement, subject to the power of the tribunal to determine otherwise based upon the contentions of the parties and the circumstances of the arbitration. The tribunal may order that any documents delivered in another language shall be accompanied by a translation into the language(s) of the arbitration.

I. Introduction

14.01 Article 14 recognizes as binding the parties' agreement, in the arbitration clause or otherwise, on a particular language in which the arbitration shall be conducted. However, where the parties have not specified the language of the arbitration, Article 14 provides that the language of the 'documents' that contain the arbitration agreement—typically, the underlying commercial contract(s)—is determinative, in principle, of the language of the proceedings. In 2009, some 95 per cent of all arbitrations under the ICDR Rules were conducted in the English language, with the remaining 5 per cent in Spanish.[1]

[1] Discussion with ICDR senior management (October 2010).

II. Textual commentary

A. Default rule provides predictability and efficiency

14.02 Article 14 differs slightly from the language provisions found in most other major arbitral rules. These typically leave it to the arbitrators' discretion, absent agreement by the parties, to determine the language of the arbitration, and the arbitrators would, in such instance, almost certainly take into account the language of the parties' commercial contract, as Article 14 provides explicitly.[2] Although this may seem more of a distinction than a difference from the ICDR Rules, the solution adopted by Article 14—of providing a default language of the language(s) of the documents containing the arbitration agreement—has the advantage of legal certainty: the language(s) of the arbitration can easily be ascertained by the parties even before the arbitral tribunal is constituted. This practice is also commercially sensible. By choosing a particular language for the main contract, the parties have already indicated that they are comfortable to conduct business with each other in that language, which may be taken as a strong indicator of their comfort in conducting an arbitration in that language.

B. In-built discretion and input by the parties provides flexibility

14.03 Article 14 also provides for some flexibility in circumstances in which a language other than that of the contract(s) may be more appropriate for the arbitration.

[2] *See eg* ICC Rules, Art 16 ('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'); 2010 UNCITRAL Rules, Art 19, with a now fairly elaborate regime for the applicable language and translations; LCIA Rules, Art 17.3 ('Upon the formation of the Arbitral Tribunal and unless the parties have agreed upon the language or languages of the arbitration, the Arbitration Tribunal shall decide upon the language(s) of the arbitration, after giving the parties an opportunity to make written comment and taking into account the initial language of the arbitration and any other matter it may consider appropriate in all the circumstances of the case'); SCC Rules, Art 21(1) ('Unless agreed upon by the parties, the Arbitral Tribunal shall determine the language(s) of the arbitration'); SIAC Rules, Art 19.1 ('Unless the parties have agreed otherwise, the Tribunal shall determine the language to be used in the proceedings'). For further commentary, *see* GB Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd edn, Kluwer Law International, The Hague, 2010) 78–79; GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 178, 1,454–55, 1,807–08; E Gaillard and J Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 1,244. *See also* Born, op cit (2009) 1,679–89; N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) para 2-81; D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 352–63.

In such case, the arbitrators can rely upon the broad discretion granted to them by Article 14 to determine that a language that differs from the 'documents' shall be the language of the arbitration, instead.

14.04 Under Article 14, the tribunal may determine a different language 'based upon the contentions of the parties'. This seems to suggest that the parties should be heard on the matter before the arbitrators reach a decision. Determining what language(s) shall apply to an arbitration typically will involve a balancing of the parties' nationality (and the language of those nationalities), the language of their previous correspondence, the language (if known) of likely witnesses and documentary evidence (as well as the attendant costs of translation), and other considerations that bear on the fairness and efficacy of the proceedings. The arbitrators' discretion is limited only by considerations of due process, because the determination of a language should not impede a party's right to be heard, which right might be impacted by imposing prohibitive costs for interpretation and translations on a party. All of these factors must be assessed on a case-by-case basis. Therefore, no single, rigid rule for determining the language of an arbitration could provide a better outcome than Article 14 of the ICDR Rules, which both provides a default (for predictability, ease, and efficiency) and broad discretion for the arbitrators to alter the default if a particular case warrants it.

14.05 Article 14 also permits the arbitrators to determine the 'language*(s)*' of the arbitration, recognizing that it may be appropriate, in some cases, to conduct the arbitration in more than one language. It is not uncommon, for example, to require the parties to make submissions in one language (for example, English), but to allow them to produce documents or witness statements in other languages without having to provide a translation (for example, French or German, especially in circumstances in which one or more of the arbitrators and both party representatives are fluent in that tongue).[3] Any directions on the language of the arbitration will typically be in the form of a procedural order and should be given at the outset of the proceedings in order to permit the parties to prepare their case accordingly.

[3] Born, op cit (2009) 1,808.

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