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Considerations in the Choice of the "Seat of Arbitration" When Drafting Arbitration Clause in International Commercial Contract

Oh, Won Suk*

* Professor, Business School, SungKyunKwan University.

Ⅰ. Introduction

In the settlement of the disputes incurred in international commercial transaction, the arbitration has many advantages over the litigation ; speediness, voluntary reference, expertness of arbitrator, closed proceeding and enforcement.

First of all, in order to resolve the disputes by the arbitration, the agreement between parties is necessary. The time of agreement may be divided into two different situations. One is that both parties agreed at an earlier stage when no dispute had yet arisen. In this case both parties include "Arbitration Clause" in their contract.

Another case is that both parties agree to submit the disputes to arbitration after their disputes had arisen. This case is called "Submission to Arbitration".

When either agreement is made, it should be carefully drafted and worded, and also include necessary elements ; the scope of disputes, the institution of arbitration(in case of institutional arbitration), the number of arbitrators, the language of arbitration, the place of arbitration, governing law and so on.

Among them, the seat of arbitration has many and significant implications in comparison with other elements, and close relations with them.

Therefore this author would like to examine the consideration factors in two dimensions ; practical and legal. Beforehand, this author will review the principle of party autonomy in deciding the seat and relationship between the seat of arbitration and the institution or the governing law. Then this author would introduce Standard Arbitration Clauses which are including the "Seat of Arbitration"

The purpose of this paper is to help the contracting party in drafting

arbitration clauses in their contract, and to make their contracts to be the most efficient and appropriate.

For this paper, this author referred many articles, authorities, and related literature on this subject. And reference materials also include Arbitration Act of Korean, Arbitration Rules of Korean Commercial Arbitration Board, Arbitration Act of 1996(of England), UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL Arbitration Rules(1998) Rules of Arbitration(I.C.C.1998), LCIA Arbitration Rules (1985), Federal Arbitration Act(U.S.A1970), International Arbitration Rules(A.A.A.2000), United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards(1958), and so on.

This paper has limitations ; as this author only to cures on the choice of "Seat of Arbitration", this could not deal with the governing arbitration law and administering institutions such as I.C.C. court of Arbitration or LCIA, even though these elements are also closely related with the "Seat of Arbitration."

II. Freedom of Choosing the "Seat of Arbitration"

If both parties choose the arbitration between the arbitration and the litigation, the choice of the "Seat of Arbitration" depends upon the intentions of both parties. The Arbitration Act of Korea stipulates that (1) the parties are free to agree on the place of arbitration. (2) Failing such agreement referred to in paragraph (1), the place[1] of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties (Art. 21(1),(2)). This principle for choosing the place of arbitration is almost same as in cases of

1) In this paper the author regards "the place of arbitration" and "the seat of arbitration" as having same meaning, since the "place of arbitration" refers to formal "seat of arbitration".

international arbitration institutions or another national institutions[2)]

In connection with the choice of the "Seat of Arbitration", what is mattered is the case when both parties have no agreement. In this case, It is necessary for us to examine institutional or administered arbitration and ad hoc or non-administered arbitration separately. In former case, we may divide national institutions such as CEPANI(Centre pour l'Etude et la Pratique l'Arbitrage National et International) in Belgium, NAI(Netherlands Arbitrage Institut) in Netherlands), AAA(American Arbitration Association) in U.S.A, JAA(Japanese Arbitration Association) in Japan, and international institutions such as I.C.C Court of Arbitration, WIPO[3)](World Intellectual Property Organization), and LCIA an alternative international arbitration institution for transnational commercial arbitration. And the arbitration institutions for specific commodity are ; the London-based Grain and Feed Association(GAFTA), Federation of Oils, Seeds and Fats Association (FOSFA) and London Rice Brokers Association(LRBA) ; the New York -based American Fat and Oils Association(AFOA) and the Washington based North American Export Grain Association.[4)]

If both parties selected any national institution like CEPANI, NAI or commodity institution based on any specific city like GAFTA, the "Seat of Arbitration" would be the nation or the city which these institutions are situated.

But provided that both parties selected ad hoc arbitration or international arbitration such as ICC Court of Arbitration without agreement on the "Seat of Arbitration", the arbitral tribunal or the competent institution would choose the "Seat of arbitration" according to governing arbitration rules ar law.

In making agreement of the "Seat of Arbitration", geographic condition,

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2) ICC Rules of Arbitration, Art. 14 ; UNCITRAL Arbitration Rules, Art.16 ; Arbitration Act 1996(of England), Sec. 3.

3) WIPO is willing to act as arbitration institution for the settlement of disputes with regard to intellectual property right. It has specific arbitration rules for domain name disputes (R.H. Smit, "General Commentary on the WIPO Arbitrtion Rules" (1998) 9 AmR. I. A. pp.3-44.

4) B. Chapman, "FOSFA international arbitration" (1986) Arb. Int.323.

necessary infrastructure(conference room, interpreters, etc), accessability of evidence, the language and legal system are considered. When both parties conclude the contract, if they recognize these requirements, it is advisable to fix the "Seat of Arbitration" which is acceptable to both parties.

The selected institution or the arbitral tribunal would finally decide the seat. But if both parties have not agreed on the seat and the institution, the local court can assume to a large extent the function of a arbitration institution.

When both parties agree on the seat of arbitration, the respondent's country may be selected as the seat of arbitration. For example the commercial contract between a Egyptian and a French may lay down a arbitration clause as follows:

"The place of arbitration shall be Paris, France, if the arbitration is commenced by the Egyptian Party, and the place of arbitration shall be Cairo Egypt if the arbitration is commenced by the French Party"

The above clause has a serious problem, the respondent in the most party has a default rather than the claimant. If the arbitration proceed in the respondent's country, the claimant may have disadvantages. Thus this unequal arbitration clause may result in continuous undue conduct on the part of respondent. The reason is that, if one party continues to commit the breach, the other party would not request to proceed a arbitration in the respondent's country. Therefore, above arbitration clause may be abused for the benefit of the defaulting party.

III. Consideration Factors in Selecting the "Seat of Arbitration"

Both parties should take a prudent attitude in Selecting the "Seat of Arbitration" in two aspects. One is about practical considerations, and another is about legal considerations.

1. Practical Considerations

The "Seat of Arbitration" should be convenient in terms of hotel facilities, transportation links, nearness to witness and document, climates, and availability of local resources such as stenographers, translator, photocopies and the like. Given relatively equal bargaining power and relatively equal attention to the drafting of the Arbitration Clause, the place of arbitrating should be equally convenient for both parties[5)]

It is very convenient to organize the arbitration in the place where the arbitration institution or an arbitrator is established. It is not a good idea to hold the "Seat of Arbitration" in the country of one of the parties - the "home" party would have a psychological advantage over the "away" party. Moreover, during the hearings, the "home" party would be able to take advantage of all services such as secretariat, researchers, library, while the "away" party would have to manage with more limited resources. "Equality of arms" requires that both parties are able to act under the same circumstances ; arbitration on neutral territory is therefore sometimes the best solution.

When the country in which the selected "Seat of Arbitration" is situated

5) P. D. Friendland, *Arbitration Clauses for International Contracts*, Juris Publishing Inc, 2000, pp.36~37.

has a biased view or a hostile feeling to the arbitration, it may be possible for the award of the arbitrators to be unfair or the enforcement may be hindered. Especially even if that country is a contracting state of N.Y Convention, confirmation of the award can also be denied if the award is adjudicated as it is contrary to the public policy of the "Seat of Arbitration".

The selection of the "Seat of Arbitration" does not oblige the arbitrator to operate only in that place. Unless otherwise agreed by the parties, arbitrators may meet, hear witness, experts and parties, and visit locations, etc., in any place they think fit.[6] Arbitration are not ever required to deliberate in the "Seat of Arbitration". They can confer with each other by telephone or letter. However, the arbitrators must always state formally that the award is made at the "Seat of the Arbitration".[7]

2. Legal Considerations

It is very important that arbitration has seat in a country with a suitable legal system for the supervision of an arbitration procedure, since, unless otherwise agreed, it is the proper law of the "Seat of Arbitration" which determines the validity and effects of the arbitration agreement, the appointment of arbitrator, the basic requirements for the arbitration procedure and the binding effect of the arbitration award. Sometimes the arbitration act of the seat includes mandatory procedural rules from which both parties can not deviate.[8] The court of the seat may intervene in an arbitration procedure.[9] Moreover, a claim to set aside the award or it null

6) LCIA Arbitration Rules, Art. 7. 2 ; NAI Arbitration Rules, Art. 22; UNCITRAL Rules, Art. 16. 2; UNCITRAL Model Law, Art. 20. 2 ; Arbitration Act of Korea, Art. 21(3).

7) UNCITRAL Rules, Art. 16.4; T. Rensman, "Wo ergehen Schiedssprűcher nach dem New York Ůbereinkommen?(Hiscox v. Outwaite)(1991) K. I. W. 911.

8) S. Schwekel & S. Lahne, "Public Policy and Arbitral Procedure" in Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Series No.3, Kluwer, 1987. p.205.

9) W. Park, "Judicial Controls in the Arbitral Process", (1989), Arb. Int. 230.

and void will be judged by the court of the seat, in accordance with its local arbitration law.

This author would like to divide the legal implications of the selection of the seat into three categories and to examine one by one.

1) Enforcement

There are very close relationships between the choice of the "Seat of Arbitration" and the enforceability of an arbitral award.

In most cases the arbitration award is voluntarily executed ; it seldom happens that the losing party challenges the award : If this challenge is unfounded the award must be enforced. However, if the losing party has a resonable challenge against the award, the award may be challenged.

Proceeding to challenge a award can only be brought before the competent court which, unless otherwise agreed between parties, is the court of the seat. In many legal system, the challenge of the award implies an application for the annulment of the award. The possibility to challenge the award is generally limited, and the grounds for challenge are provided in every arbitration act. For example, they include an invalid arbitration agreement, violation of the rights of the defence, and an award contrary to public order. It is noteworthy that the award can generally not be challenged only became the arbitrator made the wrong analysis of the facts or applied the law incorrectly.

The purpose of arbitration is to resolve a dispute definitely and quickly. Therefore an appeal on the merits against a award is in principle not available. As a matter of fact most arbitration rules state that the arbitration award is definite.[10]

If the losing party refuses to give effect to the award, the arbitral award can be forced through a court order such as the attachment of the assets of

10) ICC Rules of Arbitration Art.24 ; LCIA Arbitration Rules. Art.16.8 ; UNCITRAL Arbitration Rules, Art.32.2 ; Arbitration Act of Korea, Art.35.

the reluctant party.

The award may be enforced in the country where the "Seat of Arbitration" is or it may be enforced in another country.

In former case, the award needs ratification by the count. By this ratification(exequatur) the court grants the arbitral award the same status as a judicial order : the arbitral award can be forced in the same way as a court order. The court only confirms the award after examination of the arbitral procedure and of the award. The examination is in most countries rather superficial ; but in some countries the court carries out more thorough examination. It is therefore necessary to check what the law of the seat says on the requirements and procedures for enforcement.[11]

Both parties usually may agree on the "Seat of Arbitration" in neutral place, different from the place of the parties. In that case the enforcement in the neutral place may often useless as there are no assets of the losing party in that country. The award in the neutral place may not be forced in the country where the losing party is established.

In later case, the enforcement is carried out not in the country of the "Seat of Arbitration", but in the another country. The enforcement in another country is generally by the regulated international convention if the country is a contracting state. The most important convention in this respect is the New York Convention on the Enforcement of Foreign Arbitral Awards(1998). This Convention is in force between 136 Sates as of March, 2004. Some of these countries apply this Convention only when the award is made in a state that is also a signatory to the Convention ; other states apply the Convention to the enforcement of any foreign award, no matter where the award was made.

Anyone who wants to prevent the enforcement should bear the bounden of proving that the award could not be confirmed by the court. The typical reasons for the refusal of the court to confirm can be : incapacity of a

11) V. Ranouil, "Enforcement of arbitral award and judicial decision : a comparative analysis" (1988), D.P.C.I.427.

party, invalidity of the arbitration agreement, defective information on the appointment of arbitrators and the start of the proceeding, non-arbitrable of the dispute according to the law applicable to the arbitration agreement, or according to the law of the seat. Furthermore, the court may refuse to confirm an award if the dispute is not arbitrable according to the law of the forum. Confirmation of the award also can be denied if the award is contrary to public policy.[12]

The European Convention on International Commercial Arbitration (1961) simplifies the enforcement of arbitration awards between 20 countries. An award made in one of these countries may be enforced in another Contracting State, sometimes even if it has been annulled in the country of origin.[13]

Under the European Convention the enforcement may be effected even more smoothly than under the New York Convention. The reason in that, under the European Convention, enforcement can not be refused when the arbitrators failed to observe the procedural rule of the domestic arbitration law of the seat in so far as observance was not stipulated by the parties or imposed by the European Convention. Furthermore, the nullity of an award in one Contracting State does not in itself prevent enforcement in another State, the party to the European Convention.

If there is a risk of enforcement in a country, not party the New York Convention or European Convention, the "Seat of Arbitration" should be chosen in a country which has a bilateral treaty on the enforcement of an arbitral award with this country.

Even among the signatories to the New York Convention, the enforcement of an award can not be effected, provided that the award was set aside by the courts at the place of arbitration,[14] and if the courts are

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12) Chr. Kuner, "The Public Policy Exception to Enforcement of Foreign Arbitral Award in the United States and West Germany under the New York Convention"(1990), J.I.A. 4-71.

13) European Convention, Art. IX.

14) New York Convention, Art. V(1)e ; "Recognition and enforcement of the award

hostile to international arbitration or biased against a non-national in dispute with a national, the parties increase the risk that their award will be enforceable anywhere.

Thus when both parties select the place of arbitration, they should consider not only whether a certain jurisdiction has enacted a modern arbitration law, but also whether the courts in that jurisdiction tend to respect and enforce such a law even it is contrary to the interests of a local party. And both parties cannot avoid the consequences of their selection of the "Seat of Arbitration" through their choice of substantive law. The local law at the place of arbitration governs the interaction of the enforcement court and the arbitral process.

2) Judicial Interference in Arbitral Proceeding

The selection of the "Seat of Arbitration" can affect the arbitral proceedings, in addition to influencing the enforceability of an arbitral award. For example the court of the "Seat of Arbitration" may demand or compel the arbitral proceedings, order or forbid discovery, and limit the appearance of witnesses.[15]

The court may also be called upon to perform such an important functions as the appointment of arbitrators in the absence of agreements and the order of provisional relief.[16]

If both parties want to avoid theses consequence of their choice of the "Seat of Arbitration", they should agree on the arbitration act governing the procedure.

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may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that(e) The award has not yet become binding on the parties, or has not been set aside or suspended by a competent authority of the country in which or under the law of which, that award was made.

15) P.D. Friendland, op. cit., p.36.

16) A. Redfern, & M. Hunter, Law and Practice of International Commercial Arbitration, 3rd, 1999. pp.24-30 ; W. L. Craig et al., International Chamber of Commerce, 2rd ed., 1990. pp.34-36.

3) Selection of the Arbitrators

If the both parties or appointed co-arbitrators cannot agree upon the presiding arbitrator or a chairman and there is no designated appointing authority, the court of the "Seat of Arbitration" may select him. In this case the "Seat of Arbitration" is one important factor that the appointing authority will consider in making this critical appointment.

When both parties agree on the "Seat of Arbitration", they should take into account that the national of that place would be selected as a presiding arbitrator by the local court.

Ⅳ. Lack of Choice of the Seat and Governing Arbitration Act

1. How to Decide the Seat When not Agreed

If both parties select international arbitration and fail to choose the "Seat of Arbitration", the institution will make the choice for the parties, in light of factors such as the nationality of the parties, the subject matter of the dispute and the governing substantive law. The ICC practice is to select a neutral third country.[17] The LCIA is to select London unless circumstances compel otherwise.[18] The AAA practice is to consider all relevant circumstances[19]

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17) ICC Rules of Arbitration, Art. 14.1 ; "The place of arbitration shall be fixed by the court unless agreed upon by the parties".

18) LCIA Rules, Art. 16.1 ; " The parties may agree in writing the seat(or legal place) of their arbitration. Failing such a choice, the seat of arbitration shall be London....

19) AAA International Arbitration Rules, Art.13 ; "If the parties disagree as to the place of arbitration, the administrator may initially determine the place of arbitration, subject to the power of tribunal to determine finally the place of

If both parties select ad-hoc arbitration and fail to choose a place of arbitration, the choice will fall to the courts, if the courts are willing.

The Arbitration Act of Korea[20], like ICC or LCIA, stipulates that failing an agreement on the place of arbitration, it shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

2. Relationship Between the Seat and Arbitration Act

Arbitration law regulates arbitration procedure, contrary to the governing law regulating the substantive issues of the contract.

The substantive law regulates the rights and obligations of the parties and the arbitrators apply it on the merits in the disputes during the course of the formation and performance of the contract.

Most of international commercial contracts lay down the governing law clause which designates specific substantive law. For example United Nations Convention on Contracts for the International Sales of Goods (CISG) has found its position as an international uniform law in the contract for the international sale of goods. Korea, like 63 countries, became a contracting state from March 1st, 2005.

Among the contracting states, unless otherwise stipulated in their contract, the CISG would be applied. In the course of the enactment of CISG, the issues which could not be adjusted or compromised among the different legal systems were excluded. Therefore legal vacancy for the issues is inevitable. Fortunately, UNIDROIT Principles of International Commercial Contract(1994&2004)are expected to execute their supplementary function to the uniform law. In international commercial arbitration, both parties may

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arbitration within 60days after its constitution. All such determinations shall be made having regard for the contentions of the parties and circumstances of the arbitration".

20) Arbitration Act of Korea, Art. 21(2).

insist that the arbitrators shall decide according to "the general principle of law" or the lex mercatoria.[21] Such reference in my opinion creates some risks ; the lex mercatoria still appears too vague and unclear to offer a satisfactory guideline for arbitration.

But even though both parties select arbitration instead of litigation to resolve the disputes, it is very rare to lay down a arbitration governing law in their contract. In most cases, both parties do not know to lay down substantive governing law and an arbitration governing law in the contract separately, so they think it sufficient to stipulate only a substantive governing law.[22]

In so far as the parties have not decided on procedural issues and have no chosen arbitration governing laws or rules, the law of the "Seat of Arbitration" becomes the governing law, whatever the substantive governing law the parties select. In this sense it may be said that to stipulate arbitration governing law is not necessary.[23] Parties should nevertheless consider adding a choice of governing arbitration law where(i) they wish to avoid the arbitration law of the place of arbitration or (ii) they are in agreement upon which arbitration law should apply and wish reduce this potential area of uncertainty in the event of a dispute.

Therefore the selection of the "Seat of Arbitration" is closely related the governing arbitration law. In the most arbitration law, unless otherwise agreed between parties as the arbitral tribunal or the secretariat determines the seat, having regard to the circumstances of the case, the place which the arbitral institution or the court of arbitration is located would be the "Seat of Arbitration".

For arbitration in the United State, there may be a particular incentive to assure that the arbitration agreement will be governed by the U.S. federal

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21) G. Huphreys, "La Lex Mercatoria in international arbitration : some differences in the Anglo-French point of view"(1992) IBLJ. 849.

22) Martrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52. 64(1995).

23) P. Sanders, Quo Vadis Arbitration? Sixty Years of Arbitration Practice 2-9 (1999).

law rather than the state law, wherein the arbitration takes place, because U.S federal law is generally more pro-arbitration than state arbitration law and better known to practitioners than the arbitration law of the individual states.

If the parties wish the Federal Arbitration Act to be the governing law for an international contract, the following sentence could be added to the arbitration clause : "This arbitration agreement and any arbitration shall be governed by the Federal Arbitration Act, Chapter 1 and 2[24], to the exclusion of state law inconsistent therewith"[25]

The following clause provides for both a substantive and arbitration law, and distinguishes the two : "This agreement shall be governed by the law of the State of New York(other than with respect to principles of conflicts of laws thereunder), except that issues relating to this arbitration clause and any arbitration hereunder shall be governed by the Federal Arbitration Act, Chapter 1 and 2"

After all when both parties conclude a contract, it is desirable to lay down the "Seat of Arbitration" in this contract, But even though they agreed on the arbitration, the "Seat of Arbitration" would be determined by the arbitration governing law if the agreement does not stipulate the "Seat of Arbitration".

The arbitration laws of the most of the countries, unless both parties otherwise agreed, stipulate that their designated institution or arbitral tribunals determine the "Seat of Arbitration" according to the arbitration laws and rules.

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24) Chapter 2 of the Federal Arbitration Act concerns international contracts and implements the New York Convention. Chapter 1 of the Federal Arbitration Act applies to international arbitration insofar as not inconsistent with Chapter 2.

25) If the parties wish New York state law pertaining to arbitration to be the governing arbitration law, the following sentence could be used instead : "This arbitration agreement and any arbitration shall be governed by the provisions of New York Civil Practice Law and Rules.

3. Examples of Arbitration Clauses including the Seat and Arbitration Act

Each national arbitration institution or international arbitration institution drafted a standard arbitration clause, so if the drafters of a contract do not have the necessary expertise, they do better to incorporate one of the available ready-made arbitration clause[26]

This author would like to examine the standard arbitration clause of ICC, UNCITRAL, CEPANI, LCIA and AAA including KCAB one by one. focusing on the "Seat of Arbitration" and Arbitration act.

1) Standard Arbitration Clause of KCAB

"All disputes, controversies, or differences which may arise between the parties, out of or in relation to or in connection with this contract or for the breach thereof, shall be finally settled by arbitration in Seoul Korea, in accordance with the Commercial Arbitration Rules of The Korean Commercial Arbitration Board and under the Law of Korea. The award rendered by the arbitrator(s) shall be final and binding upon both parties concerned."

This clause lays down Seoul as a place of arbitration and the Arbitration Act of Korea and the Arbitration Rules of KCBA as a governing law and rules.

As regards the "Seat of Arbitration", the Arbitration Rules of KCBA stipulate that in the absence of an agreement between parties, the Secretariat shall determine the place of arbitration taking into account relevant factors including the convenience to the parties and access to documentary

26) S. Bond, "How to draft an ICC Arbitration Clause" (1992) 7 ICSID Rev. No.1. 153 ; G. Delaume, "How to draft an ICSID Arbitration Clause"(1992) 7 ICSID Rev. No.1, 168 ; M. Hoellering, "How to draft an AAA Arbitration Clause"(1992) 7 ICID Rev. No.1, 141.

evidence(Art.17), and supplement the Arbitration Act(Art.21)

Thus if the parties opt for the KCAB, but did not indicate the "Seat of Arbitration", the arbitration would take place in Seoul where the KCBA is located.

2) Arbitration Clause of ICC Court of Arbitration

ICC is the most well-known international arbitration institution resolving international commercial disputes by arbitration.[27] The arbitration clause recommended by the ICC is as follows:

"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

This clause only refers to the arbitration rules without mentioning the "Seat of Arbitration". But in "Note" following the Clause, ICC is recommending to stipulate the place of arbitration in the Clause.

When both parties choose this arbitration rules, they have a freedom to agree on the seat, the number of arbitrators and the language. But if the both parties do not exercise the right to select the "Seat of Arbitration", the place of the arbitration shall be fixed by the Court, (Rules of Arbitration, Art. 14(1)). As for the rules governing the proceeding, language and the applicable rules of law would be determined by the arbitral tribunal unless agreed upon by the parties(Rules of Arbitration, Art. 15, 16, 17).

3) UNCITRAL Arbitration Clause

The arbitration clause which the UNCITRAL recommends for adoption is as follows :

"Any dispute, controversy or claim arising out of or relating to this

27) Bank Mellat v. GAA Development and Constitution Co. (1988) 2 Lloyd's Rep.44 at 48.

contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as present in force."

Note-Parties may wish to consider adding :

(a) The appointing authority shall be ... (name of institution or person) ;

(b) The number of arbitrators shall be ... (one or three) ;

(c) The place of arbitration shall be ... (town or country) ;

(d) The language(s) to be used in the arbitral proceedings shall be ...;

The main characteristic of the UNCITRAL Arbitration Rules is that no arbitration shall fail on the ground that the parties cannot agree on an arbitrator or for any reason no arbitrator can act. If no appointing authority has been agreed by the parties or if the appointing authority refuses to act or fails to appoint an arbitrator within 60days of the receipt of a party's request, either party may request the Secretary-General of the Permanent. Court of Arbitration at the Hague to designate an appointing authority.[28]

Unless the parties have agree upon the place where the arbitration is to be held, such place is determined by the arbitration tribunal.[29] The reason is that UNCITRAL itself does not have the arbitration facilities, so it does not have the secretariat.

It is further provided by Art. 21(1) and (2) that the arbitration tribunal shall have the power to rule on objections that it has no jurisdiction and to determine the existence or the validity of a contract of which the arbitration clause forms part ; for the purpose of this provision the arbitration clause is treated as independent of the other terms of the contract.

Many national chamber of commerce and arbitration institutions have agreed to act "appointing authority" under the UNCITRAL Arbitration Rules.[30]

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28) UNCITRAL Arbitration Act, Art. 6(2).

29) UNCITRAL Arbitration Act, Art. 16(1).

30) Leo D'Arcy et al, The Law and Practice of International Trade, Sweet & Maxwell, 2000. p.491.

The LCIA and the AAA have issued booklets detailing the service that they will provide in arbitrations under the UNCITRAL Rules.[31]

4) LCIA Arbitration Clauses

The London Court of International Arbitration is a tripartite organization, sponsored by the London Chamber of Commerce, the City of London Corporation, and the Chartered Institute of Arbitration, and is administrated by the latter. It's seat is at the International Arbitration Center in London. The Rules of the London Court of International Arbitration are known as the LCIA Rules. The Court recommends the adoption of the following clause:

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration which rules are deemed to be incorporated by reference into this Clause"

The following provisions may be suitable:

The governing law of this contract shall be the substantive law of.....

The tribunal shall consist of ..... (a sole or three) arbitrator. (In the case of a three of a three member tribunal, the following words may be added ..... two of them shall be nominated by the respective parties)

The place of arbitration shall be ..... (city)

The language of arbitration shall be .....,

In the above clause, LCIA Clause like ICC or UNCITRAL are recommending to state the place of arbitration. But if both parties do not accept this recommendation, LCIA Rules stipulate London as the "Seat of Arbitration".[32]

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31) F. D. Friendland, op. cit., p.23

32) LCIA Arbitration Rules(1998), Art. 16(1) ; "The parties may agree in writing the seat(or legal place) of their arbitration. Failing such a choice, the seat of arbitration shall be London unless and until the LCIA Court determines in

view of all the circumstance, and after having given the parties an opportunity to make written comment that other seat is more appropriate"

5) CEPANI Arbitration Clause

The CEPANI is Belgian arbitration institution. CEPANI arbitration may be conducted in French, Dutch, English, German or some other chosen language. In about 40 percent of CEPANI arbitration one or more parties are foreign. The CEPANI arbitration clause reads in English as follows:

"Any dispute concerning the validity, the interpretation or execution of the present contract shall be definitely settled in accordance with the Rules of CEPANI, by one or several arbitrators appointed in accordance with these Rules."

Further provisions may be added to this clause :

(a) the arbitration tribunal shall be composed of ....(a single arbitrator)or of.... (three arbitrator),

(b) the place of arbitration shall be .... (name of town or city)

(c) the language of the proceedings shall be .... ( )

In above Arbitration Clause, both parties may agree on the place of arbitration. But if the is no agreement, it would be determined by the CEPANI Rules.

6) AAA(American Arbitration Association)Arbitration Clause

The AAA's International Arbitration Rules booklet(effective as of April, 1997) suggests that parties use the following arbitration clause:

"Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Arbitration Rules of the American Arbitration Association."

The parties may wish to consider adding :

(a) "The number of arbitrators shall be (one or three)",

(b) "The place of arbitration shall be (city/state)",

(c) "The language(s) of the arbitration shall be ( )".

For arbitration before AAA, unlike arbitration before the other leading

arbitral institution, the parties have a choice among multiple sets of arbitration rules(International Arbitration Rules, Commercial Arbitration Rules, Construction Industry Arbitration Rules, and other). For international contracts, the parties should specify the International Arbitration Rules, unless there is a particular reason to choose another set of Rules.

In AAA's Arbitration Rules, parties may agree on the number of arbitrator, the place of arbitration and the language.

If there is no stipulation on them, International Arbitration Rules shall be applied. The Rules[33] stipulate that if the parties disagree as to the place of arbitration, the administrator may initially determine the place of arbitration, subject to the power of the tribunal to determine finally the place of arbitration within 60days after its constitution. All such determination shall be made having regard for the contentions of the parties and circumstances of the arbitration.

V. Conclusion

In international commercial contracts, first both parties should decide to resolve their disputes whether through litigation or through arbitration, and them reflect their agreements in their contracts.

Once if they agreed on arbitration, it is advisable to lay down an arbitration clause in their contract. When drafting a arbitration clause, they should decide again whether to make use of an arbitration institution or ad-hoc arbitration. If both parties have on-going business transactions, the latter may be useful. But generally speaking, the former is more efficient and safe than the later.

In the institutional arbitration, both parties may use the standard or recommended arbitration clause of a nominated institution, in which

33) AAA International Arbitration Rules, Art. 13(1).

contains a arbitration rules of the institution. If they select a standard arbitration clause, unless otherwise agreed, the place of arbitration, the number of arbitrators and the language are determined according to the arbitration rules, under which the arbitral tribunal or the secretariat of the institution actually would determine, by taking into account of relevant factors and circumstances.

But, in the institutional arbitration, the nation in which the institution is located would usually be the "Seat of Arbitration". But, if the both parties select ad-hoc arbitration because of their concerns about administrative costs, both parties themselves have to organize an ad-hoc arbitration. They or their arbitrators should set their own rules for their arbitration proceedings. Even in the ad-hoc arbitration, if the UNCITRAL Arbitration Rules are nominated as governing arbitration rules, which is called "hybrid arbitration", other arbitration elements would be determined according to the Rules.

However, to draw up detailed rules in an arbitration clause in advance is not only laborious but in fact unfeasible, when the nature of the dispute is yet unknown. Parties should therefore restrict themselves to some general guidelines in the arbitration clause. Among the general guidelines, the most important one is for the "Seat of Arbitration". Once the "Seat of Arbitration" is fixed, other factors would be determined by the rules of the institution or the court in that place. Besides the "Seat of Arbitration", if the arbitration rules are fixed, the involvement of the court would be suspended.

This writer would like to recommend either ICC arbitration or LCIA arbitration, if both parties do not agree on the seat of any specific country, for which this author introduce the Standard Arbitration Clauses of these institutions. If both parties does not want these international arbitration institutes, this author would like to recommend AAA or CEPANI arbitration which is famous home and abroad.

Among many institutions, ICC, LCIA and AAA, are the most famous internationally. In the case of LCIA, the "Seat of Arbitration", unless

otherwise agreed by the parties, is London. On the country in the cases ICC and AAA, the "Seat of Arbitration" would be determined by taking into account of the circumstances.

In ICC arbitration, the Court of Arbitration specifically requires, among other things, the establishment of the framework for the settlement at the start of the proceedings in Terms of Reference, which should be signed by the parties. The Court of Arbitration also examines the formal validity of the arbitral award, which enhances the enforcement of award. AAA and LCIA often act as intermediaries for the transmission of documents and message between parties and arbitration : briefs must be sent to the secretariat of the institution which is responsible for further distribution.

Thus, when both parties select any arbitration institution and insert its Standard Arbitration Clause in their contact, first they should confirm the seat in the Clause and add the seat, if necessary, provided that the Clause does not nominate the seat, and next examine the arbitration rules of the institution to confirm how the seat be determined.

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ABSTRACT

Consideration in the Choice of the "Seat of Arbitration" When Drafting Arbitration Clause in International Commercial Contract

Oh, Won Suk

The purpose of this paper is to examine practical and legal considerations in the choice of the "Seat of Arbitration".

As the selection of the "Seat of Arbitration" in an international commercial contract is vital both judicially and practically, so to speak, in terms of enforceability of award, judical interference in arbitration proceedings, relative convenience and expense, and the selection of arbitrators, the selection should be carefully considered and examined.

In case of institutional arbitration, when the arbitration clause does not nominate the seat, the administrator or the secretariat of the institution or the arbitrator tribunal would usually determine the seat. On the contrary in case of ad hoc arbitration, Unless otherwise agreed by the parties, the "Seat of Arbitration" would be determined according to the rules which are selected by parties or their arbitrators.

To avoid confusing situation about the selection of the seat, this writer would like to recommend ICC or LCIA with each Standard Arbitration Clause. If the parties want any national arbitration institution because of the expenses incurred in international institution, AAA or CEPANI is recommendable in terms of the reputation, operating system and recognized performance. Specially ICC Court of Arbitration usually examines the award before it is issued, so the enforceablity would go up.

Thus when the parties lay down the arbitration clause in their contract,

they should confirm whether the "Seat of Arbitration" is fixed or not. If not, at least they should examine the arbitration rules which would be applied, and know in advance how the seat be determined.

Key Word : Seat of Arbitration