Determining the language in international arbitration

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Resumen: *En la práctica del arbitraje internacional, es cada vez más frecuente que se planteen conflictos en relación con la determinación del idioma del arbitraje, tanto si el idioma ha sido pactado en el convenio arbitral –como parte del contenido facultativo del mismo–, como en defecto de pacto. En la práctica, prevalece la autonomía de la voluntad de las partes, con la necesaria intervención de los árbitros en defecto de acuerdo entre aquéllas. En este artículo analizamos la importancia de incluir, en el convenio arbitral, un pacto relativo al idioma de las actuaciones, debido, entre otras cuestiones, a su repercusión en el respeto al principio de igualdad de partes, a los costes del procedimiento arbitral y al nombramiento de los árbitros.*

A. INTRODUCTION

1. Arbitration can be domestic or international. The term "international" is used to differentiate arbitrations that exceed national scope from those that are entirely domestic[1]. It is quite common for international arbitration to involve parties, arbitrators, lawyers and third parties –such as witnesses and experts– of different nationalities, who usually speak different languages or do not have the same level of proficiency in the same language. For that reason, one of the most important decisions when negotiating an arbitration clause or the features of the specific arbitration proceedings, in the absence of a prior agreement, is determining which language or languages will be used.

2. The language –or languages– of the arbitration is the language in which all matters connected with the arbitral proceedings will be conducted, including the parties' written and oral submissions, evidence –whether written or oral–, the arbitrators' procedural orders and the award itself.

3. The language of the arbitration has a decisive impact on at least four different aspects of how the proceedings develop, namely (i) party equality, this is, the right for the parties to present their case in a neutral language[2], (ii) efficiency and the cost of the arbitral proceedings, (iii) the composition of the arbitral tribunal and (iv) the interaction with national courts in the event of annulment or enforcement of the award.

4. As it is such a significant issue, the language chosen for the arbitration –or the decision to use more than one language– should be considered carefully by the parties when negotiating the terms of the arbitration clause. Parties should use their freedom to choose the language of arbitration wisely, depending on the circumstances of the case, and opt for a neutral language. Consequently, they should expressly select the language in their arbitration agreement in order to avoid a dispute over this and, therefore, save time and costs. In the past, it was generally understood that the language should be that of the underlying contract. However, more recently, several

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1 Blackaby, N., C. Partasides, C., Redfern, A. and Hunter, M., *Redfern and Hunter on International Arbitration*, 5th edition, Oxford University Press, Oxford (United Kingdom), 2009.

2 Dias Simões, F., "The language of international arbitration", *Conflict Resolution Quarterly*, Association for Conflict Resolution and Wiley Periodicals, Inc., vol. 35, no. 1, 2017.

lecturers and practitioners understand that the language should be that of the majority of the documentation or communications exchanged between the parties in question.

5. With this in mind, arbitration clauses frequently specify the language (or languages) of the arbitral proceedings and the award. This decision is of vital importance, as it can have a profound practical effect, as stated above, on the selection of the arbitrators and on the features of the arbitral proceedings[3]. Moreover, even if the arbitral agreement makes no mention of this matter, the parties still have the opportunity to reach an agreement on the language of the arbitration in the early stages of the proceedings[4].

6. In the absence of an agreement between the parties, institutional rules usually authorise the arbitral tribunal to select the language of the arbitration[5]. In such cases, the arbitral tribunal has to determine the language or languages to be used in the proceedings. For this purpose, arbitrators should consider the circumstances of the dispute, the law governing its subject matter, etc., and select the most appropriate language in order for the proceedings to be conducted efficiently, taking into account that the most important factor should be the principle of equal treatment.

B. THE IMPORTANCE OF THE LANGUAGE OF INTERNATIONAL ARBITRATION PROCEEDINGS

7. Due to the globalisation of business and the increase in international trade, arbitration has become a frequent method of resolving international business disputes. Therefore, arbitrations involving parties of different nationalities can be considered international arbitrations. If those parties do not share the same native language, both the parties' right of defence and communication become an issue. Furthermore, legal language presents an additional problem, since law has a distinct language of its own, known as legal jargon[6].

8. In the introduction to this article, we referred to four of the aspects affected by the language chosen for the arbitration, which are the principle of party equality, the efficiency and cost of the proceedings, the composition of the arbitral tribunal, and the interaction with national courts. We will briefly refer to each of them below.

a) Party equality: the use of a neutral language for the parties to present their case

9. The fulfilment of the parties' fundamental right to properly present their case to the arbitral tribunal depends on whether the parties can communicate correctly and follow the proceedings thoroughly.

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3 Born, G., *International Arbitration: Law and practice*, Wolters Kluwer Law & Business, Kluwer Law International, The Netherlands, 2012, page 36.

4 Unless agreed otherwise in the framework of the arbitral proceedings, there is not usually a time limit for the parties to agree to change the language of the arbitration. Obviously, if the arbitrators have already accepted their appointment, the parties must be aware that a change in the language of the arbitration may force some arbitrators to resign.

5 Although institutional rules may not address the issue, national law ordinarily gives arbitrators the authority to select a language for the arbitration. In Spain, this provision is established in Article 28 of the Spanish Arbitration Act ("**SAA**").

6 Dias Simões, F., *op. cit*.

10. The language of the arbitration can have a negative impact on party equality since the chosen language can give the more proficient party a practical advantage. If the selected language is deemed to be unfair to one of the parties, the arbitral tribunal may alter the language to restore equality.

11. In this regard, even though the violation alone of the rules regarding the language of the arbitration should not be a sufficient ground for the annulment of the award or the refusal of its recognition and enforcement, the effect such violation has on the fundamental rights of the effected party may be considered[7]. That the parties are represented by lawyers proficient in different languages is irrelevant to this matter as the rights pertain to the parties themselves and must be observed. However, if the parties are represented by lawyers qualified to act in a particular State and therefore, under a particular law, this can be of great significance.

b) Efficiency and cost of the arbitral proceedings. "Multi-lingual" arbitration

12. In addition to the above reasons, the decision of the language of the arbitration should not be taken lightly as it may have an impact on the efficiency and cost of the proceedings[8].

13. The efficiency of the proceedings might not be the main aspect considered by the parties when negotiating the terms of the arbitral clause concerning the language, party equality being the key issue of such negotiation. Therefore, the question of the efficiency and cost of the arbitration, with regard to language, usually arises in the early stages of the proceedings and in the absence of an agreement between the parties. That is, when the arbitral tribunal has the authority to determine the language of the arbitration. In such case, arbitrators should also consider the aim of providing cost-effective dispute resolution. This decision involves considering the parties' nationality (and the language of those nationalities), the law governing the dispute, the language of their previous correspondence, the language of witnesses and documentary evidence, the costs of translation, and other factors that may impact the fairness and efficacy of the proceedings[9]. These aspects are commonly known as the "circumstances of the case" referred to in several arbitration rules and recommendations, which we will mention hereinafter.

14. If advisable for whatever reason, the use of multiple languages is usually permitted and can be considered if the circumstances require this. This means that the parties or the arbitral tribunal may select more than one language for a single arbitration. However, the use of more than one language may significantly increase the costs of arbitration as documents and hearings may need to be translated. This is not the only problem arising from multi-lingual arbitration. The International Bar Association Guidelines for Drafting International Arbitration Clauses (the "**IBA Guidelines**")[10] expressly refer to "multi-lingual arbitration" in the following terms:

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7 Blackaby, N., C. Partasides, C., Redfern, A. and Hunter, M., op. cit.

8 Fry, J., Greenberg, S., Mazza, F., *The Secretariat's Guide to ICC Arbitration*, Chapter 3: Commentary on the 2012 Rules, ICC Publication 729, Paris (France), 2012, pages 212 to 217.

9 Gusy, N., Hosking, J. and Schwartz, F., *A Guide to the ICDR International Arbitration Rules*, Oxford University Press, Oxford (United Kingdom), 2011.

10 https://www.ibanet.org/ENews_Archive/IBA_27October_2010_Arbitration_Clauses_Guidelines.aspx

> "(…) *Multi-lingual arbitration, while workable (there are numerous examples of proceedings conducted in both English and Spanish, for example), may present challenges depending on the languages chosen. There may be difficulties in finding arbitrators who are able to conduct arbitration proceedings in two languages, and the required translation and interpretation may add to the costs and delays of the proceedings. A solution may be to specify one language of arbitration, but to provide that documents may be submitted in another language (without translation).*"[11]

15. In addition to what is stated in the IBA Guidelines, the Report of the International Chamber of Commerce ("**ICC**") Commission on Arbitration and ADR entitled "Controlling Time and Costs in Arbitration" refers to the fact that multi-lingual arbitration might increase the cost of the proceedings[12]:

> "*Having two or more languages of the arbitration will normally increase time and cost. Consideration should be given to whether the use of two or more languages truly justifies the additional time and cost. On the other hand, where there is a single language of the arbitration, the use of an additional language should be considered if it would reduce time and cost* (…)."

16. Regardless of the language of the arbitration, and as provided for in the IBA Guidelines, the submission of documents in a language other than that of the arbitration, without a translation, may be permitted if the parties expressly agree to this. Additionally, witnesses are often permitted to testify in their own language, as long as the proposing party provides the relevant translations and interpretations; unless the other parties involved (i) are proficient in the language in question and (ii) expressly decline such procedures.

17. As far as Spain is concerned, Article 28.2 of the SAA[13] also allows the arbitrators to agree to the submission of documents, or the execution of other procedural actions, in a language different to the language of the arbitration, unless the parties challenge such decision. This regulation was adopted following the recommendations of the United Nations Commission on International Trade Law Arbitration's ("**UNCITRAL**") Model Law on International Commercial Arbitration (the "**Model Law**"). Specifically, Article 19.2 of the Model Law foresees that "[t]*he arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal*."

18. This exception is intended to expedite the proceedings and will only be permitted if all the parties involved are proficient in the language of such documents or procedural actions –despite not it being the language of the arbitration. This provision does not entail a violation of the rules regarding the language of the arbitration, nor a breach of party equality, since a translation is only necessary if expressly requested by the party in question[14].

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11 Guideline 7: The parties should specify the language of arbitration.

12 ICC Commission on Arbitration and ADR Task Force on Reducing Time and Costs in Arbitration, "Controlling Time and Costs in Arbitration", 2nd edition, 2018, page 8.

13 "*Unless a party takes exception, the arbitrators may allow any document to be provided or proceedings to be conducted in a language other than the arbitration language, with no need for translation*."

14 Matilla-Serrano, F., *Ley de Arbitraje. Una perspectiva internacional*, Iustel, 1st edition, Madrid (Spain), 2005, pages 162-165.

19. Despite the above, a multi-lingual –or fully bilingual– arbitration is difficult to conduct as it:

i) may increase costs significantly, as the correspondence between the parties and the arbitral tribunal, the parties' written and oral submissions, and the procedural orders and awards, may need to be issued in all languages;

ii) carries the risk of inconsistencies, as differences of meaning may arise between different language versions, which is particularly problematic where awards are concerned, and may delay the drafting of such awards; and

iii) might reduce the pool of potential arbitrators for the case to those who are proficient in all languages[15].

20. Finally, as regards proceedings administered by specialised arbitral institutions, parties and arbitrators may wish to consider their communications with the relevant institution when deciding on the language of the arbitration. Conducting the arbitration in a language in which the arbitral institution is capable of operating can reduce delays. However, parties are free to select a language other than those used by the relevant institution. The language used for correspondence between the institution and the parties, and between the former and the arbitral tribunal, should not restrict or influence the arbitral tribunal's decision of the language of the arbitration[16].

c) Composition of the arbitral tribunal: selecting arbitrators proficient in the language of the arbitration

21. As well as improving efficiency and reducing costs, reaching an agreement on the language in the first stages of the proceedings greatly simplifies the process for selecting the sole arbitrator or the members of the arbitral tribunal –and also for selecting the lawyers responsible for the case–, as the parties will be aware in advance of the language abilities required for all individuals involved.

22. Arbitrators who participate in international arbitration proceedings must have an adequate working knowledge of the language in which the arbitration is carried out. Ideally, the appointed arbitrators should be able to:

i) understand the language in which the written evidence is drafted or in which the oral evidence is given[17];

ii) follow the proceedings without the need for translation; and

iii) understand the other arbitrators, parties, lawyers and witnesses without details and undertones being lost in translation[18].

23. Consequently, an arbitrator who lacks the necessary fluency in the language of the arbitration may fail to understand some of the crucial issues necessary to resolve the dispute. If this is the case, it is advisable that such arbitrator resigns from the role.

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15 Fry, J., Greenberg, S., Mazza, F., *op. cit*.

16 Fry, J., Greenberg, S., Mazza, F., *op. cit*.

17 Dias Simões, F., *op. cit*.

18 Lew, J., Mistelis, L. and Kroll, S., *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague (The Netherlands), 2003.

24. Arbitral institutions responsible for administering most international arbitration proceedings –such as the ICC, the London Court of International Arbitration ("**LCIA**") and the International Centre for Settlement of Investment Disputes ("**ICSID**")– normally provide the parties with a list of potential arbitrators with sufficient competence to act as arbitrators, including, among other capabilities, their proficiency in different languages. However, choosing arbitrators based solely on their language abilities can also limit the number of available arbitrators and reduce the importance of other aspects, such as their specialisations and experience or their knowledge of the law applicable to the dispute.

d) Interactions with national courts

25. Finally, a fourth area in which the language of the arbitration is relevant is the interplay between the arbitration proceedings and the national courts. Once the award is rendered, the question of language may play a role when it comes to seeking the annulment of the award at the place of arbitration, or its enforcement in the losing party's country or elsewhere[19]. In this sense, issues regarding language may arise if the language of the arbitral award is not the official language of the arbitration.

C. THE SELECTION OF THE LANGUAGE OF THE ARBITRATION BY THE PARTIES

26. Under most national laws and institutional rules, parties are free to agree on the language or languages to be used in the arbitral proceedings and, therefore, the chosen language of the arbitration is normally contained in the arbitration clause. This being the case, the language chosen is often the same as that of the contract in which the arbitration clause is contained (the underlying contract) and, if such contract was drafted in more than one language, one of these languages is usually chosen.

27. However, more recently, the trend is that a number of other significant factors is taken into account, such as (i) the language of both pre- and post-contractual communications between the parties, (ii) the pool of well-qualified (within a certain industry or field of law) counsels and arbitrators, and (iii) the pool of arbitrators with knowledge of the law governing the case and of international arbitration practices.

28. The parties' agreement on the language of the arbitration should be clear, precise and, ideally, recorded in writing. In the majority of institutional model arbitration clauses, the agreement on the language is included as part of the arbitration agreement. In the absence of such an agreement, the parties will agree on the language as soon as a dispute arises and, if no agreement is reached, the most common practice (under national laws and institutional rules) is that the arbitrators determine the language or languages to be used in the proceedings.

29. A neutral language, frequently English, is often chosen. This occurs (even when the contract between the parties was originally drafted in a language other than the neutral one) when the parties to an international commercial contract do not have good knowledge of the same language. However, the use of a neutral language increases the possibility of errors and ambiguity and could cause new disputes, and could also cause arbitrators, lawyers, and parties to erroneously believe that

19 Webster, T.H. and Bühler, M. W., *Handbook of ICC Arbitration*, "Commentary on Article 20", Sweet & Maxwell, 4th edition, London (United Kingdom), 2018, page 317.

all participants have the same expectations about the proceedings, resulting in an inefficient management of the arbitration[20].

D. DETERMINATION OF THE LANGUAGE OF THE ARBITRATION BY THE ARBITRAL TRIBUNAL

30. In the absence of an agreement by the parties on the language of the arbitration, the arbitrators must determine the language or languages to be used in the proceedings. This decision needs to be made early in the proceedings as it is required to draft the terms of reference, among other issues. Therefore, the language of the arbitration is often the topic of the arbitral tribunal's first procedural order[21].

31. When the arbitration agreement is silent on the matter of the language of the arbitration, guidance must be sought in the rules applicable to the arbitration. It is advisable to bear in mind institutional recommendations such as the IBA Guidelines (Guideline 7: "*The parties should specify the language of arbitration*"), which provide that:

> "*Arbitration clauses in contracts between parties whose languages differ, or whose shared language differs from that of the place of arbitration, should ordinarily specify the language of arbitration. In making this choice, the parties should consider not only the language of the contract and of the related documentation, but also the likely effect of their choice on the pool of qualified arbitrators and counsel. Absent a choice in the arbitration clause, it is for the arbitrators to determine the language of arbitration. It is likely that the arbitrators will choose the language of the contract or, if different, of the correspondence exchanged by the parties. Leaving this decision to the arbitrators could cause unnecessary cost and delay*."

32. In similar terms, Article 20 of the ICC Rules ("*Language of the Arbitration*") reads as follows:

> "*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*."

33. The language of the arbitration clause is also a very relevant factor to be analysed under the ICC Rules. In this sense, the authors of leading commentary on the ICC Rules[22] state that the arbitral tribunal should also "[a]*ttempt to identify the language in which the parties would have expected the arbitration to proceed when they made their arbitration agreement, using objective factors and taking into account the language of both pre- and post-contractual communications between the parties*".

34. The arbitral tribunal shall determine the language that is most appropriate to the circumstances of the case in order to conduct the proceedings efficiently. When deciding on this issue, tribunals should consider several different aspects, the principle of equal treatment being the key aspect for the tribunal to consider when choosing the language of arbitration.

35. From a Spanish perspective, it is also advisable to take into account the provisions of the Code of Best Practices ("**CBP**"), initially issued by the Spanish

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20 Dias Simões, F., *op. cit*.

21 Derains, Y. and Schwartz, E., *A Guide to the ICC Rules of Arbitration*, 2nd edition, Wolters Kluwer Law & Business, Kluwer Law International, The Hague (The Netherlands), 2005.

22 Fry, J., Greenberg, S. and Mazza, F., *op. cit*.

Arbitration Club ("**CEA**") in 2005 and updated in 2019. It should be noted that the first version of the CBP (2005) highlighted the significance of the law of the underlying contract in determining the language of the arbitration. In this sense, Article 21 of the CBP of 2005 established that:

> "*A single common language must be agreed and, if possible, this language should be neutral, taking into consideration the location of the arbitration; the applicable law to the contract; the language of the contract; the language of documents and witnesses and the availability of arbitrators who are fluent in the relevant language.*"

36. By contrast, the consideration of the law of the contract has been replaced by the "the circumstances of the case" in the new version of the CBP (2019). Article 23.1 of the CEA Model Arbitration Rules[23] ("*Language of the arbitration*") reads as follows:

> "*If there is no agreement between the parties, the language of the arbitration shall be determined by the arbitrators taking into account the circumstances of the case, and after hearing the proposals of parties. If justified by the circumstances, the arbitrators may decide, providing reasons for such decision, that there be more than one language of arbitration.*"

37. Reference is made to the Model Law, of which Article 19.2[24], regarding the language of the arbitration, states that "[s]*ubject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings* (…)". Additionally, the arbitrators' decision regarding the language of the arbitration must take into account the principle of equal treatment expressly stated in Article 17.1 of the Model Law, as follows:

> "*Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.*"

38. In conclusion, arbitrators should determine the language of the arbitration with due regard to "*all relevant circumstances*", including the language of the contract. The language of the arbitration agreement or the language used in the initial arbitration documents may imply a specific choice of language. Arbitrators should generally make their decision based on a combination of such approaches, always taking into account the parties' right to due process[25].

39. As we mentioned in section B.b. of this article, the use of multiple languages may (i) significantly increase the costs of arbitration as it entails the translation of documents and hearings, (ii) make the appointment of skilled, independent, and neutral arbitrators difficult and (iii) carry the risk of inconsistent texts when drafting the terms of reference, orders, and awards. Notwithstanding this, if the contract is

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23 https://www.clubarbitraje.com/wp-content/uploads/2019/01/Code-of-Best-Practices-in-Arbitration-of-the-Spanish-Arbitration-Club.pdf.

24 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf

25 Other authors consider that it is both customary and logical for the language of the arbitration to be the language of the contract, without taking into account other circumstances, since this is most likely to be the common language that the parties used in relation to the contract (Blackaby, N., C. Partasides, C., Redfern, A. and Hunter, M., *op. cit.*).

drafted in more than one language, it is possible for arbitrators to agree on a bilingual arbitration in which two languages may be used interchangeably by the parties without the need for translation or interpretation. However, as stated above, it is desirable to determine one principal language for the drafting of the terms of reference, orders, and awards,[26] and for it to be used in the event that any conflicts or ambiguities arise between two or more texts.

40. Finally, although rare in most popular jurisdictions for arbitration, arbitrators should check whether the applicable law to the arbitration or the rules of the corresponding arbitral institution set a default language in the absence of an agreement between the parties on this issue.

E. BRIEF CONCLUSION

41. Arbitration is one of the most frequent methods for resolving international business disputes where parties of different nationalities, and native speakers of different languages, are involved. The language of the arbitration will have a decisive impact on aspects such as the principle of party equality (which means the fulfilment of the parties' right to present their case in a neutral language), the efficiency and cost of the arbitral proceedings and the appointment of the arbitrators.

42. In the absence of an agreement between the parties, arbitrators should determine the language of the arbitration with due regard to "*all relevant circumstances*", including the language of the contract, the language of the pre- and post-contractual communications and the language used in the initial arbitration documents.

43. The choice is usually based on the language of the underlying contract. However, more recently, other relevant circumstances such as (i) the language of both pre- and post-contractual communications between the parties, (ii) the pool of well-qualified (within a certain industry or field of law) counsels and arbitrators, and (iii) the pool of arbitrators with knowledge of the law governing the case and of international arbitration practices, have gradually gained considerable importance when making a decision.

44. One such circumstance, the law governing the dispute (which should also determine the nationality of the counsels to the parties), should always be taken into account, particularly when considering the difficulties that may arise for the enforcement of the award when working in a different language, which could give rise to various issues concerning the decision made by the arbitral tribunal.

Madrid, December 2019

26 Derains, Y. and Schwartz, E., *op. cit*.