The place of arbitration

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New York Arbitration Convention 1958: Where is an arbitral award "made"? Case comment House of Lords, 24 July 1991, Hiscox v. Outhwaite*

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1. Introduction

The parties are two Lloyd's underwriters, Mr. Hiscox, suing on his own behalf and on behalf of the members of a syndicate at Lloyd's and Mr. Outhwaite, being sued on his own behalf and on behalf of all other members of another syndicate at Lloyd's. They became involved in a dispute about a contract for re-insurance. The arbitration clause in the re-insurance contract stipulated explicitly London as place of arbitration. The parties agreed that Mr. Robert MacCrindle was to act as sole arbitrator. The arbitration was heard in England and conducted under English procedural rules. So far the arbitration was in every respect English.

Mr. MacCrindle is an English QC with a great reputation, also in arbitration. When he was in practice at the English Bar, he was in Chambers at 4, Essex Court, Temple, London. He minded, however, to move to France to join an American law firm where he now resides in Paris. He kept his postal address 4, Essex Court, London, a situation which English lawyers describe as a "door tenant".

After having held hearings in London, Mr. MacCrindle rendered an award on 20 November 1990. The award states at the end:

"Now, I, the said Robert Alexander MacCrindle... do hereby make and publish this my interim award
[follow decisions]
Dated at Paris, France, this 20th day of November 1990 [signature]
Robert Alexander MacCrindle,
12, Rue d'Astorg, 75008 Paris, France."
(emphasis added)

Next to his signature was a signature of his secretary, attesting that the signature was Mr. MacCrindle's signature.

Mr. Hiscox was not happy with the award and initiated several proceedings against the award in England. One of the proceedings was an originating summons for leave to appeal on questions of law to the High Court, Section 1(3)(b) of the Arbitration Act, 1979 (England is one of the few countries where the merits of an arbitral award can be reviewed by a court to a certain extent).

Mr. Outhwaite raised a preliminary objection against these proceedings. He asserted that the award being signed in Paris, it was made in Paris. Hence, it fell under the New York Arbitration Convention ("Convention Award") and under the terms of the Arbitration Act, 1975, which implements the New York Convention in the United Kingdom. Therefore, reasoned Mr. Outhwaite, the High Court in London was disabled from adjudicating upon appeal proceedings which can be used only for awards made in England, but not abroad.

The High Court, per Hirst, J., rejected the objection.[1] It held that it was not an Convention Award because, although dated in Paris, it was "made" in London for

1 *The Times*, 7 March 1991.

"*made in the territory of a State other than the State where the recognition and enforcement of such awards are sought*".

Accordingly, paragraph 1 applies to awards made in *any* other State.

However, a State, when becoming a party to the Convention, can limit this field of application by using the first reservation of the third paragraph of article I. The State making that reservation will apply the Convention to the recognition and enforcement of awards made in the territory of another *Contracting* State only. This is the so-called reciprocity reservation which is used by approximately two/third of the Contracting States (by now more than 85).

Article I(1) of the Convention reflects the principle of territoriality of international arbitration. According to this principle, the arbitration law of the place of arbitration governs the arbitration. That was the intent of the vast majority of the drafters of the Convention. It was also thought of as a hard and fast rule which would be easily ascertainable in practice. And indeed, in the more than 475 cases reported under the Convention in the *Yearbook Commercial Arbitration* as of its inception in 1976, no problem in that respect has arisen. It is only the Hiscox case which has created confusion – in my opinion, unnecessarily so.

It is true that the definition of the Convention's scope in article I(1) does not expressly state that the award made in another State must be subject to a national arbitration law. However, this requirement must be deemed to be implied when article I is read in conjunction with the other provisions of the Convention. According to article V(1)(a), enforcement of an award may be refused if the respondent can prove that the arbitration agreement is invalid "under the law of the country where the award was made".

Even more significant is the reference to the applicable arbitration law in article V(1)(e), under which enforcement of an award may be refused if the respondent can prove that the award has been set aside by a court of "a country in which... that award was made." The latter provision in particular indicates that the Convention is built on the presumption that the award is governed by a national arbitration law – and, in particular, the arbitration law of the place of arbitration – since the setting aside of an award belongs to the exclusive jurisdiction of the court under whose arbitration law the award was made.

At the time the Convention was drafted (i.e., in 1958), some countries took the view, however, that the place of arbitration – where, as it will be explained presently, the award is to be made – should not be the sole connecting factor for the applicability of the law governing the arbitration. They supported the rather academic view that parties can agree to arbitrate in one country under the arbitration law of another country. Thus, parties may agree Paris as place of arbitration under German arbitration law. The lobby of these countries was strong and it led to a compromise solution by adding a second criterion to the Convention's field of application. The second sentence of article I(1) reads that the "Convention applies also to arbitral awards which are not considered as domestic awards in the State where their recognition and enforcement are

sought". In accordance with this additional criterion the text of the Convention was amended to include "or under the law of which the award was made" (grounds (a) and (e) of article V(1)). The additional criterion covers therefore awards which are made in the State where their enforcement is sought under the arbitration law of another country. Practice, however, shows that such agreement is virtually never made by parties because it can lead to complications as to the court which is competent in matters relating to arbitration, such as the appointment of arbitrators and the setting aside of the award. [5] Also the Hiscox case did not involve such a non-domestic award. It was simply an award resulting from proceedings held in London and governed by English arbitration law.

It was already mentioned that also article V contains references to the State where the award was made. Article V relates to the grounds on which enforcement may be refused. Thus, ground (a) of article V(1) refers for the law governing the arbitration agreement to "the law of the country where the award was made". The same applies to ground (e) in relation to the setting aside of the award. Ground (d), however, contains a somewhat different wording. That provision declares that the enforcement of an award may be refused if respondent can prove that

"*the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.*" *(emphasis added)*

It is outside the scope of this case comment to discuss the first part of this ground for refusal which would seemingly indicate that agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure ranks first. [6] What is interesting for the questions which will be examined shortly, is the second part which refers to "the law of the country where the arbitration took place". Is that law different from the law of the country where the award was made which is referred to in grounds (a) and (e)? It will be attempted to provide an answer when examining the third question, viz. "Should an award be made at the place of arbitration?"

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5 See my article, "Non-domestic Awards under the 1958 New York Convention", 2 *Arbitration International* (1986) p. 191.

6 See my article, "Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions", 3 *ICSID Review – Foreign Investment Law Journal* (1988) p. 439 at 445.

If the parties have not agreed to the place of arbitration, the arbitration rules, if agreed to, usually provide for a solution. For example, the ICC Arbitration Rules provide in article 12 that, if the parties have not agreed to the place of arbitration, the International Court of Arbitration determines this place. Also, many arbitration laws provide that if the parties have not agreed to the place of arbitration, the arbitral tribunal may determine the place. Here again, the intent and expectation of the parties with respect to the notion of the place of arbitration will not be different. While mandating the determination of the place of arbitration to an arbitral institution, they will assume that the arbitration law of the place of arbitration applies.

The same happened in the Hiscox case. The conduct of the parties in this case clearly showed that they were of the opinion that English arbitration law applied. Just before the award was rendered, the solicitors of the parties were engaged in an exchange of corresponcence concerning the modalities of appeal proceedings before the High Court in London. It was only after the award was made that Mr. Hiscox felt it necessary to raise a preliminary point as to the applicability of English arbitration law by characterizing the award as a Convention Award for the mere reason that it stated to have been "dated" in Paris.

Question 3: Should an award be made at the place of arbitration?

It is submitted that this question is to be answered in the affirmative. The requirement is not merely a legal obligation in many legal systems. It also makes sense. If an arbitrator were allowed to mention in the award any place which he or she deems fit, unacceptable consequences could ensue. This is very pointedly explained by Dr. F.A. Mann in his famous article "Where is an award made?" [7]

"*An arbitration which is in every possible sense an English one, could suddenly become foreign, merely because the arbitrator has gone to Paris and signed and, perhaps, dispatched the award there. If there are three arbitrators who hold an arbitration in London, but meet in Paris to consider their award, and sign it in their respective residences, viz. New York, Geneva and Tokyo, the award should be treated as "made" in London, even if each arbitrator has indicated the place where he has signed it. The award, it is submitted, is no more than a part, the final and vital part of a procedure which must have a territorial, central point or seat. It would be very odd if, possibly without the knowledge of the parties or even unwittingly, the arbitrators had the power to sever that part from the preceding procedure and thus give a totally different character to the whole.*"

In other words, where else should the award be made than at the place of arbitration?

And here it is important to stress that the word "made" is not equivalent to the words "dated" or "signed". Indeed, the New York Convention itself does not use these two words. If that were the case, a dating and signing of the award by

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7 1 *Arbitration International* (1985) p. 187.

correspondence would be impossible and arbitrators would be obliged to travel, possibly from remote countries, solely to sign the award at the place of arbitration. That is not current practice and would not be cost efficient for international arbitration.

And what will happen if the arbitrators sign in three different places? Is such an award made in three different countries? To go even one step further, what happens if an arbitrator signs in an aeroplane flying over the Antarctic?

It is true, as is also admitted by Dr. Mann, that the foregoing considerations give a somewhat strained meaning to the word "made". But a literal meaning will, as is shown above, have absurd consequences.

As mentioned before, the text of the Convention refers to both the law of the country in which the award was made and to the law of the place of arbitration (grounds (a) and (e) as well as (d) of article V(1) of the Convention). It is sometimes argued that these two may be different as did Lord Justice Legatt of the Court of Appeal in his concurring opinion. This may be so, but only in those cases where the parties expressly agreed that (a) the arbitration procedure will be governed by the law of the place of arbitration and (b) the award is to be made in the legal sense in a different place. Such an agreement is not encountered in practice and, indeed, could only have been invented in theory. For the purposes of the Convention, it can be assumed that in almost all cases the law of the place of arbitration referred to in ground (d) is the same as the law of the country where the award was made referred to in grounds (a) and (e). The *travaux préparatoires* of the Convention do not indicate a different interpretation.

If the arbitrators mention in their award that they have made it at a place which is different from the place of arbitration as agreed to by the parties or determined by them, this constitutes a prima facie technical misconduct of the arbitrators. This error should be rectified in appropriate proceedings in the country where the arbitration took place.

Question 4: What happens if the award does not mention where it is made?

Having regard to the analysis under the previous questions, this question is to be solved in the first place by inquiring whether the award mentions the place of arbitration. If so, it can be presumed that the award is made there.

If the place of arbitration is not mentioned either, it may be permitted to look to the agreement of the parties as to the place of arbitration or to a determination of the arbitral tribunal to that effect during the arbitral procedure.

Look at the place of arbitration in the physical sense.

However, the inquiry by an enforcement court should not be extensive. In this respect one cannot but approve the statement of the Court of Appeal that:

"*In no circumstances should it be necessary, and it cannot have been contemplated by the Convention, that there should be a factual inquiry by the enforcing court as to*

where an award was signed [rather made] if this does not appear on the face of the award."

There may be added: or if it can prima facie be established under the above rules.

5. The Netherlands Arbitration Act 1986

It is interesting to mention the way in which Netherlands arbitration law would have solved problems raised in the Hiscox case. If the arbitration had taken place in the Netherlands, the Netherlands Arbitration Act of 1986 applied. The Act is quite explicit on its territorial applicability. Article 1073 CCP provides that the Act shall apply if the place of arbitration is situated within the Netherlands.

As regards the place of arbitration, the Act prescribes that it shall be determined by agreement of the parties or, failing such agreement, shall be determined by the arbitral tribunal (article 1037(1), first sentence, CCP). This is the place of arbitration in the legal sense. The Act attaches several consequences to the place of arbitration. Amongst other things, it determines which District Court is competent for the setting aside of the award.

The Act also refers to the place of arbitration in the physical sense. It provides expressly that the arbitral tribunal may hold hearings, deliberate, and examine witnesses and experts at any other place, within or outside the Netherlands, which it deems appropriate (article 1037(3) CCP).

The foregoing provisions answer the second question which is discussed above: "What is to be understood by the place of arbitration?"

Further, the Act is explicit in that the "determination of the place of arbitration establishes also the place where the award shall be made" (article 1037(1), second sentence, CCP). That provision answers the third question discussed above: "Should an award be made at the place of arbitration?"

In addition, the Act requires that the place of making the award, which is, as mentioned, to occur at the place of arbitration, must be expressly mentioned in the award. If the place is making is not mentioned in the award, such omission can be corrected through the rectification procedure provided for in the Act (article 1060, CCP). This provision provides an answer to the first and fourth questions raised above: "How can it be determined where the award was made?" and "What happens if the award does not mention where it has been made?"

Thus, had Mr. Hiscox and Mr. Outhwaite agreed to arbitrate in Amsterdam, and had Mr. MacCrindle minded to state at the bottom of his award merely "dated at Paris", either party could have requested a rectification of this omission and required Mr. MacCrindle to mention in his award that it is made in Amsterdam.