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Language and Due Process in International Arbitration

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With the growth of international trade, parties of diverse nationalities increasingly come to the arbitral forum with differing linguistic and cultural backgrounds. The resulting communications challenges can be formidable. Parties may enter into contracts written in a language other than their own and, perhaps, different even from the language used in their course of dealings. They may agree that their contract is to be governed by a third country's "neutral" law expressed in still another language, and provide that any arbitration be seated in and conducted under the *lex arbitri* of a country that introduces yet another language to their relationship. They may retain party representatives and legal advisors from multiple countries; they may submit documentary evidence written in, and proffer witnesses to testify in, a number of languages. The arbitral institution administering the arbitration could be located in a country otherwise foreign to the parties' dealings, and the arbitrators selected will themselves likely be from multiple countries with different mother tongues and different legal traditions and cultures. Yet for the arbitral process to produce a fair and just result, all the participants must be able to understand each other and overcome the linguistic barriers that otherwise impede effective communication and impair the right to be heard.

Language and "Proper Notice" in Arbitration.

At bottom, language differences present a challenge to the fundamental right of due process embodied in Article V(1)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")¹. Where language differences unfairly impede a party's right to present its case to the arbitrators and result in actual prejudice, due process is violated and the final award is susceptible to set aside at the seat of the arbitration (the primary jurisdiction) or non-recognition at the enforcement forum (the secondary jurisdiction).

The close interplay between language and due process in international arbitration was recently illustrated by the decision in *CEEG (Shanghai) Solar Science & Technology Co. v. LUMOS, LLC*, 829 F.3d 1201 (10th Cir. 2016). The case involved a Chinese manufacturer, CEEG, that had entered into a co-branding agreement (the "Agreement") with a U.S. company, LUMOS. The Agreement provided that all documentation, including notices relating to judicial proceedings and arbitration, would be in English. It also provided that all disputes would be resolved under the rules of the China International Economic and Trade Arbitration Commission ("CIETAC"). The parties later entered in a separate sales contract (the "Contract") under which CEEG commit-



ted to deliver certain solar products to LUMOS. The Contract was executed both in Chinese and English, but provided that if the two versions differed the English version would control. It also provided that disputes would be resolved under the CIETAC rules. There was, however, no stipulation as to the language of the arbitration, and the CIETAC rules provided that, unless the parties agreed otherwise, Chinese was the default language for the proceeding.

When LUMOS subsequently alleged that the delivered goods were defective and claimed breach of warranty, CEEG filed an arbitration claim with CIETAC, which mailed LUMOS a notice and other documents entirely in Chinese. LUMOS claimed that it did not realize that the documents purported to constitute notice of arbitration and that, by the time it had inquired and been advised of their import by CEEG's counsel, the fifteen-day window it had under the CIETAC rules to appoint an arbitrator had expired. CIETAC and CEEG appointed arbitrators, without the participation of LUMOS. The arbitral tribunal conducted the arbitration in Chinese and proceeded to render an award assessing damages against LUMOS.

The trial court refused recognition under the New York Convention², and the Court of Appeals panel (which included Judge Neil Gorsuch (now Associate Justice of the Supreme Court of the United States) unanimously affirmed. The Court of Appeals focused on Article V(1)(b) of the Convention, under which recognition of an award may be refused if a party is denied "proper notice." 829 F.3d at 1206 (internal quotation marks omitted). It stated that, in deciding what constitutes "proper notice," courts must "look to the forum's standards of due process." *Id.*³ Under U.S. law, to satisfy due process, notice must be "reasonably cal-

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culated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). The Court held that the Chinese-language notice was not so “reasonably calculated” because all previous communications between the parties had been in English; the Contract stated that the English version would control, thus reinforcing that English would govern the relationship; and the Agreement memorialized the parties’ understanding that all interactions and dispute resolution proceedings would be in English. *Id.* at 1207. In sum, “CEEG could not have reasonably calculated that notice in a language it knew the LUMOS’ executives would be unable to comprehend would apprise LUMOS of the arbitration proceeding.” *Id.* Moreover, the Court found that the lack of “proper notice” substantially prejudiced LUMOS since it was thereby deprived of the right to participate in appointing the arbitral tribunal, which is itself a ground for refusing recognition of an arbitral award under Article V(1)(b) of the New York Convention. Article V(1)(d) requires that the arbitration have been conducted “in accordance with the agreement of the parties,” which, the Court said, clearly includes following the arbitration agreement and any applicable arbitral rules on arbitrator selection. *Id.* at 1206.

Notably, the Court reached this result without relying on a contractual provision regarding the language of the arbitration, for there was none, and without citing the arbitral rules which, as noted, provided that Chinese was the default language. Nor did the Court hold that the Agreement, which contained the provision requiring that all notices relating to dispute resolution or arbitration be in English, governed the Contract containing the arbitration clause that CEEG invoked. Rather, the Court took a more pragmatic view and, based on the totality of the evidence, found that the parties understood that their relationship would proceed in English and, still further, that CEEG could not have reasonably calculated that a Chinese-language notice would have been understood by and apprised the LUMOS executives of the arbitration proceeding. The *CEEG* decision thus counsels a claimant to be attentive to the language used in the parties’ prior course of dealings and to consider whether it is reasonable to believe that the language of the arbitration notice, irrespective of whether it is the agreed-upon language of the arbitration, will be understood by the respondent and constitute “proper notice” for purposes of due process not only under the *lex arbitri* of the place of arbitration but also under the due process requirements of the jurisdiction where recognition and enforcement of the award are likely to be sought.

Implications of Differing Languages for Due Process.

The requirement of “proper notice” under Article V of the Convention is part of the broader requirement of due process imposed by that provision. Article V(1)(b) refers to the situation in which “[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.” *Id.* (Emphasis added). Thus a lack of “proper notice” is simply an example of the more general problem of a party being “unable to present his case” and thereby being denied due process. Where such actions have harmful consequences and result in substantial prejudice to the party, a due process violation may occur, resulting in a set aside at the seat or a refusal to recognize the award in the enforcement court’s jurisdiction, as occurred in *CEEG*.

Beyond lack of proper notice, language issues that may likewise present due process concerns can arise in multiple other contexts in

international arbitration. Consider the following:

Selection of Arbitrators. Normally the language of the arbitration is determined by the parties or, absent such agreement, by the arbitrators. Where the parties have failed to specify a language, the parties will have to nominate arbitrators (and they will have to select a third arbitrator) before the arbitral tribunal is constituted and is able to make that language determination. Although many arbitrators are multilingual, this period when the appropriate language of the arbitration is uncertain can create a potential problem for the parties, who risk choosing an arbitrator who may not be fluent in the language ultimately selected as the official language of the arbitration. In terms of Article V(1)(b) of the New York Convention, the party’s ability to present its case may be impeded because its nominated arbitrator cannot adequately understand the arguments and evidence presented and participate meaningfully in the arbitrators’ deliberation. This situation also presents an ethical question for the prospective arbitrator who, under the applicable rules, should accept an appointment “only if he is fully satisfied that he . . . has an adequate knowledge of the language of the arbitration.” International Bar Association (“IBA”) Rules of Ethics for International Arbitrators, Rule 2.2 (1987).

Language of the arbitration. Where the parties have not agreed upon the language of the arbitration, the arbitrators will make that determination, unless the applicable institutional rules provide for a default language⁴. Institutional rules usually give the arbitrators broad discretion in that regard, without providing much guidance as to the relevant factors to consider. Some rules highlight the language of the contract as a particularly relevant factor, while others point to the relevance of the language of the arbitration agreement. Thus, Article 20 of the International Chamber of Commerce Arbitration Rules (“ICC”) provides that, in the absence of agreement by the parties, the arbitrators should give “due regard” to “all relevant circumstances, including the language of the contract.” ICC art. 20. Similarly, Article 18 of the Rules of the International Centre for Dispute Resolution Arbitration Rules (“ICDR”) advises that, absent agreement by the parties, “the language (s) of the arbitration shall be the language(s) of the documents containing the arbitration agreement, subject to the power of the arbitral tribunal to determine otherwise.” ICDR art. 18. The London Court of International Arbitration (“LCIA”) rules provide that, following the formation of the arbitral tribunal, and unless the parties have agreed on the language or languages of the arbitration, the tribunal “shall decide upon the language(s) of the arbitration,” taking into account “the initial language[s] of the arbitration and any other matter it may consider appropriate in the circumstances.” LCIA art. 17.4. Various authorities emphasize the language used in the parties’ prior dealings as another important consideration.

Plainly, the arbitrators’ determination of the language of the arbitration is another area where a party’s right to present its case may be affected and thus presents due process considerations that the arbitrators need to weigh carefully before making their decision.

Translation of documents. To support its claim or defense and establish authenticity, a party will submit documents in their original language, which may be different from the language of the arbitration as well as the language used by the other party or by both parties in their prior course of dealing. Arbitrators may be faced with the question of whether they should admit such documents into evidence without requiring a translation and whether the due process rights of the other party would be affected. Institutional rules typically state that the arbitrators “may” order the party offering the documents to provide a translation of all or any part of that document into the language of the arbitration. *See, e.g.*, HKIAC Rule 15.2. The LCIA rules

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provide the further alternative of ordering translation into the language “of the arbitral seat,” apparently on the assumption that the parties have consented to that approach by incorporating the LCIA rules into their arbitration agreement. LCIA art. 17.5.

Although institutional rules make ordering translations discretionary, the lack of a translation of a document admitted into evidence can provide the basis for a due process challenge to the final award. The objecting party may be met with the argument that it had received the document sufficiently in advance of the evidentiary hearing that it could have arranged for its own translation; voluminous documents submitted only in their original language would, of course, raise further issues of the undue burden imposed on the opposing party in having to arrange for translations, as would issues regarding how much of a document has to be translated.

Translation of witness testimony at the hearing. Written witness statements usually must be in the language of the arbitration (or translated into that language); however, witnesses giving *viva voce* testimony at hearings are generally permitted to use the language of their choice, which will frequently be in their native tongue. It is common practice for the proponent of the witness to arrange for an interpreter to translate the witness’s testimony (as well as the questions put to the witness) into the language of the arbitration. The rules of the major arbitral institutions are notably silent on the question of ordering translations when a witness testifies in a language other than that of the arbitration⁵. Due process concerns are presented by the risk that the interpreter may impose his own interpretation on ambiguous language or mistranslate the testimony, the likelihood of which is significantly heightened where simultaneous (rather than consecutive) translation is employed. The selection of the interpreter, his qualifications and experience, are generally left to the proponent of the witness. The opposing party may protect its interests by employing a “check” interpreter, positioned near the witness and the main interpreter, who may interpose objections to the accuracy of the translation; differences in translation are thus called to the attention of the

arbitrators, who must decide how to proceed. Although simultaneous translation saves time, it does so at the cost of assuring accuracy and providing the opposing party with an opportunity to challenge and correct apparent mistranslations⁶.

Numerous examples could be added to the foregoing list. The good news is, however, that most of the due process problems created by language differences can be avoided by the parties through careful drafting of the arbitration agreement, including by affirmatively designating the language of the arbitration. The principle of party autonomy includes the right to choose the language(s) of the arbitration, and model clauses of major arbitral institutions typically include a provision specifying the language to be used in the arbitral proceedings. See, e.g., ICDR art. 18.

Other potential linguistic problems can be resolved or ameliorated by having the parties raise them with the arbitrators at the first organizational meeting so that they can be addressed in the initial procedural order. The 2016 UNCITRAL Notes on Organizing Arbitral Proceedings (note 2) outline a series of language and translation issues that may merit consideration at the outset of the arbitration. Given that flexibility is one of the hallmarks of arbitration, the first organizational meeting and initial procedural order present an opportunity to adopt procedures that are appropriate for the particular circumstances of the case⁷. By anticipating and addressing these issues early the parties will not be surprised at a later stage of the proceedings when language and translation issues arise.

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Given the central importance of due process, arbitrators and parties continually need to be alert to language issues and deal with them fairly, so that the validity of the final award is not later jeopardized. This will be true until the unlikely day when all parties agree on a single *lingua franca* for international arbitration.

1. The right of due process traces its origin in common law at least as far back as the Magna Carta in 1215 and in civil law to Roman and canon law. See Charles T. Kotuby and Luke A. Sobota, *General Principles of Law and International Due Process* at 55-59 (Oxford Univ. Press 2017). The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (“Model Law”) recognizes due process concerns in its Article 18, which advises that “[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.” Model Law art. 18 (1985) (amend. 2006).
2. See *CEEG (Shanghai) Solar Sci. & Tech. Co. v. LUMOS, LLC*, No. 14-cv-03118-WYD-MEH, 2015 WL 3457853 (D. Colo. May 29, 2015).
3. See *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier*, 508 F.2d 969, 975 (2d Cir. 1974) (“This provision essentially sanctions the application of the forum state’s standards of due process”); *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1129-30 (7th Cir. 1997) (“[A]n arbitral award should be denied or vacated if the party challenging the award proves that he was not given a meaningful opportunity to be heard as our due process jurisprudence defines it.”).
4. See China International Economic and Trade Arbitration Commission Arbitration Rules (“CIETAC”), art. 81 (in the absence of the parties’ agreement, the language of the arbitration “shall be Chinese”); Hong Kong International Arbitration Centre, Administered

- Arbitration Rules (“HKIAC”), art. 15 (subject to agreement by the parties, “the arbitral tribunal shall, promptly after its appointment, determine the language or languages of the arbitration”).
5. In contrast, the IBA Rules on the Taking of Evidence in International Arbitration (2010) expressly require, in Article 4.5(c), that witness statements disclose the language in which the statements were originally prepared as well as the language in which the witnesses anticipate giving testimony at the evidentiary hearing. Article 22(2) of the UNCITRAL Model Law provides: “The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.” Model Law art. 22(2).
 6. “One cannot overemphasize the importance of competent, complete and accurate translation.” Sally A. Harpole, *Language in Arbitration Procedure: A Practical Approach for International Commercial Arbitration*, 9(2) Contemp. Asia Arb. 273, 290 (2016). This is a concern of paramount importance when there is a need to translate judicial decisions and other legal authorities. See *id.* at 291-93 (noting the “special challenges” of translating legislation, legal terms and legal decisions). See also, Tibor Varady, *Language and Translation in International Commercial Arbitration* at 87, 111 (Asser Press 2006).
 7. See Note to art. 23 of the ICC Arbitration Rules (addressing Terms of Reference) which also discusses language issues.