Ad Hoc Arbitration

1. **NURHIMA KIRAM FORNAN**
2. **FUAD A. KIRAM**
3. **SHERAMAR T. KIRAM**
4. **PERMAISULI KIRAM – GUERZON**
5. **TAJ – MAHAL KIRAM – TARSUM NUQUI**
6. **AHMAD NAZARD KIRAM SAMPANG**
7. **JENNY K.A. SAMPANG**
8. **WIDZ – RAUNDA KIRAM SAMPANG**

Claimants

v.

MALAYSIA

Respondent

Preliminary Award on Jurisdiction and Applicable Substantive Law

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May 25, 2020

Sole Arbitrator

Dr. Gonzalo Stampa

Representatives of the Claimants

Mr. Paul H. Cohen
Me. Elisabeth Mason
4-5- Gray's Inn Square Chambers
London WC1R 5 AH
United Kingdom

Prof. Dr. Bernardo M. Cremades
Mr. Bernardo M. Cremades, Jr.
B. Cremades & Asociados
Goya 18, 2nd Floor
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Spain

Representative of the Respondent

Honourable Tuan Tommy Thomas
Attorney General
Attorney General's Chambers of Malaysia
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Malaysia

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GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS

Application	Application for the judicial appointment of an arbitrator pursuant to Article 15.4 of the Arbitration Act 60/2003, of December 23, 2003, filed by Claimants on February 1, 2018 before the Civil and Criminal Chamber of the Superior Court of Justice of Madrid
Arbitration Agreement	The arbitration clause contained in the Deed
Brödermann Report	Expert Report by Professor Dr. Eckart Brödermann, along with its Exhibits, addressing the issue of applicable substantive law and dated December 19, 2019
Brödermann Report Addendum	Addendum to the Brödermann Report, along with its Exhibits, issued by Professor Dr. Eckart Brödermann on February 26, 2020
Claimants	(i) Nurhima Kiram Fornan, (ii) Fuad A. Kiram, (iii) Sheramar T. Kiram, (iv) Permaisuli Kiram – Guerzon, (v) Taj – Mahal Kiram – Tarsum Nuqui, (vi) Ahmad Nazard Kiram Sampang, (vii) Jenny K.A. Sampang and (viii) Widz-Raunda Kiram Sampang
Counter–Memorial on Jurisdiction	Counter – Memorial on Jurisdiction filed by Claimants, along with Exhibits and Expert Report, on February 10, 2020
Deed	An instrument for grant and cession of a portion of territory along the North Coast of Borneo concluded between Sultan Mohammed Jamalul Alam and Messrs. Alfred Dent and Baron Gustavus de Overbeck, on January 4, 1878
Geneva Convention	European Convention on International Commercial Arbitration of April 21, 1961
Hearing on Jurisdiction	Hearing on jurisdiction which took place on February 21, 2020, at Hotel Intercontinental Madrid, Meeting Room Toledo, Paseo de la Castellana 49, 28046 Madrid
Judgement of March 29, 2019	Judgment 11/2019 of the Civil and Criminal Chamber of the Superior Court of Justice of Madrid dated March 29, 2019
Mackaskie Judgment	Judgment of the Chief Justice C.F.C Macaskie of the High Court of the State of North Borneo in the case *Dayang – Dyang Haji Piandao Kiram of Jolo, Philippines & 8 others v. The Government of North Borneo & Others* [Civil Suit No 169/39] dated December 18, 1939
Malaysia	Malaysia
Notice of Arbitration	Notice of Arbitration filed by the Claimants on July 30, 2019
Notice of Intention to Commence Arbitration	Claimants' notice of intention to commence arbitration dated November 2, 2017 and filed against the Respondent
Parties	Claimants and Respondent, jointly
Preliminary Award	Preliminary Award on Jurisidiction and Applicable Law dated May 25, 2020

Preparatory Conference	The preparatory conference, which took place on October 25, 2019, at Hotel Intercontinental Madrid, Meeting Room Toledo, Paseo de la Castellana 49, 28046 Madrid
Procedural Calendar	Procedural Calendar, established by the Arbitrator in Procedural Order 9
Respondent	Malaysia
Response to the Notice of Arbitration	Response to the Notice of Arbitration, to be filed by the Respondent by September 9, 2019
SAA	Arbitration Act 60/2003, dated December 23, 2003
U&M Legal Opinion	Legal opinion issued on December 1, 2019 by Uria & Menendez to Respondent *«…in connection with procedural matters under Spanish law in the claim filed in Spain by the self-proclaimed successors-in-title to the Sultan of Sulu…against the Government of Malaysia…»*
UNCITRAL Arbitration Rules	Arbitration Rules adopted by of the United Nations Commission on International Trade Law on August 15, 2010
UNCITRAL Model Law	Model Law adopted by the United Nations Commission on International Trade Law on June 21,1985
UNIDROIT Principles	Principles of International Commercial Contracts endorsed by the International Institute for the Unification of Private Law and amended in 2016

I. THE SCOPE OF THE PRELIMINARY AWARD

1. The Arbitrator renders this Preliminary Award on Jurisdiction and Applicable Substantive Law (henceforth, the Preliminary Award) in accordance with the Procedural Calendar[1] for the abovementioned arbitration (henceforth, the Procedural Calendar).

2. Claimants in this arbitration are, jointly, (i) Nurhima Kiram Fornan; (ii) Fuad A. Kiram; (iii) Sheramar T. Kiram; (iv) Permaisuli Kiram – Guerzon; (v) Taj – Mahal Kiram – Tarsum Nuqui; (vi) Ahmad Nazard Kiram Sampang; (vii) Jenny K.A. Sampang; and (viii) Widz – Raunda Kiram Sampang (henceforth, jointly referred to as the Claimants). Respondent in this arbitration is Malaysia (henceforth, Malaysia or Respondent). Claimants and Respondent will henceforth also be referred to jointly as the Parties.

3. Respondent raised an objection on the jurisdiction of the Arbitrator, as it contended that it has been wrongly brought before the Spanish Courts and disagrees with the judicial appointment of the Arbitrator by said Courts. Respondent also questioned the characterisation of the arbitration agreement and its binding nature. Claimants challenged the objection and sought a preliminary award on jurisdiction and on the determination of the substantive law applicable to the dispute.

4. The Preliminary Award seeks to determine these issues at the outset of the present arbitration. The Arbitrator will decide on the admissibility of the Parties' respective allegations addressed during this incidental phase of the proceedings. The footnotes are to be considered part of the Preliminary Award.

II. AN OVERVIEW OF THIS DISPUTE

5. The arbitration concerns an instrument of grant and cession of

> «…*all territories and lands tributary to us on the mainland of the Island of Borneo, commencing from the Pandassan River on the east, and thence along the whole east coast as far as the Sibuku*

[1] The Arbitrator established the Procedural Calendar in Procedural Order 9. The Parties were served with Procedural Order 9. Claimants acknowledged receipt of Procedural Order 9 on December 10, 2019, at 15:30 hours, Madrid Time. Respondent was served by email on December 10, 2019. The Prime Minister of Malaysia received this email on December 10, 2019, at 10:17 hours (Madrid Time) at his email address pro.ukk@kln.gov.my. Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on December 10, 2019, at 17:16:53 hours (Madrid Time) and read it on December 11, at 09:22:49, Malaysia Time. Respondent failed to acknowledge receipt of this email and Procedural Order 9, nor did they provide an acceptable excuse.

> *River on the south, and including all territories, on the Pandassan River and in the coastal area, known as Paitan, Sugut, Banggai, Labuk, Sandakan, China – Batangan, Mumiang, and all other territories and coastal lands to the south, bordering on Darvel Bay, and as far as the Sibuku River, together with all the islands which lie within nine miles from the coast…»*

concluded on January 4, 1878 between Sultan Mohammed Jamalul Alam and Messrs. Alfred Dent and Baron Gustavus de Overbeck (henceforth, the Deed).[2]

6. According to Claimants, a dispute arose between the Parties under the Deed.

Claimants seek to vindicate their commercial rights under the terms of the Deed, as they plead that the surrounding circumstances at the time of its signature were radically changed by the subsequent discovery of natural resources which were not contemplated by the Parties when they signed the Deed.

Respondent alleges that it had paid the agreed monies under the Deed to Claimants *«…continuously… until 2010. For the years 2011 and 2012, the Cession Monies were paid directly to the heirs of the Sulu Sultanate…Regrettably, payments ceased in 2013. Malaysia is now ready and willing to pay your clients all arrears from 2013 to 2019, and agrees to fully comply with the 1878 Grant and the 1903 Confirmation of Cession from henceforth with regards to future payments…».*[3]

III. THE PARTIES AND THEIR COUNSEL

7. Claimants set their address for the purpose of these proceedings at *Romulo Mabanta Buenaventura Sayoc & De los Ángeles*, 8741 Paseo de Roxas, Makati, 1200 Metro Manila, Philippines. Counsel representing Claimants in these proceedings –to whom all communications were sent- are:[4]

Mr. Paul H. Cohen
Ms. Elisabeth Mason
4-5- Gray's Inn Square Chambers
London WC1R 5 AH
United Kingdom

Tel.: +34 91 183 59 89
E-mail: pcohen@4-5.co.uk; emason@4-5.co.uk

[2] Exhibit C 13.

[3] Exhibit C 52.

[4] Procedural Order 1, ¶¶ 6 to 10. Exhibit C 54.

Prof. Dr. Bernardo M. Cremades
Mr. Bernardo M. Cremades Román
Mr. Javier Juliani
Mr. José María López
Ms. Paloma Carrasco
Mr. Patrick T. Byrne
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8. Malaysia –Respondent- is a Sovereign State situated in Southeast Asia, with its Prime Minister's Office located at Main Block, Perdana Putra Building, Federal Government Administrative Centre, 62502 Putrajaya, Malaysia.

Malaysia did not appear to be represented by external Counsel in these proceedings,[5] apart from its Attorney General.

On October 25, 2019, at 20.17 hours, Respondent informed the Arbitrator and Claimants of the appointment of Dr. Arias and Mr. Capiel as its Counsel in this arbitration, amongst other issues. Respondent's Counsel appointment was noted in Procedural Order 7 and Respondent was consequently invited to submit to these proceedings its letter of representation in favour of its Counsel in this arbitration, Dr. David Arias and Mr. Luis Capiel, by November 12, 2019. Mr. Capiel acknowledged receipt of Procedural Order 7 through email dated November 7, 2019, sent at 18.45 hours (Madrid Time), with copy to Claimants and with the tacit acceptance of Respondent.

Nevertheless, on November 18, 2019, Dr. Arias sent an email to the Arbitrator –with copy to Claimants- requesting *«…please do not copy HSF in any further correspondence…»*, implying that Dr. Arias and Mr. Capiel had withdrawn from the case.

Respondent was invited in Procedural Order 8,[6] amongst other issues, (i) to explain its failure in instructing its Counsel, Dr. Arias and Mr. Capiel, to appear in this arbitration,

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5 Procedural Order 1, ¶¶ 6 to 10. Exhibit C 54.

6 The Arbitrator rendered Procedural Order 8 on November 26, 2019. The Parties were served on the same day. Claimants acknowledged receipt of Procedural Order 8 on November 26, 2019, at 13:08 hours, Madrid Time. Respondent was served by email on November 26, 2019. The Prime Minister of Malaysia received this email on November 26, 2019, at 12:58 hours (Madrid Time) at his email address pro.ukk@kln.gov.my.

as directed by Procedural Order 7; and (ii) to confirm in writing their procedural activities in this arbitration from October 25, 2019 until November 18, 2019. Respondent failed to provide an acceptable response that ensured its Counsel's withdrawal on November 18, 2019 would not be harmful for its defence in this arbitration nor did it attend the invitation contained therein to express its views.

Therefore, Respondent's representative in these proceedings –to whom all communications in relation with this matter were sent- is:

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62100 Putrajaya
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E-mail: ag.thomas@agc.gov.my

IV. THE PROCEDURAL HISTORY TO DATE

1. *The Initial Phase of the Proceedings*

i. The Notice of Intention to Commence Arbitration

9. Claimants served a preliminary notice of intention to commence arbitration, dated November 2, 2017, pursuant to the Deed (henceforth, the Notice of Intention to Commence Arbitration) at the Embassy of Malaysia in Madrid (Spain) on November 2, 2017.[7]

ii. The Agreement to Arbitrate

10. The Deed contains a clause for the resolution of disputes (hereinafter, the Arbitration Agreement) which provides as follows:

Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on November 26, 2019, at 12:58 hours (Madrid Time) and read it on November 27, at 08:57:28, Malaysia Time. Respondent failed to acknowledge receipt of this email and Procedural Order 8, nor did they provide an acceptable excuse.

7 Exhibit C 37.

> *«…Should there be any dispute, or reviving of all grievances of any kind, between us, and ours heirs and successors, with Mr. Gustavus Baron de Overbeck or his Company, then the matter will be brought for consideration or judgment of Their Majesties' Consul-General in Brunei…».*

11. On February 1, 2018, Claimants filed an application for the judicial appointment of an arbitrator before the Civil and Criminal Chamber of the Superior Court of Justice of Madrid (henceforth, the Application), pursuant to Article 15.4 of the Arbitration Act 60/2003, of December 23, 2003 (henceforth, the SAA). The docket number assigned to the Application was 4/2018. The Civil and Criminal Chamber of the Superior Court of Justice of Madrid rendered the Judgment 11/2019, dated March 29, 2019 (henceforth, the Judgement of March 29, 2019),[8] which –amongst other issues- provided as follows on the Arbitration Agreement:

> *«…Therefore, having unequivocally agreed to submit to arbitration in the following terms:* «…Should there be any dispute, or reviving of all grievances of any kind, between us, and ours heirs and successors, with Mr. Gustavus Baron de Overbeck or his Company, then the matter will be brought for consideration or judgment of Their Majesties' Consul-General in Borneo (Brunei)…*»; before the impossibility of resorting to the arbitrator originally appointed, taking into account that there is apparently, within the scope of cognition of this proceeding, no limitation to the will of the defendant in being subjected to said arbitration clause, an arbitrator shall be appointed, as requested, regardless of further considerations, as the claimant met the substantive requirements for the referred action…».*[9]

2. *The Sole Arbitrator: Appointment by the Civil and Criminal Chamber of the Superior Court of Justice of Madrid*

12. Malaysia failed to jointly appoint the arbitrator for the determination of the dispute under the Deed, as requested by Claimants and within the deadline provided in the Notice of Intention to Commence Arbitration.

13. On February 1, 2018, Claimants filed the Application. Respondent did not appear and was not represented therein.[10]

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8 Exhibits C 44 and C 54.

9 Exhibit C 44: *«…En consecuencia, pactado inequívocamente el sometimiento a arbitraje en los siguientes términos:* «Si acaso en lo sucesivo hubiera controversia por nuestro contrato entre nuestros sucesores, así como los del Barón de Overbeck o de la Compañía en los extremos que abraza este contrato se someterá al juicio del Cónsul Gral. de Borneo (Brunei)»*; no siendo posible acudir al árbitro designado primigeniamente y sin que quepa apreciar, en el ámbito limitado de cognición propio de este procedimiento, restricción alguna de la voluntad de la parte demandada en la asunción de dicha cláusula compromisoria, debe procederse a la designación de árbitro interesada, sin entrar a decidir otras cuestiones, puesto que la actora cumplió escrupulosamente con el requisito material de la acción a que hemos hecho referencia…».*

10 Judgment of March 29, 2019, Facts, Four. Exhibit C 54. Preliminary Award, Heading V *infra*.

14. The Judgment of March 29, 2019 appointed a sole arbitrator, further to powers under Article 15.6 of the SAA:

> *«…«…Four.- The appointment of an arbitrator who shall resolve the controversy as sole arbitrator is applicable; thus, as provided in Art 15.6 LA, considering the nature of the controversy to be resolved and the qualities reasonably requested by the claimant, in the second further statement: a) With proven experience in commercial conflict resolution; b) Fluent in both Spanish and English; and c) Of a nationality different to that of either party (Philippine or Malaysian), the appointment by lot of the sole arbitrator for the resolution of this conflict shall take place at the enforcement stage hereof, as a list of suitable candidates must needs be drawn up by the Court of Arbitration of the ICAM* [Madrid Bar Association].
>
> *Once the list is obtained, the lot shall be drawn publicly, before the Law Clerk of this Court, who shall summon the parties therefore…».*[11]

15. The Civil and Criminal Chamber of the Superior Court of Justice of Madrid made the arrangements to make the necessary appointment itself. On May 22, 2019, it appointed Dr. Gonzalo Stampa, as sole arbitrator.

16. Dr. Stampa accepted to serve as sole arbitrator before the Civil and Criminal Chamber of the Superior Court of Justice of Madrid on May 31, 2019. He submitted his statement of acceptance, availability, impartiality, and independence pursuant to Article 17 of the SAA.

Dr. Stampa's contact details and address for communications are as follows:

> Dr. Gonzalo Stampa
> STAMPA ABOGADOS
> Ayala, 4
> 28001 Madrid
> Spain
>
> Tel.: +34.91.561.84.77
> Fax: +34.91.752.37.08
> E-mail: g.stampa@stampaabogados.com

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[11] Exhibit C 44: *«…CUARTO.- Siendo procedente, pues, el nombramiento de un árbitro que decida, como árbitro único en Derecho, la controversia, el Tribunal, tal y como dispone el art. 15.6 LA, atendiendo a la naturaleza de la contienda que se pretende dirimir y cualidades que, razonablemente señala la parte actora, en su otrosí digo segundo: a) Que tenga experiencia acreditada en arbitraje internacional, así como en la resolución de controversias de carácter comercial; b) Que hable español e inglés de forma fluida; y c) Que no tenga nacionalidad de ninguna de las partes (filipina o malasia), la designación por sorteo del árbitro único para dirimir la controversia entre las partes litigantes, debe quedar para la fase de ejecución de esta sentencia, al ser preciso elaborar una lista de candidatos que reúnan dichas condiciones, lo que se solicitará de la Corte de Arbitraje del ICAM. Obtenida la lista de candidatos se procederá, en audiencia pública al sorteo, bajo la fe pública judicial de la Sra. Letrada de la Administración de Justicia de este Tribunal, convocando al efecto a las partes…».*

17. The Arbitrator confirmed that he is and shall remain impartial and independent of the Parties and that he has disclosed, before the Court and to the best of his knowledge, all circumstances likely to give rise to justifiable doubts as to his impartiality or independence and that he will without delay disclose any such circumstances that may arise in the future. This remains correct on the date of the Preliminary Award.

3. *The Establishment of the Proceedings*

i. Procedural Order 1

18. Once appointed, the Arbitrator issued Procedural Order 1 on June 24, 2019.[12]

19. Its ¶34 provided as follows:

> *«…The Claimants are invited to file their notice of arbitration by July 30, 2019 (henceforth, the Notice of Arbitration)…».*

20. Its ¶36 provided as follows:

> *«…The Respondent is invited to file its response to the Notice of Arbitration by September 9, 2019 (henceforth, the Response to the Notice of Arbitration)…».*

ii. The Preparatory Conference

21. ¶ 54 of Procedural Order 1 contemplated the celebration of a preparatory conference for procedural consultations with Parties on organizing arbitral proceedings in the present matter (henceforth, the Preparatory Conference).

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[12] The Parties were served with Procedural Order 1 on the same day. Claimants acknowledged receipt on June 24, 2019, at 15:40 hours, Madrid Time. Respondent was served by email on June 24, 2019, and by express courier service on June 24, 2019, on June 26, 2019, on September 17, 2019 and on September 19, 2019. The Prime Minister of Malaysia received International Courier DHL, on June 26, 2019 at his Office, located at Main Block, Perdana Putra Building, Federal Government Administrative Centre, 62502 Putrajaya, Malaysia. Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on June 24, 2019, at 10:56 hours, Madrid Time (04:55:26 hours, Malaysia Time) and read it on June 25, 2019, at 08:15:12 hours, Malaysia Time and received International Courier DHL, on June 26, 2019 and on September 19, 2019, at his Chambers located at 45 Persiaran Perdana, Precinct 4, 62100 Putrajaya, Malaysia. Respondent failed to acknowledge receipt of this email and Procedural Order 9, nor did it provide an acceptable excuse. Exhibit C 54.

22. Its ¶ 55 invited Parties to advise the Arbitrator by July 22, 2019 as to their preference on the manner in which the Preparatory Conference should be held and their availability.[13] In their letter of June 28, 2019, Claimants expressed their preference for the Preparatory Conference to be held in person, in Madrid, on October 24 and 25, 2019.[14] Respondent failed to provide its views nor indicated its availability for a Preparatory Conference, nor did it provide an acceptable excuse.

23. The Arbitrator convened the Preparatory Conference for October 24 and 25, 2019, in Madrid[15] and invited Parties to submit the list of persons who would be present.[16] Claimants submitted its list of attendees on September 10, 2019. Respondent failed to submit the list within the period provided for in Procedural Order 2 and extended by Procedural Orders 3 (i.e., by September 20, 2019) and 4 (i.e., October 18, 2019), nor did it provide an acceptable excuse. Parties were summoned for the Preparatory Conference with sufficient advance notice.

24. The Preparatory Conference took place on October 25, 2019, between 10.00 hours and 12.00 hours, at Hotel Intercontinental Madrid, Meeting Room Toledo, Paseo de la Castellana 49, 28046 Madrid.[17]

25. The Preparatory Conference was devoted to the procedural organization of the arbitration, in accordance with the proposed agenda of matters for possible consideration,

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[13] Procedural Order 1, ¶ 55: «*…Given the diversity of locations where the Parties and the Arbitrator are based, this conference can be held either by telephone conference, skype or in the place of arbitration (if already determined) or in Madrid (failing the Parties' agreement for the determination of the place of arbitration). The Arbitrator is available from October 22 to October 25, 2019 and on the week of November 11, 2019 to November 15, 2019. The Parties are invited to advise to the Arbitrator as to their preference and availability by July 22, 2019, by 18.00 hours (Madrid Time)…*».

[14] Claimants' letter of June 28, 2019: «*…We write pursuant to paragraph 55 of Procedural Order 1 in the above-referenced case. Counsel for the Claimants are available in person for a preparatory conference in Madrid on October 24 and 25, 2019. We could attend a conference telephonically on November 13, 14 or 15, 2019, but with some logistical difficulty. We, therefore, register our strong preference for the October dates…*».

[15] Procedural Order 1, ¶¶ 54 – 56, Procedural Order 5. Exhibit C 54.

[16] The Arbitrator rendered Procedural Order 2 on July 25, 2019. The Parties were served on the same day. Claimants acknowledged receipt of Procedural Order 2 on July 25, 2019, at 14:35 hours, Madrid Time. Respondent was served by email on July 25, 2019. Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on July 25, 2019, at 12:05 hours (Madrid Time) and read it on July 26, 2019, at 08:17:34, Malaysia Time. Respondent failed to acknowledge receipt of this email and Procedural Order 8, nor did it provide an acceptable excuse. Exhibit C 54.

[17] Procedural Order 1, ¶ 54. Exhibit C 54.

prepared by the Arbitrator and enclosed in Procedural Order 5.[18] Claimants were represented by their Counsel. Respondent –aware of its existence[19]- voluntarily decided neither to participate, nor to intervene therein directly or by proxy, nor did it provide an acceptable excuse.

26. The Preparatory Conference was recorded on DVD, incorporated into the proceedings, which the Parties were invited to download by logging onto an identified ftp site.[20]

27. The proceedings continued as scheduled.

iii. The Place of Arbitration

28. The Arbitration Agreement remains silent on the issue of the seat of the arbitration.

29. Claimants submitted their position in their notice of arbitration of July 30, 2019 (henceforth, the Notice of Arbitration)[21] and considered that Madrid should be determined as the seat of the arbitration for the following reasons: (i) the Superior Court of Justice of Madrid –which had already reviewed the Application- would control the validity of the awards to be rendered in this arbitration, *«…preserving the integrity of the arbitral process and to avoid hostility towards any arbitration award rendered by the Sole Arbitrator…»*; (ii) Respondent has an Embassy in Madrid; (iii) Madrid is a neutral venue; (iv) the SAA is a modern arbitration legislation; (v) the Arbitrator and Claimants' co-Counsel are located in Madrid; and (vi) there are no rules restricting the appearance of lawyers from other

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[18] The Arbitrator rendered Procedural Order 5 on October 21, 2019. The Parties were served on the same day. Claimants acknowledged receipt of Procedural Order 5 on October 21, 2019, Madrid Time. Respondent was served by email on October 21, 2019. The Prime Minister of Malaysia received this email on November 26, 2019, at 12:58 hours (Madrid Time) at its email address pro.ukk@kln.gov.my. Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on October 21, 2019, at 17:24 hours (Madrid Time) and read it on October 22, at 11:38:23, Malaysia Time. Respondent failed to acknowledge receipt of this email and Procedural Order 8, nor did it provide an acceptable excuse. Exhibit C 54.

[19] Respondent's emails of October 26 and 27, 2019.

[20] The Arbitrator rendered Procedural Order 7 on November 7, 2019. The Parties were served on the same day. Claimants acknowledged receipt of Procedural Order 7 on November 7, 2019, at 12:33 hours, Madrid Time. Respondent was served by email on November 26, 2019. Respondent's then Counsel received this email on November 7, 2019, at 12:26 and read it on the same day at 12:30:54, Madrid Time. Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on November 7, 2019, at 12:26 hours (Madrid Time) and read it on November 27, at 08:57:28, Malaysia Time. Exhibit C 54.

[21] Notice of Arbitration, Heading V.B, ¶¶ 95 – 100; Exhibit C 54.

jurisdictions in legal matters in Spain, which does not require visas for citizens of Malaysia for stays of up to 90 days. Based on Article 26 of the SAA, Claimants concluded that the «*…Arbitrator may meet at any place he deems appropriate for hearing witnesses, experts or the parties, inspecting goods or documents, or examining persons. This means that the Sole Arbitrator can fix Madrid as the seat, but hold any in-person hearings elsewhere…*».

30. The Preparatory Conference was devoted to the procedural organization of the arbitration, in accordance with the proposed agenda of matters for possible consideration, prepared by the Arbitrator, enclosed in Procedural Order 5 and including the determination of the seat of this arbitration.

Claimants reiterated their position on this issue during the Preparatory Conference. Respondent failed to submit any comments on Claimants' position, despite being aware of the existence of the Preparatory Conference, of its DVD –incorporated into the proceedings- and notwithstanding Respondent's Counsel admitting in its argumentation that its client had provided them with the Notice of Arbitration –apparently without exhibits- as well as Procedural Orders 1 to 5, rendered throughout the proceedings.

In the absence of Parties' agreement, the Arbitrator shall determine the seat of the arbitration, as it constitutes a crucial issue in any international arbitration. Respondent's failure will not be treated as an automatic admission of Claimants' assertions.

31. The Arbitrator determined Madrid as the place of arbitration, from Procedural Order 9, after consultation with the attending Party –the Claimant- during the Preparatory Conference. However, the Arbitrator will confirm the legal properness of this determination considering Respondent's non-appearance and based on the result of an impartial and independent assessment of Claimants' arguments on the seat of the arbitration.

32. The determination of the arbitral seat can have profound legal and practical consequences, including mundane issues of convenience and cost. The following are prominent factors to be considered when evaluating the choice of the arbitral seat: (i) suitability of the law on arbitral procedure of the place of arbitration; (ii) existence of a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may be enforced; (iii) the convenience of parties and arbitrators, including the travel distances; (iv) availability and cost of supports services needed; and (v) location of the subject matter in dispute and proximity of evidence. Therefore, it can be concluded that the arbitral seat constitutes a relevant construct, resulting from the consideration of legal, strategical and practical criteria.

33. The effect of the territorial scope of the arbitral legislation of the arbitral seat governs a wide range of internal and external procedural issues in the arbitration.

Those internal matters potentially governed by the law of the arbitration seat may include, amongst others, the parties' autonomy to agree on substantive and procedural issues, the interpretation and enforceability of the parties' arbitration agreement, standards of procedural fairness in arbitral proceedings, timetable of arbitral proceedings or conduct of the hearings, including the parties obligations to be heard and the examination of witnesses.

Likewise, the external matters potentially ruled by the law of the arbitration seat entail judicial supervision of the arbitral proceedings by the competent courts of the arbitral seat, including, amongst others, arbitrators' competence-competence, selection of arbitrators, annulment of arbitral awards or determination of the nationality of the award.

Therefore, the legal criteria are connected to the natural consequence of the choice of the place of arbitration. [22]

34. If Madrid –the capital of Spain- is to be considered as the seat of the present arbitration, the provisions of the SAA will apply.

The SAA –monistic in nature- is inspired by the Model Law adopted by the United Nations Commission on International Trade Law on June 21, 1985 (henceforth, UNCITRAL Model Law) and thus closely follows the international standard for arbitration legislation in matters such as the power of the arbitral tribunal to rule on its own jurisdiction (*competence-competence* rule), the provision for precautionary measures during the arbitral proceedings, the grounds on which an award might be set aside, and the restricted grounds for judicial supervision or intervention in arbitration. It also deals explicitly with some matters on which the UNCITRAL Model Law is silent (i.e., the confidentiality of arbitral proceedings).

The SAA governs the enforcement of arbitration proceedings in Spain, along with those applicable rules of arbitration that the parties may have agreed to in the arbitration

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[22] *Star Shipping A.S. v. China National Foreign Trade Transportation Corporation (the «Star Texas»)*, [1993] 2 Lloyd's Rep. 445. *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA*, [2012] EWCA Civ. 638. Judgment of the Civil and Criminal Chamber of the Superior Court of Justice of Cataluña dated April 4, 2013. Judgment of Valencia Court of Appeal dated February 19, 2003, on the analysis of the importance of the seat of arbitration settled by the parties and unilaterally changed by the arbitral tribunal. In order to justify its decision granting the annulment of an award, the Court rightly argued that *«…the place where the award is issued is not irrelevant since it determines, not only the competence of the Appeal Court with regard to the remedy of annulment* […] *but also the Court of First Instance in charge of solving the request for the execution of precautionary measures* […] *and, at the same time, the Court before which enforcement of the award will be carried out, if necessary…».*

agreement. Its Article 3[23] restricts the application of the provisions of the SAA to controversies arising from international trade and submitted to international commercial arbitration. Along with its Article 1, the SAA establishes the mandatory application of its Articles 3, 4, 6, 8, 9 (except paragraph 2), 11, 23 and of its Titles VIII and IX, even when the seat of the arbitration is outside Spain.

As previously explained, the Judgement of March 29, 2019 applied the provisions of the SAA. The reasoning contained therein showed that the selection and appointment of the Arbitrator was based on the procedure contained in Article 15.6 of the SAA[24] «*…considering the nature of the controversy to be resolved and the qualities reasonably requested by the claimant, in the second further statement: a) With proven experience in commercial conflict resolution; b) Fluent in both Spanish and English; and c) Of a nationality different to that of either party (Philippine or Malaysian)…*».

Moreover, Article 26 of the SAA[25], in conjunction with its Article 3, establishes the criteria that will determine the seat of arbitration in cases, where, as in the one at hand, the arbitration agreement contains no such reference. The Arbitrator will then be free to determine the arbitral seat «*…having regard to the circumstances of the case and the convenience of the parties…*».

35. Strategic criteria are composed of two aspects: neutrality and effectiveness.

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[23] SAA, Article 3: «*… 1. Arbitration will be regarded as international in any of the following circumstances: a) At the time when the arbitration agreement is concluded, the places of business of the parties thereto are located in different States; b) Any of the following are located outside the State in which the parties have their places of business: the place of arbitration, determined in the agreement or pursuant thereto; the place where a substantial portion of the obligations of the legal relationship from which the dispute stems are to be performed; or the place to which the subject matter of such dispute is most closely related; c) The legal relationship from which the dispute stems affects the interests of international trade. 2. For the purposes of the provisions of the preceding item, if a party has more than one place of business, his place of business will be the one most closely related to the arbitration agreement; and if a party has no place of business, his habitual residence will serve as the reference…*».

[24] SAA, Article 15.6: «*…Where arbitrators are to be appointed by the court, it will draw up a list of three names for each arbitrator to be appointed. When drawing up the list, the court will have due regard to the requirements established by the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. Where a sole or a third arbitrator is to be appointed, the court will also have regard to the advisability of appointing an arbitrator of a nationality other than those of the parties and, as appropriate, of those of the arbitrators already appointed, in light of the circumstances prevailing. The arbitrators are subsequently appointed by lot…*».

[25] SAA, Article 26: «*… 1. The parties are free to agree on the place of arbitration. Failing such agreement, it will be determined by the arbitrators, having regard to the circumstances of the case and the convenience of the parties. 2. Notwithstanding the provisions of the preceding item, the arbitrators may, unless otherwise agreed by the parties, meet at any place they deem appropriate for hearing witnesses, experts or the parties, inspecting goods or documents, or examining persons. Arbitrators may hold consultation meetings at any place they deem appropriate…*».

Neutrality in arbitration depends on its location. In the case at hand, Madrid is a neutral venue, located in a third country from that of either of the Parties.

Effectiveness depends on the enforceability of the award made by the arbitrators, including the Preliminary Award. Spain –without reservations- and Malaysia –with a declaration of reciprocity-[26] ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on June 10, 1958 (henceforth, the New York Convention). [27] Spain also ratified the European Convention on International Commercial Arbitration of April 21, 1961 (henceforth, the Geneva Convention).[28]

36. Practical criteria give due consideration to such aspects as convenience, security and practicality for carrying out arbitration activities, such as closeness to the parties' domicile or to the place where most evidence (documents or witnesses) is located; availability of supporting services (suitable offices in which to hold hearings, communications, legal assistance); costs; or personal security of arbitrators. The hotel rates are affordable and costs for hearing rooms are also reasonable. Madrid is of easy access to the Parties, as it is a well–connected city, both nationally and internationally, by road, train and air, without visa requirements for both arbitrator and Counsel and for citizens of Malaysia for stays of up to 90 days since 1995. These elements contribute to the smooth conduct of the arbitration proceedings.

37. The Arbitrator evaluated all the foregoing factors and concludes and confirms that Madrid, as a seat, has both arbitration legislation and courts which are supportive of international arbitration. This conclusion is essential to determine that the place of this arbitration be Madrid (Spain). [29] This does not preclude the Arbitrator from conducting

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[26] *«…The Government of Malaysia will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State. Malaysia further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Malaysian law…».*

[27] Official State Gazette dated July 9 and 11, 1977. Articles 93 to 95 of the 1978 Spanish Constitution, in relation with article 1.5 of the Spanish Civil Code, provide that Treaties become part of Spanish domestic law upon their publication in the Official State Gazette. First part of Article V(1)(a) of the New York Convention refers as the applicable law to determine the validity of the arbitration agreement the law to which the parties have subjected the arbitration agreement. In the case at hand, the Arbitration Agreement contains no reference to the law that is to govern its formation and substantive validity. This determination will therefore be made by the court seized of a challenge thereto. Some of the most adopted solutions are the law of the arbitral seat which may be in a country other than that of the court (New York Convention, Article V(1)(a) second rule, by analogy). SAA, Article 46. FRIEDLAND, P.D. & HORNICK, R. N., «The relevance of international standards in the enforcement of arbitration agreements under the New York Convention», *The American Review of International Arbitration*, 1995, vol. 6, nº 2, pp. 149 – 190.

[28] Official State Gazette dated October 4, 1975.

[29] Preparatory Conference; Procedural Orders 5 and 7. Exhibit C 54.

hearings and meetings with the Parties and possible witnesses and experts at any other place, after consultation with the Parties, or communicating with the Parties by telephone conference calls or by other available electronic means of communication, if considered appropriate for the orderly and efficient conduct of the arbitration.[30]

iv. The Applicable Procedural Rules

38. The Arbitration Agreement contains no reference to the procedural law of the present arbitration and Parties have not made other arrangement through the adoption of standard or other arbitral rules. In the present case, the seat of the arbitration has been determined as Madrid (Spain).

39. Claimants submitted its position on the *lex arbitrii* in the Notice of Arbitration.[31] Claimants sustained the application of Article 25 of the SAA,[32] in conjunction with its Articles 1.1[33] and 3. Claimants characterised the present arbitration as international in nature and considered that, in the absence of Parties' agreement on the *lex arbitrii*, it should be determined by the Arbitrator, as per the powers of management and conduct of the proceedings contained under Article 25.2 of the SAA.

40. The Preparatory Conference was devoted, amongst other procedural aspects, to the determination of the *lex arbitrii* of this arbitration.[34] Claimants reiterated their position on this issue during the Preparatory Conference. Respondent voluntarily failed to submit its comments on Claimants' position, despite being aware of the existence of the Preparatory Conference, of its DVD –incorporated in the proceedings- and notwithstanding Respondent's Counsel admitting in its argument that its client had provided the Notice of Arbitration –apparently without exhibits- together with Procedural Orders 1 to 5. In the absence of Parties' agreement, the Arbitrator shall determine the *lex arbitrii* of the arbitration. Respondent's failure will not be treated as an automatic admission of

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[30] SAA, Article 26.2; *P.T. Garuda Indonesia v Birgen Air*, [2002] SGCA 12, ¶¶ 19 – 25. BĚLOHLÁVEK, A.J., «Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth», *ASA Bull*., 2013, vol. 31, nº 2, pp. 262 – 292.

[31] Notice of Arbitration, Heading V.C, ¶¶ 101 – 103. Exhibit C 54.

[32] SAA, Article 25: «…Determination of procedures *1. Subject to the provisions of the preceding article, the parties are free to agree on the procedure to be followed by the arbitrators in conducting the proceedings. 2. Failing such agreement, the arbitrators may, subject to the provisions of this act, conduct the arbitration in such manner as they deem appropriate. The power vested in the arbitrators includes the power to determine the admissibility, relevance, materiality, taking (even ex officio) and evaluation of the evidence…».*

[33] SAA, Article 1.1: «*…This act will apply to domestic and international arbitration conducted on Spanish soil, without prejudice to the provisions laid down in treaties to which Spain may be party or laws with special provisions on arbitration…».*

[34] Procedural Order 5. Exhibit C 54.

Claimants' assertions. The Arbitrator will make an impartial and independent assessment of Claimants' arguments on the *lex arbitrii* of the arbitration.

41. Procedural law is often used as a shorthand term for the non-substantive laws applicable to arbitration. As there is a natural relationship between the seat of arbitration and the procedural law applicable to the arbitration proceedings, it would be wrong to depict those laws as only concerned with procedural matters.

Jan Paulsson distinguishes the law applicable in arbitration –i.e., the substantive law or the *lex causæ*[35]- from the law applicable to arbitration (*lex arbitrii*),[36] which includes both procedural law and non-procedural matters such as arbitrability, decisions on jurisdiction, national court intervention in support of arbitration and the grounds on which awards may be challenged and set of rules for the conduct of arbitration in that territory, available to assist the orderly progress of a case if the parties have not made other arrangement through the adoption of standard or other arbitral rules.

Therefore, it is appropriate to conclude that the *lex arbitrii* is the arbitration legislation of the arbitral seat, which provides rules governing the external relationship between the arbitral process as well as the courts and the internal conduct of the arbitration; the directory functions of the domestic legislature, to use the language of Dicey, Morris and Collins.[37]

42. The SAA apply to these proceedings, which shall be conducted in accordance with its mandatory provisions, as Madrid (Spain) is the place of arbitration. Its Articles 24[38] and 25 provide guidelines to assist the orderly progress of a case by determining that, in the absence of this Parties' agreement, the Arbitrator is vested with sufficient powers to conduct the proceedings in such a manner as he deems appropriate, provided that its execution is subject –as it will be- to the provisions of the SAA.

43. As the SAA contains no detailed rules governing the conduct of the proceedings, this absence will be supplemented by the rules already determined in Procedural Order 1

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[35] Preliminary Award, Heading VII.3 *infra*.

[36] PAULSSON, J., *Arbitration in Three Dimensions*. LSE Law, Society and Economy Working Papers 2/2010, London School of Economics and Political Science, Law Department. London, in http://ssrn.com/abstract=1536093.

[37] DICEY, A.V., MORRIS, J.H.C. & COLLINS, L. *Dicey, Morris, and Collins on the Conflict of Laws*. Vol. 2. Fifteenth Ed. Sweet & Maxwell. London. 2012, ¶¶ 16-031 – 16-034.

[38] SAA, Article 24: «…Principles of equality, review and rebuttal *1. The parties will be treated with equality and each party will be given full opportunity to present his case. 2. The arbitrators, parties and arbitral institutions, as appropriate, are bound to honour the confidentiality of the information received on the occasion of arbitration…*».

and such further rules which the Arbitrator may consider, after consultation with the Parties throughout the proceedings. The Arbitrator may seek guidance from, but shall not be bound by, the Arbitration Rules adopted by of the United Nations Commission on International Trade Law on August 15, 2010 (henceforth, UNCITRAL Arbitration Rules), the International Bar Association Guidelines on arbitration and the Chartered Institute of Arbitrators Guidelines on International Arbitration to the extent considered appropriate by the Arbitrator in its overall procedural discretion.[39]

v. The Language of the Arbitration

44. The determination of the arbitration language or languages of the proceedings is, logically, incumbent upon the parties and, failing that agreement, upon the arbitrators. The Arbitration Agreement contains no reference as to the language of this arbitration. The Parties did not reach any agreement otherwise. In the absence of Parties' agreement, the Arbitrator shall determine the language of arbitration.

45. Claimants submitted its position in the Notice of Arbitration, based on Articles 26 and 28 of the SAA.[40] Claimants contended that, in the absence of Parties' agreement on this topic, the Arbitrator should determine the language of the arbitration with special emphasis on the surrounding circumstances of the case, such as the language in which the Deed was written (a Malay dialect), the impossibility to determine a common language of Parties at the time of the signature of the Deed (the local language of the Sultan, German for Mr. Overbeck and English in the case of Mr. Dent), the venue of the arbitration (determined in Madrid), the official language of the SAA (Spanish), the Arbitrator's fluency on both English and Spanish and the official language of Malaysia, where English is commonly used.

46. Claimants reiterated their position on this issue during the Preparatory Conference and added the possibility of Spanish being also used throughout the proceedings, as any award rendered herein might be subject to judicial scrutiny by Spanish competent courts. Respondent failed and/or voluntarily refused to avail itself of the opportunity to make a submission on this procedural issue or otherwise participate in the Preparatory Conference, nor did it intervene therein directly or by proxy, nor did it provide an acceptable excuse notwithstanding Respondent's Counsel admitted in its argumentation that its client submitted the Notice of Arbitration –apparently without exhibits- and Procedural Orders 1 to 5, rendered throughout the proceedings.

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[39] Preparatory Conference; Procedural Orders 5 and 7. Exhibit C 54.

[40] Notice of Arbitration, Heading V.E, ¶¶ 123 – 129. Exhibit C 54.

Respondent's failure will not be treated as an automatic admission of Claimants' assertions.

47. Parties were unable to find a common understanding on the language of the present arbitration and, therefore, the Arbitrator, based on the power vested by Article 25 of the SAA, in relation to its Article 26, will make an impartial and independent assessment of Claimants' arguments on the language of the arbitration and shall determine it.

48. The issue of the language of the arbitral proceedings is of utmost importance, as it affects the choice of counsel and arbitrators and the effectiveness, amongst others, of witness and expert testimony and the conduct of the hearings. In the case at hand, the Deed has been translated into both English[41] and Spanish language[42] and the main correspondence exchanged between the Parties has likewise been carried out in both said languages.[43] Thus, both Counsel for the Parties and Arbitrator are able to conduct the proceedings in English without the need of translation, so that niceties and undertones will not be lost and, as a result, an accurate picture of the dispute will be obtained as the basis for the resolution of the present dispute.

49. Taking these considerations into account, it is the Arbitrator's view that the language of this arbitration should be English. The arbitration shall be conducted in the English language.[44]

vi. The Time Limit for the Preliminary Award

50. The deadline for rendering the Preliminary Award was May 25, 2020.[45]

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41 Exhibit C 14.

42 Exhibit C 13.

43 Exhibits C 29, C 35, C 36, C 37, C 38, C 52, C 53 and C 54.

44 Preparatory Conference; Procedural Orders 5 and 7. Exhibit C 54.

45 The Arbitrator rendered Procedural Order 14 on March 13, 2020. The Parties were served on the same day. Claimants acknowledged receipt of same on March 13, 2020, at 15:56 hours, Madrid Time. Respondent was served by email on March 13, 2020. The Prime Minister of Malaysia received this email on March 13, 2020, at 14:24 hours (Madrid Time) at its email address info@jpm.gov.my. The Embassy of Malaysia in Madrid received this email on March 13, 2020, at 14:24 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on March 13, 2020, at 14:24 hours (Madrid Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

4. *The Bifurcation of the Proceedings: Conduct of the Arbitration*

i. The Written Submissions

51. Claimants filed the Notice of Arbitration and included Exhibits numbered C 1 to C 51 and CL 1 to CL 26. The Arbitrator acknowledged receipt of its electronic copy of the Notice of Arbitration and its Exhibits and noted Claimants' comments contained therein by email dated July 30, 2019, dispatched at 12:49:24 hours (Madrid Time).[46] The Arbitrator received hard copy the Notice of Arbitration, along with its attachments and exhibits, on July 31, 2019. The Notice of Arbitration and its Exhibits C 1 to C 51 and CL 1 to CL 26 were incorporated into the proceedings by Procedural Order 3.[47]

52. Claimants served Respondent with the Notice of Arbitration on August 2, 2019, dispatched by express courier service in accordance with Procedural Order 1. [48] Respondent voluntarily failed to submit its Response to the Notice of Arbitration within the period provided for in Procedural Order 1 and extended by Procedural Orders 3 (i.e., by September 30, 2019) and 4 (i.e., October 18, 2019), nor did it provide an acceptable excuse.[49]

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[46] The Prime Minister of Malaysia and the Embassy of Malaysia in Madrid received this email on July 30, 2019, at 12:50 hours (Madrid Time) at their respective email addresses: pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on July 30, 2019, at 12:51 hours (Madrid Time) and read it on July 31, 2019, at 08:43:10 hours, Malaysia Time. Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse. Exhibit C 54.

[47] The Parties were served with Procedural Order 3, issued on September 17, 2019. The Parties were served on the same day. Claimants acknowledged receipt on September 17, 2019, at 15:33 hours, Madrid Time. Respondent was served by email on June 24, 2019, and by express courier service on June 24, 2019 and on June 26, 2019. Respondent was served by email on September 17, 2019. The Prime Minister of Malaysia and the Embassy of Malaysia in Madrid received this email on September 18, 2019, at 19:10 hours (Madrid Time) at their respective email addresses: pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on September 18, 2019, at 19:10 hours (Madrid Time) and read it on September 19, 2019, at 08:46:13 hours, Malaysia Time. Respondent failed to acknowledge receipt of this email and Procedural Order 9, nor did it provide an acceptable excuse. Exhibit C 54.

[48] On September 18, 2019, Claimant submitted evidence on the date of dispatch and delivery of the Notice of Arbitrator to Respondent by express courier service, as follows: *«… i) A courier receipt from Instapack dated July 31, 2019, evidencing delivery of the Notice of Arbitration and accompanying documents from the offices of Cremades y Asociados to the Embassy of Malaysia in Madrid; ii) A courier receipt from DHL dated August 1, 2019, evidencing pick-up of the Notice of Arbitration and accompanying documents from the offices of Cremades y Asociados on July 30, 2019 at 6:38pm, for delivery to the office of the Prime Minister of Malaysia in Kuala Lumpur; iii) A courier receipt from DHL dated August 1, 2019, evidencing pick-up of the Notice of Arbitration and accompanying documents from the offices of Cremades y Asociados on July 30, 2019 at 6:38pm, for delivery to the office of the Attorney-General of Malaysia in Kuala Lumpur; iv) A courier receipt from DHL dated August 2, 2019, evidencing pick-up of the Notice of Arbitration and accompanying documents from the offices of Cremades y Asociados on July 30, 2019 at 6:38pm, for delivery to the office of the Minister of Foreign Affairs of Malaysia in Kuala Lumpur…».*

[49] Procedural Order 1, ¶ 32. Exhibit C 54.

53. On October 2, 2019, Claimants submitted an email to the Arbitrator, with copy to Respondent, enclosing a copy of the correspondence exchanged with Respondent between July 31, 2019 and September 19, 2019. This email and its attachments were incorporated into the proceedings.[50]

54. On October 3, 2019, Respondent submitted an email to the Arbitrator, with copy to Claimants, enclosing a copy of its letter dated September 19, 2019, addressed to Claimants.[51] This email and its attachments were incorporated into the proceedings. Respondent submitted further correspondence to the Arbitrator on October 14, 2019, with copy to Claimants.[52]

55. Respondent –through its Counsel, Dr. David Arias and Mr. Luis Capiel- submitted an electronic mail addressed to the Arbitrator –with copy to Claimants- on October 25, 2019, at 20.17 hours, after the Preparatory Conference, informing of the appointment of Dr. Arias and Mr. Capiel as its Counsel in this arbitration and seeking the stay of the proceedings for one month from the date they would get access to the filed documents, for them to become familiarised with the case.[53]

Respondent's Counsel admitted in its argument that its client submitted the Notice of Arbitration –apparently without exhibits- and Procedural Orders 1 to 5, rendered throughout the proceedings. Respondent's Counsel sustained the stay sought, as it apparently failed to receive from its client a full copy of the documents submitted. Respondent's Counsel considered the information provided by its client very limited and therefore, insufficient to familiarize themselves with its content. Respondent's Counsel did not specify the date on which this documentation was received from its client, nor whether the Respondent was aware of having been convened for the preliminary hearing and the eventual consequences of its inaction.

Claimants sent an electronic mail addressed to the Arbitrator –with copy to Respondent- on October 26, 2019, objecting to the suspension sought by Respondent and proposing to move forward with the arbitration as decided in the Preparatory Conference. Respondent rebutted Claimants' arguments on October 26, 2019, through an electronic mail sent to the Arbitrator, with copy to Claimants. In its email of October 26, 2019, Respondent's Counsel referred to ¶76 of the Notice of Arbitration; an explicit and detailed quote that revealed enough command of its contents. The Arbitrator acknowledged receipt of Parties' electronic mails and attachments.[54]

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50 Exhibit C 54.

51 Exhibits C 52 and C 54.

52 Exhibits C 53 and C 54.

53 Exhibit C 54.

54 Preliminary Award, Heading IV.4.i *supra*. Exhibit C 54.

56. The Parties showed a constructive approach and spirit of cooperation in their correspondence exchanged on October 27, 2019, although it was short lived.

On October 27, 2019, Claimants submitted a further email to the Arbitrator, with copy to Respondent, clarifying its previous position of October 26, 2019. Claimants' position was portrayed as follows:

> *«…Considering, on one hand, the balance of the Claimants' legitimate expectations for speedy resolution and, on the other, our desire to extend professional courtesy to Messrs. Arias and Capiel, we now propose the following revised schedule for consideration of the jurisdictional and choice of law points:*
>
> *(i) Respondent's objections to jurisdiction and any observations on applicable law: Monday 16 December 2019 (46 days from HSF's intervention)*
>
> *(ii) Claimants' response to objections to jurisdiction and any observations on applicable law: Monday 27 January 2020 (46 days)*
>
> *(iii) Sole Arbitrator's decision on jurisdiction and (if applicable) law: Monday 27 March 2020 (60 days)…».*

Respondent answered this Claimants' electronic mail on October 27, 2019, addressed to the Arbitrator, with copy to Claimants. Respondent seemed to accept the Claimants' proposal as follows:

> *«…We further submit that it would be conducive of an efficient and amicable conduct of the proceedings if, before seeking the Sole Arbitrator's decision, the parties were to confer to try to reach agreements on the procedural calendar and other procedural issues, as envisaged in the Sole Arbitrator's Decision G in Procedural Order No. 2. Depending on the results of these conversations, it might also be helpful to reconvene an in-person conference…»*

and, on this basis, expressed its disposition *«…to share with opposing counsel and/or to submit to the Sole Arbitrator the Respondent's views on the procedural calendar and other procedural matters once we have the opportunity to familiarize ourselves with the case while proceedings are stayed…».*

Furthermore, the express admission of the existence and knowledge of Procedural Orders 1 to 5 contained in the Respondent's mail of October 27, 2019 and of its remission by the Respondent for their consideration by its Counsel confirmed that these decisions were properly served on Respondent, which was aware of its content and scope and, as previously stated, voluntarily decided to neither participate in the Preparatory Conference, nor intervene therein directly or by proxy.[55]

[55] Exhibit C 54.

57. On October 27, 2019, the Arbitrator acknowledged receipt of the Parties' exchange of pleadings and their respective positions and instructed the Parties to wait for the Procedural Order to be rendered. Parties acknowledged receipt of Arbitrator's directions and Respondent reiterated its position on the stay sought, as a precondition to consider other procedural issues raised. The Arbitrator render Procedural Order 7 on November 7, 2019 containing the following decision:

> *«…The Arbitrator decides and directs:*
>
> *A. To incorporate into the proceedings the pleadings exchanged by the Parties between October 25 and October 27, 2019.*
>
> *B. To invite Respondent to provide a letter of representation in favour of its Counsel in this arbitration by November 12, 2019.*
>
> *C. To consider the preparatory conference validly held on October 25, 2019.*
>
> *D. To incorporate into the proceedings the DVD of the preparatory conference and to invite the Parties to download it by logging in the following ftp site…*
>
> *E. To invite the Parties to confer directly in order to reach an agreement on the acceptance of the procedural issues considered during the preparatory conference and inform the Arbitrator of the agreement reached, explaining their points of agreement or disagreement, on November 18, 2019, by 18.00 hours.*
>
> *F. To invite the Parties to confer directly in order to reach an agreement on the procedural calendar proposed by Claimants during the preparatory conference and to be followed in the present proceedings and inform the Arbitrator of the agreement reached, explaining their points of agreement or disagreement, on November 18, 2019, by 18.00 hours.*
>
> *G. To invite the Parties to confer directly in order to reach an agreement on the regularisation of the financial situation of the arbitration and inform the Arbitrator of the agreement reached, explaining their points of agreement or disagreement, on November 18, 2019, by 18.00 hours.*
>
> *H. To declare the proceedings in abeyance until November 19, 2019, pending the outcome of the Parties' conversations…».*

58. On November 18, 2019, Claimants submitted their comments and suggestions on the Procedural Calendar. Claimants explained to the Arbitrator that the reasons for not being engaged in conversations with Respondent, as directed in Procedural Order 7, basically consisted in that *«…the Respondent has not provided a letter of representation to Hebert Smith Freehills (HSF) as of this writing…neither have we heard from Malaysia, independently from HSF, concerning the issues set forth in Procedural Order 7…».* Claimants requested that *«…any other outside counsel be permitted to request any delay or pause in future proceedings, unless the Attorney-General have previously written to us and the Sole Arbitrator that he is instructing such counsel to appear on Malaysia's behalf…».*

59. The abeyance of the proceedings was lifted as of November 19, 2019[56] and Respondent invited (i) to explain its failure in instructing its Counsel, Dr. Arias and Mr. Capiel, to appear in this arbitration, (ii) to confirm in writing the procedural activities of Dr. Arias and Mr. Capiel in this arbitration from October 25, 2019 until November 18, 2019, (iii) to confirm in writing the names of its Counsel and other representatives involved in this arbitration and that Respondent had duly authorized its Counsel to act and express itself in this arbitration on its behalf and (iv) to submit its position regarding Claimants' comments and suggestions on the Procedural Calendar. Arbitrator clearly stated that any justifications submitted after the time limit elapsed would not be considered and the Arbitrator would proceed with arbitration.

Respondent voluntarily decided to neither provide an acceptable excuse or attend the invitation contained therein, nor to provide an acceptable excuse or address the request contained therein.

Therefore, the Arbitrator rendered Procedural Order 9, where he expressed his view that due process and equality of arms were duly respected in the case at hand. Respondent has received proper notice of the appointment of the Arbitrator, of the Notice of Arbitration and of any subsequent steps in the arbitration, has had a fair opportunity to present its case and has been informed of the consequences of its non-participation.

The Arbitrator decided to continue the arbitration proceedings in accordance with the Procedural Calendar, as all procedural steps and efforts in the present proceedings are recorded in writing.

60. Respondent was invited to file its Memorial on Jurisdiction and Applicable Law by January 10, 202.[57] Respondent voluntarily failed to submit it within the period provided in the Procedural Calendar, nor did it provide an acceptable excuse.

It is the Arbitrator's view that Respondent received proper notice of the appointment of the Arbitrator, of the Notice of Arbitration and of any subsequent steps in the arbitration, including Procedural Order 9 and the Procedural Calendar.[58] Respondent has had a fair opportunity to present its case and has been informed of the consequences of its non-participation. All procedural steps and efforts in the present proceedings were recorded in

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[56] Procedural Order 8.

[57] Procedural Order 9.

[58] The express admission of the existence and knowledge of Procedural Orders 1 to 5 contained in the Respondent's mail of October 27, 2019 and of its remission by the Respondent for their consideration by its Counsel confirmed that these decisions were properly served on Respondent, which was aware of its content and scope and, as previously stated, voluntarily decided to neither participate in the Preparatory Conference, nor to intervene therein directly or by proxy. Exhibit C 54.

writing.[59] The Arbitrator decided to continue proceedings as scheduled in the Procedural Calendar, based on ¶ 32 of Procedural Order 1.[60]

61. Claimants filed their Counter – Memorial on Jurisdiction (henceforth, the Counter – Memorial on Jurisdiction) on February 10, 2020, with copy to Respondent.

The Counter – Memorial on Jurisdiction included Exhibits numbered C 52 to C 54, Legal Authorities numbered CL 40 to CL 52 and Expert Report of Professor Dr. Eckart Brödermann, along with its Exhibits, addressing the issue of applicable substantive law and dated December 19, 2019 (henceforth, the Brödermann Report). Claimants invited both Respondent and the Arbitrator to download the Counter – Memorial on Jurisdiction and the Brödermann Report by logging in an identified ftp site.[61]

The Arbitrator acknowledged receipt of Counter – Memorial on Jurisdiction and its Exhibits on February 11, 2020 –a hard copy of which was subsequently received by Arbitrator and Respondent- [62] and were incorporated into the proceedings, which continued as scheduled.

ii. The Hearing on Jurisdiction

62. The Arbitrator summoned the Parties for the scheduled hearing on jurisdiction (henceforth, the Hearing on Jurisdiction), [63] which took place on February 21, 2020, between 09.00 hours and 12.00 hours, at Hotel Intercontinental Madrid, Meeting Room Toledo, Paseo de la Castellana 49, 28046 Madrid.

63. The Hearing on Jurisdiction was devoted to the issue of jurisdiction and applicable substantive law of the present arbitration. Claimants were represented by their

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[59] The Arbitrator rendered Procedural Order 11 on January 14, 2020. The Parties were served on the same day. Claimants acknowledged receipt of Procedural Order 11 on January 14, 2020, at 20:47 hours, Madrid Time.

[60] Procedural Order 1, ¶ 32.

[61] Procedural Order 1, ¶ 27.

[62] Procedural Order 1, ¶ 27.

[63] Procedural Calendar. The Arbitrator sent an email to the Parties on February 18, 2020. Claimants acknowledged receipt of same on February 18, 2020, at 19:01 hours, Madrid Time. Respondent was served by email on February 28, 2020. The Prime Minister of Malaysia received this email on February 28, 2020, at 18:58 hours (Madrid Time) at his email address info@jpm.gov.my. The Embassy of Malaysia in Madrid received this email on February 28, 2020, at 18:58 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on February 18, 2020, at 18:58 hours (Madrid Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Counsel. Respondent voluntarily neither participated in the hearing on jurisdiction, nor was it represented therein, nor did it provide an acceptable excuse. During the Hearing on Jurisdiction, the Arbitrator invited Claimants to provide their opinion on the case *National Oil Company (NIOC) v. Israel*. The Claimants complied with this invitation and provided their comments by February 24, 2020, with Exhibits CL 53 to CL 56. On February 26, 2020, Professor Dr. Eckart Brödermann issued an addendum to the Brödermann Report, along with its Exhibits (henceforth, the Brödermann Report Addendum).

Claimants sent copy of their opinion and their attachments directly to Respondent and were incorporated into the proceedings.[64] The Hearing on Jurisdiction was recorded on DVD, incorporated into the proceedings. The Parties were invited to download it by logging in an identified ftp site and the proceedings continued.[65]

The Arbitrator noted that Respondent was properly served with both the Counter – Memorial on Jurisdiction and its accompanying exhibits and both the Brödermann Report and the Brödermann Report Addendum and the summons to the hearing on jurisdiction. Respondent was aware of its content, scope and location. Respondent was given an equal, fair and reasonable opportunity to present its case to the Arbitrator throughout this arbitration, including its position on the issue of jurisdiction and on the applicable substantive law. Respondent failed and/or voluntarily refused to avail itself of the opportunity to do so and made no submission nor otherwise participated in the hearing on jurisdiction, nor did it intervene therein directly or by proxy, nor did it provide an acceptable excuse.

The Arbitrator warned Respondent that if it failed to avail itself of the opportunity to present its case on jurisdiction and applicable substantive law to the Arbitrator – notwithstanding having been given such opportunity to do so- would proceed to determine its jurisdiction and the substantive law applicable to the matter at hand and issue the Preliminary Award, as determined in the Procedural Calendar. The Arbitrator granted Respondent a final chance to make a submission in connection with the issue of jurisdiction and applicable substantive law (if any) by no later than 20.00 hours on March 23, 2020. The Arbitrator advised Respondent that the Preliminary Award (which may include an award of costs) is binding and legally enforceable against Respondent, notwithstanding its non-participation in this arbitration. Respondent voluntarily decided to neither provide an acceptable excuse, nor attend the invitation contained therein.

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64 The Arbitrator rendered Procedural Order 14 on March 13, 2020. The Parties were served on the same day. Claimants acknowledged receipt of same on March 13, 2020, at 15:56 hours, Madrid Time. Respondent was served by email on March 13, 2020. The Prime Minister of Malaysia received this email on March 13, 2020, at 14:24 hours (Madrid Time) at its email address info@jpm.gov.my. The Embassy of Malaysia in Madrid received this email on March 13, 2020, at 14:24 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on March 13, 2020, at 14:24 hours (Madrid Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

65 Procedural Order 14.

Parties had sufficient opportunity to defend their respective positions and to examine the result of the evidence taken in this arbitration.[66]

64. Claimants informed the Arbitrator on their understanding that a post-hearing brief on jurisdiction issues was unnecessary and therefore no such brief was submitted, as Claimants reiterated the contents of the briefs on the issues. At the end of the Hearing on Jurisdiction, the Arbitrator invited the Parties to file submissions on how costs should be allocated in this matter, and the actual costs incurred.[67]

5. *Costs Submissions on Jurisdiction*

65. On February 28, 2020, Claimants made their submissions on costs. Respondent voluntarily decided to neither provide an acceptable excuse or attend the invitation contained therein, nor provide an acceptable excuse or address the request contained therein. The Parties' respective costs submissions are discussed further in Section VIII of the Preliminary Award.

6. *The Closing of the Proceedings on Jurisdiction*

66. The Arbitrator declared the proceedings closed on March 25, 2020 with respect to the matters to be decided in the Preliminary Award.[68] Respondent is deemed to have received all notices and documents in connection with the Arbitration, sent to its official address.[69] The proceedings should continue, and the Preliminary Award must be rendered, as it is the Arbitrator's view that Respondent voluntarily failed to take part in the proceedings without having a sufficient cause for its absence.[70]

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66 Decisions of the Spanish Constitutional Court, 15/01, of January 29, 2001 and 1/00, of January 17, 2000.

67 Procedural Order 13.

68 The Parties were served with Procedural Order 15. The Arbitrator rendered Procedural Order 15 on March 25, 2020. The Parties were served on the same day. Claimants acknowledged receipt of same on March 25, 2020, at 22:14 hours, Madrid Time. Respondent was served by email on March 25, 2020. The Prime Minister of Malaysia received this email on March 25, 2020, at 21:31 hours (Madrid Time) at its email address info@jpm.gov.my. The Embassy of Malaysia in Madrid received this email on March 25, 2020, at 21:31 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on March 25, 2020, at 21:32 hours (Madrid Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

69 Exhibit C 54.

70 Spanish Arbitration Act, Section 31; UNCITRAL Model Law, Article 25 b.

V. THE FACTUAL BACKGROUND ON THE ISSUE OF JURISDICTION AND DETERMINATION OF APPLICABLE SUBSTANTIVE LAW

67. In this Section, the Arbitrator summarizes the facts giving rise to the jurisdictional contention raised by Respondent and the request for determination of the applicable substantive law sought by Claimants, from the evidence on these issues gathered throughout this jurisdictional phase of the arbitration, as presented by the Parties to the Arbitrator. The relevant documents were contained both in the Exhibits for Claimants and, eventually, in those for Respondent; reference is made to both where necessary. Additional facts will be discussed in the Arbitrator's analysis of the disputed issues, to the extent relevant and useful.

68. Sultan Mohammed Jamalul Alam and Messrs. Alfred Dent and Baron Gustavus de Overbeck signed the Deed on January 4, 1878, which contained the Arbitration Agreement as the stipulated mechanism for the settlement of their differences. The Arbitration Agreement provided that any dispute arisen between them should *«…be brought for consideration or judgment of Their Majesties' Consul-General in Brunei…».* Malaysia became the successor in title of the Sultan Mohammed Jamalul Alam and took over his rights in the Deed.[71]

69. On April 28, 2017, Claimants sought to negotiate their differences with Malaysia under the Deed,[72] specially, terms of a more equitable and appropriate arrangement between the Parties. Claimants reserved their rights to invoke the Arbitration Agreement in case such negotiations proved unsuccessful as follows:

> *«…we are confident that an arbitral tribunal duly appointed to adjudicate this dispute will perfectly well understand the need to adjust the terms of the Agreement, according to the applicable legal and equitable principles. Those principles are well-established and indisputable…».*

Malaysia failed to provide any answer on this proposal, nor to challenge the validity of the Arbitration Agreement.

70. On October 16, 2017, Claimants wrote a letter to Sir Ian McLeod, KCMG, the Legal Advisor to the United Kingdom Foreign & Commonwealth Office,[73] exposing the existence of an ongoing difference under the Deed with Malaysia and seeking from the British Government the appointment of the *«…appropriate person or persons to fulfil the Consul-General's role in determining that dispute…»* within the following thirty (30) days

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[71] Exhibits C 12, 13, 14 and 52.

[72] Exhibit C 35.

[73] Exhibit C 50.

as from the date of the letter. Mr. McLeod, on behalf of the British Government, declined the appointment sought on the basis that *«…the Colony of North Borneo ceased to exist in 1963. In these circumstances, we have concluded that it would not be appropriate for the Government to involve itself in the dispute in the manner that you propose…»* and suggested Claimants to deal with *«…their claim directly with the Government of Malaysia…».*

71. Claimants served the Notice of Intention to Commence Arbitration at the Embassy of Malaysia in Madrid (Spain) on November 2, 2017, pursuant to the Arbitration Agreement, followed by a telephone conversation held on November 3, 2017. Malaysia did not answer the Notice of Intention to Commence Arbitration, nor did it express any willingness to cooperate in the settlement of the dispute on the Deed. Claimants reiterated their position in a letter from its Counsel, Dr. Cremades, dated January 9, 2018, where Claimants warned Respondent of their interpretation of its silence:[74]

> *«…Malaysia has no intention to comply with its agreement to arbitrate, which leaves them with no other option but to seek judicial intervention to appoint an arbitral tribunal…».*

72. Malaysia failed to provide any response to Claimants' letter of January 8, 2019 and on February 1, 2018, Claimants filed the Application before the Superior Court of Justice of Madrid.[75] On May 8, 2018, the Superior Court of Justice examined its competence in an Order dated May 8, 2018 and declared that its Civil and Criminal Chamber had jurisdiction over the matter.[76]

73. The Civil and Criminal Chamber of the Superior Court of Justice admitted the Application on May 21, 2018[77] and served and summoned Respondent on June 8, 2018 for it to appear in the proceedings.[78] Respondent voluntarily failed to take part in those proceedings, nor did it provide a sufficient cause for its absence. The Civil and Criminal Chamber of the Superior Court of Justice of Madrid declared Malaysia to be in default on October 29, 2018, when it noted Malaysia's failure to timely respond to the Application, that is to say, within ten days of service, plus two additional months for being a Sovereign State.[79]

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74 Exhibit C 38.

75 Exhibits C 39 and C 54.

76 ATSJ M 182/2018 - ECLI: ES:TSJM:2018:182A. ID CENDOJ: 28079310012018200021.

77 Exhibits C 40 and C 54.

78 Exhibits C 41 and C 54.

79 Exhibits C 43 and C 54.

74. The Judgment of March 29, 2019 appointed the Arbitrator, using the powers under Article 15.6 of the SAA.[80]

75. Claimants filed the Notice of Arbitration on July 30, 2019.

76. In its letter of September 19, 2019,[81] Respondent challenged the jurisdiction of the Arbitrator, as, in its opinion, it had been wrongly brought before the Spanish Courts and Malaysia does not recognise such submission. Further, in its letter dated October 14, 2019,[82] Respondent challenged the appointment of the Arbitrator by the Judgement of March 29, 2019, as in *«…1939, the heirs and successors to the 1878 Agreement had submitted to the jurisdiction of the High Court of the state of North Borneo to resolve a matter under contention thereunder…»* and announced its intention to reject any award rendered in this arbitration.

77. Respondent filed an anti-suit injunction before the Courts of Malaysia on December 3, 2019 and submitted an electronic copy of same to the Arbitrator, who rejected service on December 4, 2019. It included a copy of the legal opinion issued on December 1, 2019 by *Uria & Menendez* to Respondent *«…in connection with procedural matters under Spanish law in the claim filed in Spain by the self-proclaimed successors-in-title to the sultan of Sulu…against the Government of Malaysia…»* (henceforth, the U&M Legal Opinion).[83]

The Arbitrator forwarded a copy to Claimants for their comments by December 6, 2019, which, briefly explained, were as follows: (i) the Judgment of March 29, 2019 was in accordance with the Arbitration Agreement, the SAA and the civil procedural rules applicable; (ii) Malaysia lacks sovereign immunity in this arbitration; (iii) the Arbitrator, bound by the provisions of the SAA, is empowered to rule on its jurisdiction; (iv) anti suit injunctions are inoperative and routinely disregarded by arbitrators; and (v) Malaysia acknowledged the ongoing arbitration proceedings, so that the application for the anti–suit injunction should be characterised as an expression of Respondent's bad faith in these proceedings.

Further *ex parte* communications originating from Respondent to the Arbitrator took place on December 20, 2019, on January 2, 2020, on January 9, 2020 and on January 30, 2020. The Arbitrator immediately informed Claimants of their existence and contents and

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80 Exhibits C 44 and C 54.

81 Exhibits C 52 and C 54.

82 Exhibits C 53 and C 54.

83 Exhibit C 54.

invited such Claimants to provide comments. Claimants restated their position, as already pleaded on December 6, 2020.

The Arbitrator rejected all these *ex parte* communications, as their content was intimidatory and coercive and their terms intolerable under any circumstance. The Arbitrator requested proper explanations from Respondent, as these *ex parte* communications breached ¶¶ 68 and 69 of Procedural Order 1. Malaysia failed to provide any explanation.

78. Claimants filed the Counter – Memorial on Jurisdiction on February 10, 2020, where they contended the Respondent's jurisdictional challenge and requested the determination of the applicable substantive law in the matter at hand.

79. Respondent is deemed to have received all notices and documents in connection with the Arbitration, sent to its official address.[84] The proceedings should continue, and the Preliminary Award must be rendered, as it is the Arbitrator's view that Respondent voluntarily failed to take part in the arbitration proceedings –including these incidental proceedings- without having a sufficient cause for its absence.[85]

VI. JURISDICTIONAL OBJECTIONS, PARTIES' POSITIONS AND RELIEF REQUESTED

80. In the Notice of Arbitration, Claimants' position in this arbitration is formally pleaded as follows:[86]

> *«…The Claimants respectfully request that the Sole Arbitrator issue an Award in the following terms:*
>
> *(i) Declaring that the Respondent has breached the 1878 Lease Agreement;*
>
> *(ii) Ordering (a) the Respondent to pay the Claimants damages that more fairly and accurately reflect the value of the 1878 Lease Agreement from the year of Malaysia's breach (2013) through the date of the award; and (b) the rebalancing of the 1878 Lease Agreement for prospective revenues;*
>
> *(iii) In the alternative, if the Sole Arbitrator chooses not to rebalance the 1878 Lease Agreement, an award ordering (a) the termination thereof and (b) the Respondent to pay damages to the Claimants;*

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84 Exhibit C 54.

85 SAA, Section 31; UNCITRAL Model Law, Article 25 b.

86 Notice of Arbitration, Heading VII, ¶ 146.

> *(iv) Ordering the Respondent to pay pre-award and post-award interest on any and all damages awarded to the Claimants;*
>
> *(v) Ordering the Respondent to pay all of the Claimants' costs of this arbitration and pay post-award interest on these amounts; and*
>
> *(vi) Ordering any and all other relief that the Sole Arbitrator deems appropriate…».*

81. Respondent's jurisdictional objections in this arbitration are contained in its letters of September 19, 2019[87] and October 14, 2019[88] and the U&M Legal Opinion.[89]

In its letter dated September 19, 2019, Respondent's position on the issue of jurisdiction is pleaded as follows:

> *«…2. It is vital at the outset to appreciate the legal basis of your clients' claim against the Government of Malaysia, which, we contend, has been wrongly brought within the jurisdiction of Spain, and which Malaysia nether recognises nor submits to. Accordingly, nothing in this letter should be construed as Malaysia submitting to the jurisdiction of the laws of Spain, whether under its national court system, arbitral jurisdiction or otherwise…*
>
> *4… Any dispute arising between the parties* «should be submitted to Her Britannic Majesty's Consul-General for Borneo».
>
> *5. On the same day the Grant was issued (22nd January 1878) the Sultan of Sulu also issued a Commission appointing Baron de Overbeck (the chief and only authorized representative of the Company in Borneo) to be the Datu Bandahara and Rajah of Sandakan. Upon the death or retirement from office of Baron de Overbeck, the British Company was empowered to appoint others to the office of Datu Bandahara and Rajah of Sandakan.*
>
> *6. Over time, obviously the contracting parties changed. Upon the establishment of Malaysia on 16th September 1963, Malaysia became the successor-in-title to the British Company viz. the British North Borneo Company under the 1878 Grant and Confirmation by Sultan of Sulu of Cession of Certain lslands dated 22nd April 1903 (1903 Confirmation of Cession). From 1963 to 2012, that is, for an unbroken and continuous period of 49 years, Malaysia had been, under the 1878 Grant, paying your clients (themselves the successors-in-title to the Sultan of Sulu) the annual sum …*
>
> *7. From the beginning, Malaysia paid to your clients the agreed annual sum (Cession Monies)…the payment of Cession Monies had been made to the rightful heirs of the Sulu Sultanate, consistent with the judgment delivered Chief Justice C.F.C Macaskie in 18th December 1939 in the High Court of the State of North Borneo in the case* Dayang – Dyang Haji Piandao Kiram of Jolo, Philippines & 8 others v. The Government of North Borneo & Others [Civil Suit No 169/39]. *That judgment declared that the Plaintiffs are the rightful heirs with*

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87 Exhibits C 52 and C 54.

88 Exhibits C 53 and C 54.

89 Exhibit C 54.

the right over the Cessions Monies. The grounds of judgment are attached hereto as Annexure A...[90]

12. We conclude by reiterating that this letter…should not be construed as submitting to the jurisdiction of Spain…».

In its letter dated October 14, 2019, Respondent's position on the issue of jurisdiction is further pleaded as follows:

«…On behalf of the Government of Malaysia, I place on record that the entire process of this arbitration is challenged, including the appointment of the Tribunal and the selection of forum for resolution of the purported dispute.

In 1939, the heirs and successors to the 1878 Agreement had submitted to the jurisdiction of the High Court of the state of North Borneo to resolve a matter under contention thereunder.

The Government of Malaysia shall accordingly, take all steps necessary to preserve and protect the interests of Malaysia.

All proceedings in this arbitration and any award that may be rendered shall not be accepted as binding or enforceable against Malaysia…».

The U&M Legal Opinion contained arguments on jurisdiction, pleaded as follows:

«…The case filed in Spain by the Respondents is based on an apparent arbitration provision (the Disputed Provision) contained in the agreement between the Sultan Jamalul Alam Kiram of the Sulu Sultanate and Gustav von Overbeck and Alfred Dent, acting as representatives of the British Borneo Company (the Cession Agreement)…

As is clearly established in both versions, neither translation contains any reference to arbitration*…there are no references whatsoever to the notion of arbitration, awards or any other concepts that even vaguely relates to arbitration as a means of settling a dispute…*

Furthermore, even in the hypothetical case that the Disputed Provision were to be deemed a proper arbitration clause, this provision could not be enforced among the parties as it submits any disputes to «…Her Britannic Majesty's Consul General For Borneo…»*, an institution that, according to the information we have been provided with, no longer exists…*

In our view, it is clear that Malaysia has not waived its right to claim sovereign immunity in Spain and, more specifically, in the proceedings before the SCJM [Superior Court of Justice of Madrid] *to appoint an arbitrator and in the arbitration brought about in Spain by the supposed heirs of the Sultan of Sulú.*

The fact that Malaysia has not appeared in the proceedings before the SCJM cannot be construed as a waiver of sovereign immunity because article 7 SSIL[91] *expressly prohibits such a negative inference.*

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[90] Exhibit C 20.

[91] Organic Law 16/2015 of October 27 on the Privileges and Immunities of Foreign States, International Organizations seated or with an office in Spain and Conferences and International Meetings held in Spain.

In addition, in its communications with Sole Arbitrator, Dr. Gonzalo Stampa, Malaysia has always reserved its right to challenge the jurisdiction of the arbitrator (which we understand would be based on, inter alia*, sovereign immunity).*

Additionally, in the absence of an implicit submission to the Courts of Spain which cannot be derived from the Disputed Provision or from the Cession Agreement as neither of these documents mention Spain in any way, the SCJM should have abstained from ruling on a case against Malaysia, because the Courts of Spain have no international competence to hear the case…

…In this case, the Cession Agreement does not contain an arbitration clause…

Consequently, Malaysia is fully entitled to invoke its sovereign immunity before the SCJM because it does not dispute the validity, interpretation or application of an arbitration clause, but rather its very existence. Therefore, article 16 of the SSIL…».

82. In the Counter – Memorial on Jurisdiction, the Claimants' position on the issue of jurisdiction is formally pleaded as follows:[92]

«…The Claimants respectfully request that the Sole Arbitrator issue an Award in the following terms:

(i) Dismissing all of the Respondent's objections to the Sole Arbitrator's jurisdiction as put forth in any form or forum;

(ii) Upholding his jurisdiction over the present dispute;

(iii) Determining that the applicable substantive law in this arbitration to be:

a. The UNIDROIT Principles or, alternatively,

b. The general principles of international law, further determining that the UNIDROIT Principles are a reflection of general principles of international law and thus can be considered applicable substantive law in this arbitration or, alternatively,

c. The general principles of international law;

(iv) Ordering the Respondent to bear all costs of this arbitration proceeding, including the overall costs incurred by the Claimants in defending against the Respondent's objections to jurisdiction in an amount ot be determined as a later stage of the present proceedings; and

(v) Ordering any and all other relief that the Sole Arbitrator deems appropriate…».

83. During the Hearing on Jurisdiction, the Arbitrator invited Claimants to provide their views on the opportuneness of filing a post-hearing brief on the issue of jurisdiction. Claimants informed the Arbitrator that it was unnecessary, given the voluntary absence

[92] Counter – Memorial on Jurisdiction, Heading VI, ¶171.

of the Respondent and the detailed explanation of the issue contained in the Parties' pleadings on the issue incorporated in the proceedings.

84. The Arbitrator has had the benefit of some written submissions from Respondent and of extensive written and oral submissions from the Claimants, both in relation to the issues presented. The Arbitrator has carefully considered all these submissions and refers to their central point in the next Heading.

VII. THE ARBITRATOR'S ANALYSIS AND FINDINGS

85. Respondent had voluntarily chosen not to be involved into the present procedure from the beginning of the case, thus showing its reluctance to settle disputes under the Deed by resorting to the Arbitration Agreement.

86. Respondent's non-appearance will not be treated as an automatic admission of Claimants' assertions and relief sought on the issues of jurisdiction and determination of applicable substantive law to this dispute. Before doing so, the Arbitrator needs to satisfy himself that the Claimants' arguments are well founded in fact and law and Claimants – as appearing party- are entitled to obtain the relief they sought in these incidental proceedings.

87. The establishment of rules on fact-finding seems to be advisable under these circumstances. The Arbitrator will assess Parties' arguments for him to ascertain that he has jurisdiction to consider and rule upon Respondent's jurisdictional challenge (*Kompetenz – Kompetenz Principle*).[93] Depending on the outcome of this analysis, he will then determine the applicable substantive law in this specific case (*lex causæ*). It is the Arbitrator's view that, acting this way, the procedure will balance the interests of the Parties, as Respondent's interests and right to relief –as non-appearing party- should be protected and those of Claimants shall not be impaired by Respondent's non-appearance.

[93] BGH, 03.03.1955 - II ZR 323/53.

1. *On the Appointment of the Arbitrator and the Selection of Forum for Resolution of the Dispute*

i. The Parties' Positions

88. Respondent disputed the jurisdiction of the Superior Court of Justice of Madrid for the rendering of the Judgment of March 29, 2019 based on a three-fold argument: (i) the absence of evidence of its express or tacit submission to the jurisdiction of Spanish Courts and legislation for the determination of the Application; (ii) the improper service of the Application; and (iii) that Malaysia, as a Sovereign State, had not waived its right to claim sovereign immunity in Spain in the Application. Respondent concluded by denying that the Superior Court of Justice of Madrid was a court competent to determine on any issue related to the Arbitration Agreement or the Application, including the appointment of the Arbitrator, *«…because the courts of Spain have no international competence to hear the case…»*.[94]

89. Claimants denied that the review of both the Application and the Judgment of March 29, 2019 fell within the scope of the Arbitrator's jurisdiction. Claimants maintained that Malaysia had purportedly decided not to intervene in the court proceedings before the Superior Court of Justice of Madrid, despite having been validly served with the Application and being aware of its existence. Claimants also considered that Malaysia was legally impeded to plea any immunity whatsoever before the Superior Court of Justice of Madrid in relation with Application, as, in their opinion, the validity of the Arbitration Agreement overrides the applicable immunity of Malaysia as a Sovereign State pursuant to Article 16 of Organic Law 16/2015 of October 27 on the Privileges and Immunities of Foreign States, International Organizations Seated or with an Office in Spain and Conferences and International Meetings held in Spain.[95]

ii. The Arbitrator's Analysis and Findings

90. The Respondent implicitly challenged the jurisdiction of the Arbitrator by way of disputing here –which would amount to an inherent request for appeal- his appointment by the Judgement of March 29, 2019, rendered by the Civil and Criminal Chamber of the Superior Court of Justice of Madrid as a consequence of the Application. Respondent's main argument is the alleged absence of evidence of its express or tacit submission to the jurisdiction of Spanish Courts and legislation.

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94 Exhibits C 52, C 53 and C 54, p.4.

95 Counter – Memorial on Jurisdiction, ¶¶78 –116.

91. Respondent's objection cannot be upheld, as it falls outside the boundaries of the Arbitrator's jurisdiction. The Judgment of March 29, 2019 is final and binding by reason of it being outside the Arbitrator's responsibility.

92. The Spanish court system exists and is maintained by the State to provide a dispute settlement service for the parties, based on the principle of unity of jurisdiction and governed by the Organic Law 6/1985 on the Judiciary[96] –which regulates operations of the courts- and the Judicial Distribution and Boundaries Act[97], which governs the overall structure of the judicial system and defines the system of courts with the power to hear and decide most judicial proceedings in most areas of law. Judicial review is the power vested in the courts to pass upon the actions or decisions of, amongst others, lower courts.

93. Arbitration is not a national court procedure; it is not part of the State system of courts. It is a consensual procedure based on the agreement of the parties, so when the parties decide to submit to arbitration, they remove their relationships and disputes from the jurisdiction of national courts (*positive effect of the arbitration agreement*). For that reason, arbitrators lack jurisdiction to review, or to vacate judicial decisions, because judicial decision-making is uniquely public in nature and exclusively subject to judicial review by competent courts. This principle is also applicable under the SAA.[98]

94. The main decisions of the judicial proceedings relating to the Application are incorporated into the present proceedings.[99]

95. The Civil and Criminal Chamber of the Superior Court of Justice admitted the Application on May 21, 2018[100] and served and summoned Respondent on June 8, 2018 for it to appear in the judicial proceedings.[101]

Those judicial proceedings –and not this arbitration- would have been considered the proper stage for Malaysia to raise any procedural objections it might have had –such as that expressed in this arbitration under Exhibits C 52 to C 54 (i.e., the alleged improper

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96 Which, among other matters, governs the scope and limits of jurisdiction, territorial organisation, composition and powers of judicial bodies, the governing bodies of the judiciary, judicial careers, independence and responsibility, rules on the organisational structure and functioning of the Justice Administration, and the office of the Public Prosecutor.

97 Law 38/1998, of December 28, on Judicial Distribution and Boundaries Act.

98 Order of the Spanish Constitutional Court of December 13, 2005.

99 Exhibits C 39 to C 47.

100 Exhibits C 40 and C 54.

101 Exhibits C 41 and C 54.

service of the Application and the alleged waiver of Malaysia's right to claim sovereign immunity)- and to correct any procedural defect or overcome any obstacle which, in its opinion, might have prevented the Civil and Criminal Chamber of the Superior Court of Justice of Madrid from ruling decisions such as those contained in the Order of May 8, 2018 and in the Judgment of March 29, 2019.

Instead, Respondent voluntarily failed to take part in the judicial proceedings related to the Application, nor did it furnish a sufficient cause for its absence. On October 29, 2018, the Civil and Criminal Chamber of the Superior Court of Justice of Madrid decided to declare Malaysia to be in default,[102] when it noted Malaysia's failure to timely respond to the Application. Such decision is final and binding pursuant to Article 15.7 of the SAA.[103] The Arbitrator and Parties must abide by its content. [104]

96. In its Order of May 8, 2018 the Superior Court of Justice of Madrid examined its competence and declared that its Civil and Criminal Chamber had jurisdiction over the Application [105] and so proceeded to appoint the Arbitrator in its Judgment of March 29, 2019, using the powers under Article 15.6 of the SAA. These decisions are final, and binding pursuant to Article 15.7 of the SAA. The Arbitrator and Parties must abide by their contents.[106]

97. Respondent's objection fails and is dismissed.

2. *On the Arbitrator's Jurisdiction*

i. The Parties' Positions

98. Respondent challenged the jurisdiction of the Arbitrator, as in is its view (i) Claimants had forfeited any right to arbitration by submitting this dispute to the High Court of North Borneo in 1939, (ii) the Arbitration Agreement cannot be characterised as such and (iii) the institution to which the Arbitration Agreement refers for the submission

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[102] Exhibits C 43 and C 54.

[103] SAA, Article 15.7: *«…The final decisions adopted on the questions attributed hereunder to the competent court will not be subject to appeal…».*

[104] Law 1/2000, of January 7, Code of Civil Procedure, Article 522.1: *«…Compliance and enforcement of constituent judgments. Application of necessary legal proceedings. 1. All persons and authorities, especially those responsible for public records, must abide by and comply with what is available in constituent statements and adhere to legal status or situation arising out of them, unless there are obstacles arising from the record itself in accordance with its specific legislation…».*

[105] ATSJ M 182/2018 - ECLI: ES:TSJM:2018:182A. ID CENDOJ: 28079310012018200021.

[106] Law 1/2000, of January 7, Code of Civil Procedure, Article 522.1.

of any disputes related to the Deed –*«…Her Britannic Majesty's Consul General For Borneo…»*- no longer exists.

99. Claimants characterised the Deed as an international commercial agreement. Claimants maintained that Malaysia recognised its existence and binding nature – including the Arbitration Agreement- from the very moment at which it offered to resume payments in its correspondence of September 19, 2019.

Claimants denied any waiver of the Arbitration Agreement in the 1939 dispute and considered Malaysia's waiver argument as unavailing. It is Claimants' view that the terms of the Deed were neither disputed, nor invoked therein, where the matter –an interpleader procedure- concerned the determination of the heirs to the Sultan Jamalul and the legitimate recipients of the payments under the Deed.

Claimants affirmed the validity of the Arbitration Agreement, based on the Judgment of March 29, 2019, on Article 9 of the SAA, on the applicable provisions of the New York Convention and on the fact that, in their opinion, Malaysia simply disputed the interpretation and scope of the Arbitration Agreement; not its existence.

It is Claimants' view that the Judgement of March 29, 2019 ratified the Parties' will to remove all of their disputes under the Deed from the otherwise competent courts and instead deliberately submitted to the decision of *«…Her Britannic Majesty's Consul General For Borneo…»* as neutral. Claimants considered that the fact that the United Kingdom Foreign & Commonwealth Office declined the appointment sought does not affect the validity of the Arbitration Agreement, which remains binding, as well as the determination of the Parties –or of Claimants, at least- to submit their disputes to arbitration, as ratified by the Judgment of March 29, 2019.[107]

ii. The Arbitrator's Analysis and Findings

100. Respondent raised three grounds for it to challenge the Arbitrator's jurisdiction: (A) Claimants had forfeited any right to arbitration by submitting this dispute to the High Court of North Borneo in 1939, (B) the Arbitration Agreement could not be characterised as such and (C) the institution to which the Arbitration Agreement refers for the submission of any disputes related to the Deed –*«…Her Britannic Majesty's Consul General For Borneo…»*- no longer exists.

[107] Notice of Arbitration, ¶¶ 13, 40, 48, 67, 69, 89, 92 – 94, 104, 107 and 130 – 140; Counter–Memorial on Jurisdiction, ¶¶ 40 – 77 and 125 –145.

101. The Arbitrator will carefully examine the grounds of each of these contentions.

A. *Claimants' Forfeiture of Arbitration*

102. ¶ 7 of Respondent's Letter of September 19, 2019[108] portray its position on this ground for objection as follows:

> «*…7. From the beginning, Malaysia paid to your clients the agreed annual sum (Cession Monies)…the payment of Cession Monies had been made to the rightful heirs of the Sulu Sultanate, consistent with the judgment delivered Chief Justice C.F.C Macaskie in 18th December 1939 in the High Court of the State of North Borneo in the case* Dayang – Dyang Haji Piandao Kiram of Jolo, Philippines & 8 others v. The Government of North Borneo & Others [Civil Suit No 169/39]. *That judgment declared that the Plaintiffs are the rightful heirs with the right over the Cessions Monies. The grounds of judgment are attached hereto as Annexure A…*[109]».

Respondent further alleged in its letter of October 14, 2019[110] that Claimants had waived their right to arbitrate the present dispute, as the heirs and successors to the Deed would had submitted to the jurisdiction of the High Court of North Borneo in 1939 «*…to resolve a matter under contention thereunder…*».

Claimants denied Respondent's argument on the basis that the 1939 dispute had been related to an interpleader procedure, which exclusively concerned the determination of the heirs to the Sultan Jamalul and the legitimate recipients of the payments under the Deed.[111] Therefore, Claimants denied any waiver such as that alleged by Respondent, as that dispute was unrelated to the one at hand.

103. Respondent admits that

> «*…the judgment delivered Chief Justice C.F.C Macaskie in 18th December 1939 in the High Court of the State of North Borneo in the case* Dayang – Dyang Haji Piandao Kiram of Jolo, Philippines & 8 others v. The Government of North Borneo & Others [Civil Suit No 169/39]*…declared that the Plaintiffs are the rightful heirs with the right over the Cessions Monies...*».

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[108] Exhibit C 52.

[109] Exhibit C 20.

[110] Exhibit C 53.

[111] Notice of Arbitration, ¶¶57 – 59; Counter – Memorial on Jurisdiction, ¶¶ 124 – 145.

The Arbitrator is satisfied with Claimants' characterisation of the type of action decided in those court proceedings as *«…merely a question as to who these inheritors might be…»*;[112] to wit, an interpleader procedure.[113]

104. The doctrine of privity of contracts applies to arbitration agreements. This means that an arbitration agreement only confers rights and imposes obligations on the parties to it (*subjective scope of the arbitration agreement*). The positive effect of an arbitration agreement obliges the parties to submit to arbitration and confers jurisdiction on an arbitrator over disputes covered by the scope of said agreement. Like other rights, the right to arbitrate is subject to waiver. Parties may agree to terminate the arbitration agreement, cease to apply its positive and negative effects and have their disputes decided by the courts by agreement or by not objecting to the jurisdiction of the court in which proceedings are brought.[114] Article 8.1 of the UNCITRAL Model Law refers to the *«…statement on the substance of the dispute…»* as the threshold to interpret as depriving a party of its recourse to arbitration and its willingness to go along with the determination by the Courts of law instead of arbitration.[115]

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[112] Counter – Memorial on Jurisdiction, ¶ 132.

[113] An interpleader action is created when a claimant is in possession of property (called the stake) because of the other individuals or stakeholders (to wit, the third party who has the custody) involved in the case, but does not know who should be in ownership of the property or *res*. The interpleader action was a form of action used in the fourteenth and fifteenth centuries in common law, where a person faced rival claims to goods in a detinue action brought against him. It has its origins in the courts of equity and was confined to cases of detinue, an action to recover for the wrongful taking of personal property. In the modern era of the interpleader, a party faced with rival claims would either must defend suits brought by the rival claimants or would have to pursue a Bill in Equity which would lead to equitable relief. A more codified approach to interpleader began with the Interpleader Act of 1831 and so was conceived as a civil procedure that creates a neutral space for a third party to induce a lawsuit in order to make two or more other parties hash out their dispute.

[114] Party may be deemed to have waived its right to arbitrate a dispute when it substantially invokes the judicial process to the detriment or prejudice of the other party.

[115] *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd,* [1978] 1 Lloyd's Rep 357, at 361, per Lord Denning. *Capital Trust Investment Ltd. v Radio Design AB & Ors* [2002] EWCA Civ 135. Both judgments contain considerations about the English concept of *step into the proceedings*, similar in effect to the one referred in the UNCITRAL Model Law. In the second case, the English Supreme Court clarified its view on the issue and concluded that *«…Radio Design did not take a step in the proceedings when it made its application for summary judgment on 2nd May. Nor, in our judgment, did it do so thereafter. The hearing before the master was conducted on the same basis as set out in the summons, namely that Radio Design's application for summary judgment was being made only if a stay was refused. We do not think it can fairly be held that that position changed when the parties asked the master to deliver a judgment on the summary judgment application because they only did so in case an appeal against the stay failed. There was equally no change before the judge. In short, Radio Design has at no stage indicated a willingness that the courts should determine CTIL's claims instead of arbitrators…»*.

This reasoning is in line with that contained in Heading III of the Statement of Purposes of the SAA, referring to its Article 11. It is the Legislator's view that *«…the Act maintains the so-called positive and negative consequences of arbitration agreements. It provides that the procedure for averring the latter,*

Respondent bears the burden of proof, as is the case with any objection on jurisdiction. It must therefore establishes the elements of its objection under the Judgment of the Chief Justice, C.F.C Macaskie, of the High Court of the State of North Borneo in the case *Dayang – Dyang Haji Piandao Kiram of Jolo, Philippines & 8 others v. The Government of North Borneo & Others* [Civil Suit No 169/39], dated December 18, 1939 (henceforth, the Macaskie Judgment) by competent evidence that the qualifications to uphold its position of the Claimants' alleged waiver of their right to arbitrate under the Arbitration Agreement are met in this case to the satisfaction of the Arbitrator.

The Arbitrator now turns to review the content of the Macaskie Judgment to determine the power of conviction of such Respondent's allegations.

105. The analysis of the Macaskie Judgment reveals that claimants at that court proceedings sought to determine against the Government of North Borneo the rightful successors of Sultan Jamamul Kiram II for payments as per his Will. Thus, the heirs entitled to receive the payment agreed under the Deed,[116] the so called *Cession Monies*, in the Respondent's own expression as likewise used in the Macaskie Judgment: *«…The question which arises is whether this right descends to the successors in sovereignty of the Sultan to his privet heirs or representatives…».*[117] It seems that the parties in that case had a common interest –and not oppositional ones- to determine the proper parties of the Deed. This is undisputed by the Parties, as previously explained in the Preliminary Award. The object of the 1939 action is different from the cause of action sought by Claimants in the present arbitration where, as admitted, they seek to vindicate their commercial rights under the terms of the Deed, as they plead that the surrounding circumstances at the time of its signature were radically changed by the subsequent discovery of natural resources which were not contemplated by the parties when they signed the Deed.[118]

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particularly by the respondent, is a plea to the jurisdiction… It further notes that a request for interim measures raised to a court does not by any means entail the tacit waiver of arbitration, although neither does it automatically establish the negative consequence of an arbitration agreement. This dispels any doubt that might persist around the possibility of the delivery of a court decision on interim measures in connection with a dispute brought to arbitration, even before the arbitration proceedings begin…». Articles 8 and 9 of the UNCITRAL Model law and Article VI.4 of the Geneva Convention inspired this provision. Judgment of the Spanish Constitutional Court 136/2010, of December 2, 2010.

[116] Exhibit C 20, p. 5; Exhibit C 52, p. 2: *«…the first and second defendants, that is, the British North Borneo Chartered Company and the Government of the State of North Borneo, who can be taken for the purpose of this suit to be the same legal person, dispute the claim only formally. Their attitude is that they admit that the monies are payable to someone and that they are ready and willing to pay them as soon as they can ascertain who is entitled to them…».*

[117] Exhibit C 20, p. 5; Exhibit C 52, p. 9.

[118] Notice of Arbitration, ¶¶ 13 and 146: *«… The Claimants respectfully request that the Sole Arbitrator issue an Award in the following terms: (i) Declaring that the Respondent has breached the 1878 Lease Agreement; (ii) Ordering (a) the Respondent to pay the Claimants damages that more fairly and accurately reflect the*

106. The right to rely on the arbitration agreement may be waived if a party defends on the merits before court proceedings. Moreover, a party may unilaterally waive a right to invoke the arbitration agreement while the other party retains it.

This is the situation in this case, where Respondent twice declared that it did not consider itself bound by the Arbitration Agreement,[119] while Claimants vindicated their right to trigger the Arbitration Agreement to resolve their ongoing dispute in relation with the Deed. This means that Claimants were in a situation where they could choose if they wished to initiate arbitration or court proceedings. Claimants opted for the first choice. Exhibits C 35 and C 38 sustain this conclusion, ratified by the filing of the Application and subsequent actions, that lead to the present arbitration proceedings.

However, Malaysia's unilateral repudiation of its obligation contained in the Arbitration Agreement constitutes an illicit act under International Law (*estoppel by reason of contradictory conduct*) and a deliberate violation of the principle of good faith. Respondent, a Sovereign State, may not claim the invalidity of the Arbitration Agreement, after it has performed –and is apparently willing to continue doing so- its contractual obligations over a period of several years and has impliedly acknowledged the legal validity of the Deed, where the Arbitration Agreement in enclosed.[120]

The Macaskie Judgment held that *«…this court is bound by the decision given there as to the rights of plaintiffs to receive the Cession monies…»*; there was no dispute as is here the case in this arbitration initiated by Claimants in connection with the Deed. If this statement is analysed in conjunction with both the Notice of Intention to Commence Arbitration, the Notice of Arbitration and the Judgment of March 29, 2019, the conclusion obtained is twofold.

On the one hand, Claimants relied on the Arbitration Agreement as the agreed and valid means to solve their disputes with Respondent related to the Deed.[121] Mr. Cohen's letter of April 28, 2017[122] is explicit on this point: *«…should the Government of Malaysia decline to enter into such negotiations, or should any such negotiations prove unsuccessful, we reserve the right to invoke appropriate dispute resolution remedies, including the arbitration agreement from the 1878 Agreement, also excerpted above…»*. Dr. Cremades'

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value of the 1878 Lease Agreement from the year of Malaysia's breach (2013) through the date of the award; and (b) the rebalancing of the 1878 Lease Agreement for prospective revenues; (iii) In the alternative, if the Sole Arbitrator chooses not to rebalance the 1878 Lease Agreement, an award ordering (a) the termination thereof and (b) the Respondent to pay damages to the Claimants…».

[119] Exhibit C 52, ¶ 2; Exhibit C 53.

[120] Exhibit C 52, ¶¶ 6 – 12: *«…for an unbroken and continuous period of 49 years… Malaysia is now ready and willing to pay your clients all arrears from 2013 to 2019, and agrees to fully comply with the 1878 Grant and the 1903 Confirmation of Cession from henceforth with regards to future payments…».*

[121] Judgment of the Civil and Criminal Chamber of the Superior Court of Justice of Castilla and León dated October 25, 2011.

[122] Exhibit C 35, p. 3.

letter of January 9, 2018 conveyed Claimants' determination to pursue arbitration according to the Arbitration Agreement in even clearer terms: *«…Malaysia has no intention to comply with its agreement to arbitrate, which leaves them with no other option but to seek judicial intervention to appoint an arbitral tribunal…».* Claimants subsequent actions proved to be consistent with this behaviour, as the present arbitration evidences and the Judgment of March 29, 2019 concludes emphasising Claimants' intent to commence this arbitration.[123] Respondent acknowledged the validity of the Deed,[124] but chose not to intervene in the judicial proceedings related to the Application.[125]

On the other hand, Claimants admitted that they seek to defend in this arbitration their commercial rights under the terms of the Deed.[126] This statement cannot be characterised as repudiatory, as Claimants affirm of the Arbitration Agreement and it to be observed by Respondent.[127]

107. The Arbitrator concludes that, on the evidence presented to him, Claimants did not waive any right to arbitrate the present dispute in accordance with the Arbitration Agreement. Respondent's submission cannot be upheld.

B. *The Arbitration Agreement Cannot Be Characterised As Such*

108. Respondent affirmed that the Arbitration Agreement cannot be characterised as such as it does not contain any reference to arbitration and, in its opinion, its contents fail to demonstrate the Parties' will to submit to arbitration. Claimants denied the Respondent's allegation and affirmed the validity of the Arbitration Agreement, based on the Judgment of March 29, 2019, on Article 9 of the SAA, on the applicable provisions of the New York Convention and on the fact that, in their opinion, Malaysia simply disputed the interpretation and scope of the Arbitration Agreement; not its existence.

109. The starting point of the analysis of the Respondent's objection is the Judgment of March 29, 2019, which is final and binding.[128] The Civil and Criminal Chamber of the Superior Court of Justice of Madrid concluded that, *prima facie*, the Parties *«…unequivocally agreed to submit to arbitration in the following terms:* «…Should there be any dispute, or reviving of all grievances of any kind, between us, and ours heirs and successors, with Mr. Gustavus Baron de Overbeck or his Company, then the matter

[123] Exhibits C 35, C 38 and C 44, p. 8.

[124] Exhibit C 52.

[125] Exhibits C 41 and C 54.

[126] Notice of Arbitration, ¶¶ 13 and 146.

[127] *Downing v Al Tameer Establishment*, [2002] EWCA Civ 721.

[128] Exhibit C 44; SAA, Article 15.7.

will be brought for consideration or judgment of Their Majesties' Consul-General in Brunei…»…». These are terms that the Arbitrator will follow to determine the existence of the Arbitration Agreement and, on that basis, his power and authority to hear and decide the present dispute.

110. The Judgement of March 29, 2019 implicitly referred to the Arbitrator the ultimate determination of his own competence, pursuant to Article 22 of the SAA, the *lex arbitrii* in the present case.[129]

Respondent is not prevented from filing its objections as to the jurisdiction of the Arbitrator, as they were raised in its letter of September 19, 2019[130] and, therefore, before submitting its Response to the Notice of Arbitration.[131] Respondent took improper advantage of its voluntary failure to timely submit its Response to the Notice of Arbitration, as a result of which the Procedural Orders 3 and 4 extended this deadline for the protection of due process.

The fact that Respondent challenged the Arbitrator's jurisdiction in these arbitration proceedings does not prevent the Arbitrator from deciding on the merits of that challenge and determining whether he does, or does not, have jurisdiction, as it is an universally accepted principle in modern international arbitration that arbitrators have an inherent and essential power to determine whether they have jurisdiction (the *Kompetenz-Kompetenz Rule* mentioned above).[132]

The Arbitrator is satisfied that he has jurisdiction to determine his own jurisdiction.

111. The Arbitration Agreement should be properly construed, as any other contractual provision.[133] The principle of interpretation is that one cannot, without certain proof, attribute to the parties mutually irreconcilable intentions, as no interpretation which makes a clause of any agreement useless or absurd can be upheld. The literal interpretation of the wording of the Arbitration Agreement prevails.[134] The Arbitrator should read its terms along with those of the Deed where it is embedded, as a whole, giving the words used their natural and ordinary meaning in the context of the Deed, the Parties' relationship and all relevant facts surrounding the transaction so far as known by the Parties.

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[129] Preliminary Award, Heading IV.3.iv *supra*.

[130] Exhibit C 52.

[131] SAA, Article 22.

[132] SAA, Statement of Purposes, Heading V.

[133] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995): «*…When deciding whether the parties agreed to arbitrate a certain matter …, courts generally … should apply ordinary state-law principles that govern the formation of contracts…*».

[134] Spanish Civil Code, Articles 1281.1 and 1285.

The object of the Arbitrator is to ascertain what the Parties intended. The Arbitrator makes an objective judgement, based on the materials already identified in the incidental proceedings of this arbitration, complemented by those other which consultation may be recommended, as they are historical in nature and for public and unrestricted access.

112. The Arbitration Agreement has an international commercial character,[135] with the additional element of Malaysia –one of its signatories- being a Sovereign State in the disputed relationship, the Deed.

Article 2.2 of the SAA propounds the rule whereby a State and its dependent organisations that are parties to an international commercial arbitration be *«…treated exactly in the same way as any other individual…».*[136] This provision follows the doctrine of the cases *EGOTH*[137] and *I Congreso del Partido.*[138]

In the latter, Lord Wilberforce analysed a dispute that concerned an ordinary commercial contract for the sale of sugar by *Cubazucar* –a Cuban state enterprise- to a Chilean company, where cargoes of sugar were dispatched to Chile on two vessels, also chartered by another Cuban state company, *Mambisa.* The revolution in Chile, on September 11, 1973, severed the diplomatic relations between the Republic of Chile and the Republic of Cuba. Because of these diplomatic differences, the Republic of Cuba ceased any further commercial dealings with the Republic of Chile, which affected the execution of the commercial contract. The cargoes were diverted, and it was discovered later that a new vessel built at a yard in Sunderland (England) for a Liberian company –the *I Congreso del Partido*- had been assigned the benefit of the contract to *Mambisa*. She was arrested at Sunderland on September 12, 1975.

The Republic of Cuba filed a motion alleging that the *I Congreso del Partido* was its property and invoking sovereign immunity. The plaintiffs commenced a second action *in*

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[135] SAA, Article 3.1.a and 3.1.b.

[136] SAA, Statement of Purposes, Heading II. Article 177.2 of the Swiss Private International Law Act dated December 18, 1987.

[137] *République arabe d'Egypte and The Egyptian General Organization for Tourism and Hotels v. Southern Pacific Properties Ltd. and Southern Pacific Properties (Middle East)*; Award of the International Court of Arbitration of the International Chamber of Commerce in case 3493/1983 dated February 16, 1983; Decision of the President of the Circuit Court of Amsterdam, dated July 12, 1984; Judgement of the Cour d'Appel of Paris on July 12 1984 [1986 *Rev. Arb*. 75] and Judgement of the Cour de Cassation, dated January 6, 1987 [26 *International Legal Materials* (1987) p. 1004-1007]; and ICSID Case No. ARB/84/3: Awards of November 27, 1985 and of April 14, 1988 (on jurisdiction); and May 20, 1992 (final), 32 *International Legal Materials* (1993) pp. 933-1038.

[138] *I Congreso del Partido,* (1983) 1 AC 244 (HL). BOUCHEZ, L.J., «The Prospects For International Arbitration: Disputes Between States And Private Entreprises», en VV.AA., *International Arbitration: Past and Prospects [A symposium to commemorate the centenary of the birth of Professor J.H.W. Verzijl (1888-1987)]*. Ed. A.H.A. Soons Dordrech. Martinus Nijhoff Publishers. 1990.

rem against the owners of the vessel, similar to the first action but alleging that the Republic of Cuba would be liable to them in an action *in personam*. In December 1975, the plaintiffs started a third action *in rem* against the owners of the *I Congreso del Partido* in respect of the cargo on board the *Playa Larga* (another of the vessels used), alleging a claim *in personam* against either *Mambisa* or the Republic of Cuba.

When Lord Wilberforce analysed the law, he centred his attention on what he considered to be the relevant act, to wit, the initial entry of the Republic of Cuba into a commercial transaction, which conferred the relationship a commercial nature, of a private nature, that Cuba could not ignore. The analysis lead to his assertion that *«…once a trader, always a trader…»* meaning that those acts made by a State within the trading or commercial activity are not immune and therefore a breach of a contract of that character should be considered within the area of private law.

113. The Arbitration Agreement must be interpreted in good faith, with a view to preserve its validity and to uphold the will of the Parties expressed therein to have their dispute decided by international arbitrators and not by domestic courts (*in favorem validitatis*).[139]

114. Respondent challenged the formal validity of the Arbitration Agreement on the basis of a twofold argument: it did not contain any reference to arbitration and it failed to reflect the Parties' will to submit their disputes over the Deed to the dispute resolution mechanism provided by the Agreement.

Neither of these arguments is convincing.

The formal validity of an international arbitration agreement is to be determined according to the formal validity rules of the arbitration law of the country in whose territory the arbitration has its seat, including its mandatory formal validity rules. In this case, Article 9 of SAA is applicable, as it appropriately regulates the validity and extension of the arbitration agreement, guaranteeing its effectiveness and co-ordinating its text with

[139] *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1512 (3rd Cir. 1994): *«…[D]oubts about the intended scope of an agreement to arbitrate are [*to be*] resolved in favour of arbitration…»*. Judgment of the Civil and Criminal Chamber of the Superior Court of Justice of Cataluña dated September 9, 2013. Judgment of the Civil and Criminal Chamber of the Superior Court of Justice of Castilla and León dated October 25, 2011.

both the New York[140] and the Geneva[141] Conventions. Its Articles 9.1,[142] 9.3,[143] 9.5[144] and 9.6[145] –given its international character- are applicable to this analysis. The guiding principle is that an arbitration agreement is formally valid where it can be reasonably asserted that the offer to arbitrate –in writing- was accepted.

The Arbitration Agreement is in writing. Claimants presented the original of the Arbitration Agreement in the Arabic language,[146] along with two translations into English[147] and Spanish.[148] Respondent failed to either rebut these translations, or to submit alternative ones in support of its allegation. The Arbitration Agreement refers to any disputes arising from the Deed. But a further analysis on the initial intent of the signatories of the Deed is recommended as the Respondent challenged the existence of the word *arbitration* within its wording, and, based on this absence, considered that the Arbitration Agreement lacks this characterisation.

Article 9.1 of the SAA provides that the arbitration agreement must express the parties' willingness to submit to arbitration all or certain disputes arising from or related to a given legal relationship. The Arbitration Agreement contains a submission to the decision of a private neutral party, which can be construed as a submission to arbitration.[149]

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[140] New York Convention, Articles II and V. The validity of the arbitration agreement has to be determined under the law of the country where the award was made.

[141] Geneva Convention, Article I.

[142] SAA, Article 9.1: «*…The arbitration agreement, which may adopt the form of either a separate agreement of an arbitration clause in a broader contract, must express the parties' willingness to submit to arbitration all or certain disputes arising between them in respect of a given legal relationship, whether contractual or otherwise…*».

[143] SAA, Article 9.3: «*…The arbitration agreement must be in writing, in a document signed by the parties or an exchange of letters, telegrams, telexes, faxes or other telecommunication methods that ensure a record of the agreement is kept. Where an arbitration agreement is accessible for subsequent reference on electronic, optical or other media, it will be regarded as compliant with this requisite…*».

[144] SAA, Article 9.5: «*…An arbitration agreement will be regarded to exist if in an exchange of statements of claim and defence the existence of an agreement is alleged by one party and not denied by the other…*».

[145] SAA, Article 9.6: «*…In international arbitration, the arbitration agreement will be valid and the dispute arbitrable if the requirements laid down in any of the following are met: the legal rules chosen by the parties to govern the agreement; the rules applicable to the substance of the dispute; or the rules laid down in Spanish law…*». Judgment of the Civil and Criminal Chamber of the Superior Court of Justice of Madrid dated March 13, 2012. Judgment of Section Seventeen of the Provincial Court of Barcelona dated May 28, 2009. Judgment of Section Fifteen of the Provincial Court of Barcelona dated April 23, 2008.

[146] Exhibit C 12.

[147] Exhibit C 14. The translation that, according to Geoffrey Marston, Acting Consul – General in Borneo, Mr. Treacher, reported to the Foreign Office in 1878 period stated that «*…If, in the future, any dispute shall arise between us, our heirs and successors, and Gustavus Baron de Overbeck, or his Company, we both will refer it for the decision and judgment of the Queen's Consul General in Brunei…*». MARSTON, G., «International Law and the Sabah Dispute», *The Australian YearBook of International Law*. Vol. 4, pp. 103 – 152, at p. 118.

[148] Exhibit C 13.

[149] Judgment of the Civil Chamber of the Spanish Supreme Court dated June 27, 2017.

The Civil and Criminal Chamber of the Superior Court of Justice of Madrid concluded in the Judgement of March 29, 2019 that, *prima facie*, the Parties *«…unequivocally agreed to submit to arbitration in the following terms:* «…Should there be any dispute, or reviving of all grievances of any kind, between us, and ours heirs and successors, with Mr. Gustavus Baron de Overbeck or his Company, then the matter will be brought for consideration or judgment of Their Majesties' Consul-General in Brunei…»*…»*.

According to its English version, the Parties stipulated in the Arbitration Agreement that *«…if there should arise any future dispute owing to altercations or disagreements between ourselves and our heirs and successors, and Mr Gustavus Baron de Overbeck or his company, then we, for both parties, will submit the matter to consideration and views of Her Majesty´s Consul General in Brunei…».*[150] The verb *submit* has several meanings: to accept or yield to a superior force or to the authority or will of another person, to accept the authority, control or greater strength of somebody/something or to allow another person or group to have power or authority over you, or to accept something unwillingly. It is the Arbitrator's view that the use of this verb in the wording of the Arbitration Agreement made it clear that the Parties' intention was to accept a sound solution (*«…views and consideration...»*) from the Consul General in Brunei.

Its Spanish translation reads as follows: *«…Si acaso en lo sucesivo hubiera controversia por nuestro contrato entre nuestros sucesores así como los del Sr. Baron Overbeck o de la Compañía en los estremos que abraza este contrato se someterá al juicio del Consul Gral. De Borneo (Brunei)…».*[151] The verb *someter* -used in its imperative tense- means to subordinate their own judgment, decision or affection to that of another person or to entrust someone the resolution of a business or discrepancy. The noun *juicio* used in this context can be translated as judgement or sound opinion. So that, all together, the expression *se someterá al juicio* means that the Parties expressed their common intention to submit their contractual disputes to the reasoned opinion of the Consul General in Brunei.

It is the Arbitrator's view that the signatories of the Deed preferred to submit any of their disputes of any kind under the Deed, between them and their respective successors, *«…for consideration or judgment of Their Majesties' Consul-General in Brunei...»*, to a neutral party, an umpire or an arbitrator. The Consul General was not a proper judicial institution.[152] In the 19th Century, the use of the term *arbitration* was mainly conceived

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[150] Exhibit C 14, p. 3.

[151] Exhibit C 13.

[152] Consuls have a decision-making power, as mediators in legal disputes. The first mercantile incarnation of the consul title stems from the Western Mediterranean in the first centuries of the last millennium. The consulates were originally tribunals in port cities, consisting of local or foreign merchants as well as local authorities, who adjudicated disputes over maritime trade, between different merchants, between merchants and authorities or between merchants and their employees. The first such consulates could be

as an institution of peace, the primary purpose of which was to maintain harmony between persons who were destined to live together.[153] The arbitrator (i.e., the Consul General in Brunei) –as apparent in the Arbitration Agreement- was chosen *intuitu personæ* –being a friend or a man or wisdom- because the Parties trusted him or were prepared to submit to his authority, as he would be able to devise a satisfactory solution to the dispute.[154] The Parties, by referring the solution for their private commercial disputes under the Deed to the decision –a verdict- of the Consul General in Brunei, sought to withdraw the present dispute from the jurisdiction of either courts; in the present case, at the time of its signature, Borneo, [155] Hong Kong or England.

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found in Messina from 1128, in Genova from 1250 and thereafter in Valencia, Majorca, Venice and Barcelona over the next century.

There were no English consuls until the fifteenth century, as early as 1303 (Edward I and his famed *Carta Mercatoria*). The first English consuls under that name were appointed in Mediterranean ports at the end of the fifteenth century. These consuls were seldom in touch with England, and often they were not appointed by the King, but were elected and, probably more importantly, reimbursed, by the local merchants. Because of this, the consuls did not protect general English interests. WARDEN, D.B., *On the Origin, Nature, Progress and Influence of Consular Establishments*. Smith. 1813. BOREL, F., *De l'Origine et des fonctions des consuls*. Leopold Voss. 1831. MARTENS, F.F., *Das Consularwesen und die Consularjurisdiction im Orient*. Weidmannsche Buchhandlung. Berlin. 1874. PLATT, D.M.C., *The Cinderella Service. British Consuls since 1825*. Longman. London. 1971.

153 In England, subsequent legislative reforms gradually introduced greater support for commercial arbitration agreements and tribunals' powers. The 1833 Civil Procedure Act restated the rule that arbitration agreement which was made a rule of court could not be revoked. English Courts revisited the analysis in *Kill v. Hollister* [(1799) I Wil. K.B. 129 (K.B.) and *Scott v. Avery* [(1856) 5 H.L. Cas 811]. The 1854 Common Law Procedure Act provided for the irrevocability of any arbitration agreement. In 1899, England encated the Arbitration Act which was widely adopted throughout the Commonwealth. In *Castle-Curtis Arbitration*, (1894) 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200 and in *Perry v. Cobb*, (1896) 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389, arbitration was defined as *«…the submission of some disputed matter to selected persons and the substitution of their decision or award for the judgment of the established tribunals of justice…».*

154 DAVID, R., *Arbitration In International Trade*. Kluwer. Deventer/Netherlands. 1985, pp. 29 – 37.

155 Hansard HL Deb 23 June 1892: vol. 5, c 1814: *«…Lord Elphinstone: … My Lords, when I first visited the country over forty years ago the greater part of the country, so far as we could see from the rivers which we went up, was covered with a dense forest, and, as I have good reason to remember, an almost impenetrable jungle. There was no industry, no trade, no revenue; slavery and kidnapping were rampant; there was no security for life or property; and, to put the whole thing in three words,* «Might was right.» *…».*

Hansard HL Deb 23 June 1892: vol. 5 cc 1810-11: *«…Lord Brassey: … I may mention that in 1877 Sir Alfred Dent acquired from the native chiefs a perpetual lease of certain extensive territories, and that he applied for a charter of incorporation of a Company that he was about to form…The country was derelict. The native chiefs were feeble, ignorant men wielding no authority…It must be obvious that in first setting up an orderly and civilised Government in an undeveloped country, inhabited by pirates and barbarous nomad tribes, the expenditure must be largely in excess of the receipts. Everything has to be formed; highways have to be made; a Civil Service has to be established; police have to be organised; and communications, both internal and external, have to be created…».*

TREACHER, W.H., *British Borneo. Sketches of Brunei, Sarawak, Labuan and North Borneo*. Government Printing Department. Singapore. 1891, p. 100: *«…the most difficult problem…which these officers had to solve was that of keeping order, or trying to do so, amongst a lawless people…».*

Moreover, there has been a *meeting of the minds* in the present case. Claimants filed the Notice of Arbitration, affirming the existence of the Arbitration Agreement. Respondent failed to submit its response to the Notice of Arbitration. The content of its letter of September 19, 2014, as well as that of its subsequent letter of October 14, 2019, simply disputed the interpretation and scope of the Arbitration Agreement, not its existence.[156] Both letters are incorporated into the proceedings.[157]

It is the Arbitrator's view that the signatories of the Deed had chosen an alternative method for the resolution of their eventual differences: a private resolution mechanism very similar, in its nature (private person) and effects (binding solution), to the arbitration. Therefore, it would be a modification of the Parties' contractual right to claim, by way of an action for non-execution of the arbitration clause, that the Malaysian Courts could have been seized of disputes of which the heirs of the Sultan, as per the Arbitration Agreement contained in the Deed, had not intended to submit to them.[158]

The Arbitrator concludes that, on the evidence presented to it, that the Arbitration Agreement is formally valid. Respondent's objection cannot be upheld, and the correctness of the Judgment of March 29, 2019 is affirmed.

115. The substantive validity of the Arbitration Agreement –the arbitrability of the claims referred thereto- is also to be determined according to the *lex arbitrii*. The SAA applies the criterion of free choice: «*…It suffices to provide that a dispute can be settled by arbitration where its object is a matter freely negotiated by the parties. In principle, matters that can be freely decided are arbitrable…*».

In the present case, the dispute, as presented by Claimants, arise out of the Deed, a defined legal relationship, as already explained. The dispute is therefore capable of settlement by arbitration, as it refers to an international commercial agreement, as is the Deed, which do not exclusively belong to the domain of the courts. The dispute also involves Malaysia –a Sovereign State- as a party to the arbitration. Based on Article 2.2. of the SAA, it is accepted that it may not invoke its own law on the non-arbitrability of the subject matter.

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156 SAA, Article 9.5. Judgments of the Civil and Criminal Chamber of the Superior Court of Justice of Madrid dated October 30, 2019, December 17, 2014, September 10, 2014 and April 21, 2014. Judgment of the Civil and Criminal Chamber of the Superior Court of Justice of the Basque Country dated September 23, 2015. Judgment of the Civil and Criminal Chamber of the Superior Court of Justice of Murcia dated October 3, 2019.

157 Exhibits C 52 and C 53.

158 Notice of Arbitration, ¶¶ 73 and 74; Claimants' comments on *National Oil Company (NIOC) v. Israel*, dated February 24, 2020; Exhibits C 44, pp. 7 and 8 and CL 39.

116. Based on these facts and supportive evidence, it is the Arbitrator's view that the Arbitration Agreement is substantively valid. Respondent's objection cannot be upheld, and the correctness of the Judgment of March 29, 2019 is affirmed.

C. *The Institution to Which the Arbitration Agreement Refers No Longer Exists*

117. Respondent's submission can be summarised as follows:[159] the Arbitration Agreement submitted to the opinion of *«…Her Britannic Majesty's Consul General For Borneo…»*, an institution which no longer exists. Claimants rebutted Respondent's objection as they considered that the fact that the United Kingdom Foreign & Commonwealth Office declined the appointment sought does not affect the validity of the Arbitration Agreement, which remains binding, as well as the determination of the Parties –or of Claimants, at least- to submit their disputes to arbitration, as ratified by the Judgment of March 29, 2019.[160]

118. The result of the documentary evidence in the proceeding shows that on October 16, 2017 Claimants wrote a letter to Sir Ian McLeod, KCMG, Legal Advisor to the United Kingdom Foreign & Commonwealth Office,[161] exposing the existence of an ongoing difference under the Deed with Malaysia and seeking from the British Government the appointment of the *«…appropriate person or persons to fulfil the Consul-General's role in determining that dispute…»* within the following thirty (30) days as from the date of the letter.

Mr. McLeod, on behalf of the British Government, declined the appointment sought on the basis that *«…the Colony of North Borneo ceased to exist in 1963. In these circumstances, we have concluded that it would not be appropriate for the Government to involve itself in the dispute in the manner that you propose…»* and suggested Claimants to deal *«…their claim directly with the Government of Malaysia…»*.

The Arbitrator is persuaded that Mr. McLeod did not challenge the validity of the Arbitration Agreement.

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[159] Exhibit C 52, ¶ 4: *«…any dispute arising between the parties* «should be submitted to Her Britannic Majesty's Consul-General for Borneo»*…»*. Exhibit C 54, Heading 1.2, p. 4. «… *Furthermore, even in the hypothetical case that the Disputed Provision were to be deemed a proper arbitration clause, this provision could not be enforced among the parties as it submits any disputes to* «…Her Britannic Majesty's Consul General For Borneo*…», an institution that, according to the information we have been provided with, no longer exists…*».

[160] Exhibit C 44.

[161] Exhibit C 50.

119. The SAA is inspired by the principle of conservation of the arbitration agreement. Therefore, when facing those cases where an arbitral institution is inaccurately designated, the inaccuracy may be overcome by reasonable interpretation of its terms that may remedy a pathological aspect by severing what makes it unenforceable, while still retaining enough of the agreement to put the arbitration into operation.[162] In line with this doctrine, the Judgment of March 29, 2019 did not consider this absence as an obstacle to proceed with arbitration, as

> «*… having unequivocally agreed to submit to arbitration in the following terms:* «…Should there be any dispute, or reviving of all grievances of any kind, between us, and ours heirs and successors, with Mr. Gustavus Baron de Overbeck or his Company, then the matter will be brought for consideration or judgment of Their Majesties' Consul-General in Borneo (Brunei)…»; *before the impossibility of resorting to the arbitrator originally appointed, taking into account that there is apparently, within the scope of cognition of this proceeding, no limitation to the will of the defendant in being subjected to said arbitration clause, an arbitrator shall be appointed, as requested, regardless of further considerations, as the claimant met the substantive requirements for the referred action…».*

The Superior Court of Justice of Madrid seems to have correctly followed the precedent of *National Iranian Oil Company (NIOC) v. Israel,*[163] where the French Court of Cassation faced and resolved a similar situation to the one at hand and became a leading decision in the application of the concept of denial of justice to international arbitration.

The dispute concerned a participation agreement signed between Iran and Israel on February 29, 1968 for the construction, maintenance, and operation by Israel of an oil pipeline for transportation of crude oil, of 254 kilometres long, from Eilat to Ashkelon. The agreement sought the establishment of a jointly owned pipeline to facilitate a shorter, safer, and cheaper mechanism of oil transportation. The financing of the project depended on Iranian funds and, therefore the Parties agreed that Iran Law should be considered as the substantive governing law.

As the Arbitration Agreement, the *ad hoc* arbitration clause therein contained no specification as to the place of arbitration or the *lex arbitrii.*[164] It only established that each party should appoint one arbitrator. If such arbitrators failed to settle the dispute by

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[162] Judgment of the Civil and Criminal Chamber of the Superior Court of Justice of Castilla and Leon dated November 24, 2011.

[163] *National Iranian Oil Company (NIOC) v. Israel*. Judgment of the French Cour De Cassation. First Civil Chamber, rendered on February 1, 2005. Case No. 01–13.742/02–15.237.

[164] «*…If at any time within the period of this Agreement or thereafter, any doubt, difference or dispute shall arise between the Parties concerning the interpretation or execution of this Agreement or anything connecting therewith or concerning the rights and liabilities of the Parties hereunder, the same shall, failing any agreement to settle it by other means, be referred to arbitration. Each Party shall appoint one arbitrator. If such arbitrators fail to settle the dispute by mutual agreement or to agree upon a Third Arbitrator, the President of the International Chamber of Commerce in Paris shall be requested to appoint such Third Arbitrator. The decision of the Board of Arbitrators so appointed shall be final and binding upon the Parties…».*

mutual agreement or to agree upon a third arbitrator, the President of the International Chamber of Commerce in Paris should be requested to appoint such third arbitrator.

Ten years after its signature (at the end of 1978), the contract faced difficulties, aggravated by the 1979 Islamic Revolution in Iran, during which Iran nationalized the pipeline thus becoming a sworn enemy of Israel. Israel sought compensation for remedies from Iran, and several arbitrations were triggered worldwide with that purpose.[165] NIOC also expressed its intention to use the arbitration contained in the 1968 agreement. The political situation explained challenged its effectiveness to the extent that its initiation depended on the appointment of the arbitrator on behalf of the refusing party, Israel.

Israel failed to appoint a co-arbitrator and the Israeli courts were banned from appointing an arbitrator on behalf of Israel and so was its Government to participate in the arbitration process. On its side, Iranian Courts declared that they had no jurisdiction to appoint an arbitrator on behalf of Israel.

On October 14, 1994, NIOC initiated a lengthy legal procedure. It appointed its arbitrator and, before French ordinary Courts, pursued the necessary appointment of the second arbitrator on behalf of Israel. In its opinion, French courts bore jurisdiction over the case, based on the possibility that the International Chamber of Commerce in Paris could act as appointing authority of the presiding arbitrator and its headquarters is in Paris.

The French Instance Court of Paris (*Tribunal de Grande Instance*) denied NIOC's petition on February 9, 2000, as it considered that there was no legal basis for its jurisdiction. NIOC challenged the decision before the Appeal Court of Paris (*Cour d'appel*), which on March 29, 2001 reversed the decision of the French Instance Court of Paris and considered that the connection identified by NIOC was a relevant factor to establish jurisdiction and, if decided otherwise, there was a risk of incurring in a denial of justice, as NIOC could not exercise its rights of access to arbitration as the agreed mechanism to solve those disputes, since national courts who has jurisdiction –those of Israel and Iran- were not available and the right of a party to an arbitration agreement to submit its dispute to arbitration is part of French public policy. Israel objected the decision before the French Supreme Court (*Cour de Cassation*), which, in its Judgement of February 1, 2005, confirmed the decision of the Court of Appeal of Paris.

The Judgement of March 29, 2019 –definitive and binding- applied the principle of conservation of the Arbitration Agreement, in line with the spirit set forth in both the SAA and the New York Convention which rests on the presumptive validity –formal and substantive- of arbitration agreements and, based on the doctrine explained, so overcome

[165] Exhibit CL 53.

a situation where circumstances –as properly pointed out by the Claimants- conspired to make the Parties' choice impossible or impracticable.[166]

120. The failure of Malaysia to respect the Arbitration Agreement constitutes a denial of justice under International Law and a breach of the *pacta sunt servanda* principle. The concept of denial of justice belongs to the plane of substantive law. It can be defined as any failure in the organization or exercise of the jurisdictional function involving the omission on the part of the State to discharge its international duty according the judicial protection of foreigners.

The local redress principle can be characterised as its procedural requirement; it is nothing other than a condition for the obtaining of reparation of damages suffered. It presupposes the existence of a high degree of confidence of the claimants in the judicial system. The rule shall be applied, not automatically, but having regard to the circumstances of the case and, more particularly, to any limitation which those circumstances may impose upon the effective nature of the remedy sought. It constitutes one of the fundamental conditions to be fulfilled, except in those cases such as the one at hand, where there were no local remedies to exhaust and their exhaustion is useless.[167]

It is the Arbitrator's view –based on the documentary evidence available in the proceedings- that the obstinate silence of Malaysia both with Claimants and in the Application can bear only two possible interpretations: a calculated silence, loaded with ulterior motives and belligerent intentions; or else, quite simply, the silence of acquiescence. This second interpretation is the only appropriate one, that from different viewpoints is the most favourable to Parties. Therefore, it is the only one that can be accepted, as ratified by the contents of the Judgment of March 29, 2019.

121. The Arbitrator concludes that, based on the evidence presented to him, the fact that the United Kingdom Foreign & Commonwealth Office declined the appointment of *«…Her Britannic Majesty's Consul General For Borneo…»* on the basis that *«…the Colony of North Borneo ceased to exist in 1963. In these circumstances, we have concluded that it would not be appropriate for the Government to involve itself in the dispute in the manner that you propose…»* does not affect the validity of the Arbitration Agreement. Mr.

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166 *Lucky-Goldstar International (H.K.) Limited v. Ng Moo Kee Engineering Limited*, Excerpts published in [1993] 2 Hong Kong Law Reports (HKLR), 73. The court found that the arbitration clause sufficiently indicated the parties' intention to arbitrate. It held that the reference to an unspecified third country, to a non-existent organization and to non-existent rules did not render the arbitration agreement inoperative or incapable of being performed since arbitration could be held in any country other than the countries where the parties had their places of business and under the law of the place of arbitration, which could be chosen.

167 Notice of Arbitration, ¶¶ 73 and 74; Claimants' comments on *National Oil Company (NIOC) v. Israel*, dated February 24, 2020; Exhibits C 44, pp. 7 and 8 and CL 39.

McLeod, on behalf of the British Government, suggested Claimants to deal *«…their claim directly with the Government of Malaysia…»* and so did not challenge the validity of the Arbitration Agreement.

The Arbitration Agreement remains binding, as well as the determination of the Parties to submit their disputes to arbitration, as ratified by the Judgment of March 29, 2019. Respondent's submission cannot be upheld.

3. *On the Applicable Substantive Law in this Arbitration*

i. The Parties' Positions

122. Claimants sustain that the Arbitration Agreement does not provide for an applicable law on the merits. Claimants also characterise the Deed as an international commercial agreement between a local ruler and an international investor and the Deed refers in its wording to *«…foreign nations…»* and *«…Treaty…»*. Based on this reasoning and on Articles 32 and 34 of the SAA, Claimants conclude that the Arbitrator can and should apply general principles of international law to the merits of the dispute and, specifically, the Principles of International Commercial Contracts endorsed by the International Institute for the Unification of Private Law, amended in 2016 (henceforth, the UNIDROIT Principles), in accordance with the conclusions contained in both the Brödermann Report and the Brödermann Report Addendum.[168]

123. Respondent failed to submit any allegation on this issue or to rebut Claimants' position on the applicable substantive law in this arbitration.

ii. The Arbitrator's Analysis and Findings

124. *Lex causæ* is the law of the substance of the dispute that governs the rights and liabilities of the Parties in the dispute at hand, to wit, in relation with the Deed. The Arbitration Agreement contains no reference whatsoever as to the laws applicable for the merits of the dispute, nor the Deed. The Parties failed to agree on the applicable substantive law in this arbitration. Under these circumstances, the Arbitrator supersedes the Parties in the search of an applicable law to the disputed substance of this controversy and shall discover the intent –wherever possible- and shall determine the applicable substantive law in this arbitration, in accordance with the mandatory principles of the SAA, as the *lex arbitrii* and the law of the place of this arbitration.

[168] Notice of Arbitration, Heading V.D, ¶¶ 104 – 122; Counter – Memorial on Jurisdiction, ¶¶ 146 –169.

125. The Arbitrator is not at all persuaded by Claimants' argument on the international character of the Deed. Claimants allege that such characterization derives –amongst other factors- from the wording of the Deed, where it uses *«…language internationalizing the contract (such as the Sultan of Sulu addressing himself to* «foreign nations» *and the word* «Treaty» («surat perjanjian»)*…».*[169] Certainly, Claimants based their argument on the English translation of the Deed and its side letter, where both words –*«foreign nations»* and *«Treaty»*- are mentioned.[170] The expression *foreign nations* is contained in the fourth paragraph of the side letter of the Deed. The word *Treaty* is included in the final paragraph of the Deed and, therefore, in the Arbitrator's opinion, is relevant for the purposes of this interpretation, as will be explained herein below.

126. The Spanish translation of the Deed[171] –not of its side letter- differs slightly from its English version, as it contains a last paragraph which apparently might have conformed the side letter of the Deed. There is no mention whatsoever in its wording to the side letter contained in the English translation. Official translators of the Spanish Government, Mr. Alejo Alvarez and Mr. Pedro Ortuoste, made a sworn translation of the Deed from its Arabic version,[172] dated July 16, 1878 and therefore contemporary to the date on which the Deed was dated as signed: January 4, 1878. The English version of the Deed contains no declaration of validity and seems to be a private translation by Mr. W.H. Treacher, the then H.B.M. Acting Consul General in Borneo. It also contains a side letter, apparently absent from the Spanish sworn version of the Deed.

It is the Arbitrator's view that the Spanish translation prevails over the English one for various reasons. The Spanish translation is a sworn one, done by official translators of the Spanish Government, directly from its Arabic version.[173] On the contrary, the English translation of the Deed is validated by the world renowned expert, Dr. Annabel Teh Gallop, on July 19, 2019 and therefore it is not as contemporary as the Spanish translation of Deed, nor is it sworn.

127. Once the prevailing version of the Deed determined, attention should be concentrated on the translation of the word *Treaty*, on which Claimants relied for the construction of their argument on the international character of the Deed. It is contained in the last paragraph of its wording.

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[169] Counter – Memorial on Jurisdiction, ¶ 147.

[170] Exhibit C 14, pp. 2 and 4.

[171] Exhibit C 13.

[172] Exhibit C 12.

[173] Exhibit C 13: *«…D. Alejo Alvarez y Don Pedro Ortuoste, Comendadores de la Real y Americana Orden de Ysabel la Católica, de la de San Fernando de la clase y de otras varias por acciones de guerra, Ynterpretes de Gobierno y en comisión de Jolo. Certificamos que lo anterior escrito es Traducción del árabe que le antecede. Y para que conste firmamos el presente en Jolo á 16 de Julio de 1878…».*

The Spanish translation for the Deed contains the following wording:

> «…*Concluido este escrito en Jolo ante el Sultan Dehamalul Alam el primer día de la luna Mujanam año de la égira de 1295 (4 de Enero de 1878)…*».[174]

The English version establishes:

> «…*This treaty is written in the state of Suluk in the palace of Sultan Muhammad Jamalul Azam on the 19th of Muharam in the year 1295, that is the 22nd of January in the year 1878…*».[175]

Therefore, the Spanish translation of the Deed does not refer to *tratado* –the Spanish translation of the word *Treaty*- but rather to *escrito*, which may be translated into English language as *document* or *writ.*

128. A precise and contextual interpretation of the meaning of the word *escrito* in this case recommends further consultation of contemporary correspondence exchanged on the matter and available at the same web site from where Exhibit C 13 was obtained: https://www.officialgazette.gov.ph/1878. The Parties are therefore familiar with the contents of this site, as they are historical in nature and contained in an archive for public and unrestricted access.

129. On January 2, 1878, Acting Consul-General, Mr. William Hood Treacher, KCMG sent a letter to the Earl of Derby, reporting on the activities on Baron Gustavus de Overbeck, when he arrived at Labuam:[176]

> «…*I HAVE the honour to report that on the 16th December there arrived at Labuan the British steamer* America*, of 600 tons burthen, from Singapore. This vessel is chartered by or for the use of Baron Gustavus de Overbeck, an Austrian, and Consul-General (unpaid) for Austria-Hungary at Hong Kong, where he has been long resident as a merchant, having previously, I am informed, been in the house of Dent and Co.*
>
> *The Baron is accompanied by an Englishman, Mr. William Pretyman, as secretary; by Mr. Pryer, also an Englishman, and by Simpson, late a gunner in the British Royal Navy.*
>
> *The Baron de Overbeck and his staff arrived at Singapore from England by mail-steamer, and there joined the* America*, which had been specially fitted up for their accommodation.*
>
> *At Singapore the party was joined by Mr. Torrey, an American subject, now United States' paid Vice-Consul at Bangkok, Siam, and formerly a trader at Hong Kong, who was the President of*

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[174] Exhibit C 13, p. 3.

[175] Exhibit C 14, p. 2.

[176] https://www.officialgazette.gov.ph/1878/01/02/philippine-claim-to-north-borneo-vol-i-acting-consul-general-treacher-to-the-earl-of-derby/

> *the American Trading Company, and in whom, as President, were vested all the rights, &c., conceded to the said Company by the various grants of the Sultan and Rajahs of Brunei, with the power of disposing of them to other parties.*
>
> *Baron de Overbeck, on arriving at Labuan, waited upon me at Government House, and briefly informed me that it was his intention to acquire all Mr. Torrey's concessions, and that he was acting in conjunction with Mr. Alfred Dent, a member of the British firm of Dent, Brothers, of London, who, indeed, had the principal interest in the scheme; that the object proposed was to* buy out *the American interest, and form a British Company, the main desire being to develop the agricultural resources of the northern portion of Borneo, which, as your Lordship is aware, is considered to be the most fertile part of the island, and well adapted for the cultivation of sugar, pepper, gambier, and coffee, its hills affording at different altitudes the various degrees of temperature requisite.*[177]

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[177] The chartered companies of the sixteenth and seventeenth centuries had been instruments for the development for trade and plantations which enabled the British Crown to avoid direct involvement in risky enterprises. They had not proved highly effective, and long before the nineteenth century all but the East India Company and the Hudson's Bay Company ceased to exist. The first of these survived because its main function became the conduct of administration; the latter because its commerce in a remote region still retained a value and caused little criticism or rivalry. But even these two lost the charters in this period. Nevertheless, in the last two decades of the century there was brief revival of such a company as a tool of imperial administration, where commercial adventurers were ready to assume responsibility and effectively occupy spheres of influence against foreign rivals where Crown and Parliament had no wish to govern directly. The Crown was prepared to permit companies to assert the civilised country and at the expense of these investors. First of this generation of chartered companies was the British North Borneo Company. Formed in most cases, at all events from the point of view of the shareholders, for the purpose of earning dividends, these corporations have proved to be the instruments by which enormous areas have been brought under the dominion of the States under whose auspices they were created, and in this way they have been utilized by all the important colonizing Powers. The special field of their operations has been territory which the State creating them was not at the time prepared to administer directly, but which good prospects from the point of view of trade or industrial exploitation. TREACHER, W.H., *British Borneo. Sketches of Brunei, Sarawak, Labuan and North Borneo*. Government Printing Department. Singapore. 1891, p. 102.

Hansard HC Deb 17 March 1882 vol 267 cc1148-230: «*…Mr. Gorst…I am anxious to move that an Address be presented to Her Majesty in reference to the Charter recently granted by the Crown to the British North Borneo Company…And now, let me call the attention of the House for a moment to the Charter itself. It begins with a statement of the cession of Sovereign rights by two Sovereign Sultans—the Sultan of Brunei and the Sultan of Sulu—to Mr. Alfred Dent, and an anonymous individual who is never mentioned in the Charter at all, but who, I believe, turned out to be an Austrian subject, Baron Overbeck. Let me call the attention of the House to the nature of the powers ceded by these two Sultans to Mr. Dent. They include the power of life and death over the inhabitants, with all the absolute rights of property vested in the Sultan over the soil of the country and the right to dispose of the same, as well as the rights over the productions of the country, whether mineral, vegetable, or animal, with the rights of making laws, coining money, creating an Army and Navy, levying Customs rates on home and foreign trade and shipping, and other dues and taxes on the inhabitants as to him (Baron Overbeck) might seem good or expedient, together with all other powers and rights usually exercised by, and belonging to, Sovereign Rulers. It appears, therefore, that as far as the grant could be made, Messrs. Dent and Overbeck had an absolute Sovereignty over the territory. Then the Charter goes on to state that the Sovereign power had been vested in Mr. Alfred Dent alone, and then in a provisional Company founded under the Limited Liability Acts, and called the British North Borneo Provisional Association, Limited. This Limited Company has been formed for three purposes—first, to buy up and become possessed of the Sovereignty of Borneo—a strange possession for a Limited Liability*

Concessions have since been obtained by Messrs. Overbeck and Dent from the Sultan which include the whole northern portion of Borneo from the River Sulaman on the west to the River Sibuco on the east, and, to the south of Sulaman, the harbours and coasts of Gaya and Sapangar, the districts of Pappar, Benoni, and Kimanis in the near vicinity of Labuan.

The Sultan of Brunei's territory extends, at the utmost, only to the west side of Malludu Bay, though formerly the Brunei kingdom extended as far as Cape Kaniungan, on the east coast, in latitude 1° north. The remaining territory, mentioned in the grants is actually under Sulu rule, and occupied by Sulu Chiefs, and it was only because the districts were mentioned in the original American grants that they are again included, and Mr. Overbeck will now have to make a separate agreement with the Sultan of Sulu for them.

The new lessees thus become possessed of all the best harbours in Borneo, and of those which may be said to command to some extent the route to China, vessels in the northeast monsoon passing at no great distance from North Borneo. The principal harbours are, commencing from the south, Gaya, Sapangar, Amboug, Malludu, and Sandakan.

Not only does this portion of Borneo contain the best harbours, but it also possesses the best soil, and is richest in natural productions, such as bird's nests (in which the River Kinabatangan is especially rich), camphor, rattan, sago, gutta-percha, &c., and there can be but little doubt but that when explored it will be found to contain valuable minerals; the existence of coal is already known.

If supported by the occasional presence of a gunboat, I think the proposed Company would not have much difficulty with the natives, many of whom would welcome British rule; if this assistance is not afforded them, considerable tact and knowledge of native character would be requisite in the treatment of the coast natives, especially those in the Sulu portion. With the aborigines no difficulty would be experienced.

By the present arrangement the concession to the Americans is cancelled, the Sultan having received the sum of 5,000 dollars in settlement of all claims arising from that concession, while the new grant contains the name of an English merchant of position…».

This letter is relevant for interpretation purposes herein purported, due to the date in which it was written and its author, a direct witness. Leaving aside, for the time being, the legal characterization of the Deed contained therein, Mr. Treacher used the term *agreement*, when he affirmed that *«…Mr. Overbeck will now have to make a separate* agreement *with the Sultan of Sulu…»* and described it as being of a commercial nature.[178]

130. On July 22, 1878, Mr. Carlos Martínez –the then Colonel-General of Sulu- sent a letter to Baron Gustavus de Overbeck, written as follows:[179]

Company, registered under the Limited Liability Act of 1862; secondly, to obtain a Charter from Her Majesty's Government; and, thirdly, to transfer the Sovereign powers over North Borneo which, had originally been conferred upon Mr. Alfred Dent from a Limited Liability Company to the Chartered Company. 1151The Charter then goes on to create the British North Borneo Company…».

[178] TREACHER, W.H., *British Borneo. Sketches of Brunei, Sarawak, Labuan and North Borneo*. Government Printing Department. Singapore. 1891, pp. 93 – 96.

[179] https://www.officialgazette.gov.ph/1878/07/22/the-governor-of-sulu-to-baron-de-overbeck/

> *«…Sir,*
>
> *…*
>
> *The capitulation adjusted to-day by the Commissioners who under my presidency represent his Excellency the Governor Captain-General of the Philippines, with the Sultan of this Archipelago, and representatives of the country, gives me information that an engagement has been contracted with you for a lease of Sandakan and its dependencies, which contract the Sultan cancels for the reasons expressed in the letter which he addresses to me, and I enclosed to you in copy translated and certified…».*

Therefore, Mr. Martínez himself characterised the Deed as a commercial agreement, defined as *«…an engagement … contracted with you for a lease of Sandakan and its dependencies…».*

131. Baron Gustavus de Overbeck answered this letter on July 24, 1878 as follows:[180]

> *«…Dear Sir:*
>
> *I beg to acknowledge receipt of the letter of Your Excellency dated the 22nd inst. (received only today) advising me that the present possession of the Sultanate of Jolo had become, in accordance with the treaty signed, on the said day, a Protectorate of the Crown of Spain, adding that the said possessions, in addition to the Archipelago of Jolo, comprise Sandakan Bay and the dependencies of the Sultan in Borneo. Without entering here further than necessary into any discussion as to the merits of the matter involved, I will ask Your Excellency to permit me to advise you that the agreement executed between His Highness, the Sultan and myself as representative of British interests, in connection with the assignment of certain portion of the eastern coast of Borneo, claimed by His Highness as part of his domain, was concluded for all times and perpetually, signed in my presence and certified by the representative of His British Majesty and Consul General in Borneo, could not possibly be affected or cancelled by any subsequent treaty executed by His Highness with other parts concerning those territories which may still belong to him. I therefore take advantage of this opportunity to inform Your Excellency that in any event, I, in the name of the interested parties represented by me, have no intention whatsoever of withdrawing from the agreement concluded between His Highness, the Sultan and myself or to permit that same be cancelled under my pretext whatsoever.*
>
> *In conclusion, I will ask our Excellency to permit me to advise you that this matter, as far as I am concerned and as far as the interests represented by me are concerned, has been fully reported and submitted to the Government of His Britannic Majesty….».*

The letter refers to *«…the* agreement *executed between His Highness, the Sultan and myself as representative of British interests, in connection with the assignment of certain portion of the eastern coast of Borneo…»* and makes a clear distinction *«…with any subsequent* treaty *executed by His Highness with other parts concerning those territories which may still belong to him…».* Therefore, it seems that Baron of Overbeck –as one of

[180] https://www.officialgazette.gov.ph/1878/07/24/baron-de-overbeck-to-the-governor-of-sulu/

the signatories of the Deed- clearly distinguished the term *agreement* from the term *treaty* and, on that basis, characterised the Deed as an agreement of a commercial nature. Given the condition of Baron of Overbeck in relation with Deed, the Arbitrator considers this distinction as being relevant for the purposes of the present interpretation.

> 132. Mr. Martínez answered this letter on July 24, 1878, as follows:[181]
>
> *«…On board the* «Vencedora» *Roadstead of Meimbong, July 24, 1878.*
>
> *Sir,*
>
> *I have received your letter in answer to that which I had the honour of writing to you on the 22nd of this month. With regard to your observations respecting the rights of Spain to the territory of this Sultanate, I have to inform you that they have never ceased to exist, and if you made a contract of lease with the very excellent Sultan while he was at war with us, and while there were previous Treaties in existence, and lastly, one in 1851, which states in a public and definitive manner what are the rights of Spain, you will understand the value of your contract. At all events, I report under this date to his Excellency the Governor-General of the Philippines for such decision as he may choose to come to…».*

Mr. Martínez, once again, referred to the Deed as *«…a* contract of lease *with the very Sultan…»* and made the reservation that it would be Baron of Overbeck himself who *«…will understand the value of your* contract*…».* The wording of the letter clearly differentiated between the term *agreement* –referring to the Deed- and the term *Treaties*, *«…which states in a public and definitive manner what are the rights of Spain…».*

133. Based on the content of these documents, it is the Arbitrator's view that the Deed can be characterized as an international private commercial agreement entered into between a local ruler –Sultan Mohammed Jamalul Alam, the Sultan of Sulu- and international private investors, Messrs. Alfred Dent –a British colonial merchant- and Baron Gustavus de Overbeck, a German entrepreneur, diplomat and consul to the Austrian Empire in Hong Kong at the time of the signature of the Deed. Professor Dr. Brödermann confirms that, in his opinion, *«…the 1878 Agreement does not bind two states…»*[182] and therefore ratifies the correctness of the Arbitrator's conclusion.

134. The Macaskie Judgment clarifies that *«…the argument is that the deed of Cession was a complete and irrevocable grant of the territories comprised therein and all*

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[181] https://www.officialgazette.gov.ph/1878/07/24/philippine-claim-to-north-borneo-vol-i-the-governor-of-sulu-to-the-baron-de-overbeck/

[182] Brödermann Report, ¶ 50.

that the grantor obtained was the right to a money payment, that is, only a contractual right, personal to the Sultan and to his private heirs…».[183]

135. Article 34.2 of the SAA provides as follows:

> *«…2. Without prejudice to the provision of the preceding item, in international arbitration, the arbitrators will decide the dispute in accordance with such rules of law as are chosen by the parties. Any designation of the law or legal system of a given State will be construed, unless otherwise indicated, as directly referring to the substantive law of that State and not to its conflict of laws rules.*
>
> *Failing any indication by the parties, the arbitrators will apply the rules they deem appropriate…».*

In the case at hand, as previously explained, the Parties have not chosen the applicable substantive law of this arbitration. Therefore, the Arbitrator will determine the rules of law he deems appropriate, in accordance with Article 34.2 of the SAA.

136. This provision of the SAA refers to *rules of law*, an expression that is used as a new term in an arbitration law in former Article 1496 of the New French Law of Civil Procedure, currently Article 1511 after its reform of 2011.[184]

Heading VII of the Statement of Purposes of the SAA clarifies that *«…the Act prefers the phrase* applicable legal rules *to* applicable law *inasmuch as the latter term appears to call for referral to a State's specific set of laws, when in some cases the rules to be applied are nestled in different sets of laws or rules of international trade… The arbitrators are not bound by the act to a system of conflict of interest rules…».*

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[183] Exhibit C 20, p. 7; Exhibit C 52, p. 11.

[184] French Decree No. 2011-48 of 13 January 2011, reforming the law governing arbitration: *«…Article 1511. The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law it considers appropriate. In either case, the arbitral tribunal shall take trade usages into account…».*

UNIDROIT, *Principles For International Commercial Contracts. Study L, Document 53*. UNIDROIT. 1993, p. 3: *«… Arbitrators are not necessarily bound by a particular domestic law. This is self-evident if they are authorised by the parties to act as* amiable compositeurs *or* ex aequo et bono. *But even in the absence of such an authorisation there is a growing tendency to permit the parties to choose rules of law other than national laws in which the arbitrators are to base their decisions. … In line with this approach, the parties would be free to choose the Principles as the rules of law according to which the arbitrators would decide the dispute, with the result that the Principles would apply to the exclusion of any particular national law, subject only to the application of those rules of domestic law which are mandatory irrespective of which law governs the contract (see Art. 1.4)…».*

137. Therefore, Article 34.2 of the SAA provides authority to the Arbitrator to engage the so called *voie directe*, as he is not bound to follow a specific set of national conflicts of law rules and, in that respect, enjoys a freedom that the judges in a national court do not have. Arbitrator is empowered to decide and directly apply the rules of law which he considers appropriate in the circumstances for a fair and reasonable solution of the dispute before him, without having to recourse to conflict of law rules.[185]

138. When dealing with international commercial contracts such as the Deed, which have the added characteristic of involving a State, the view generally held is that the normal principles of private international law that are followed in contracts between private companies should also be applied to contracts involving state parties, subject to the following qualifications:

A. The Arbitrator is not bound to apply the conflict of laws rules either of the state where the seat of the arbitration is located, nor of the state party involved in the arbitration; and

B. Applying conflicts of rules to such contracts will not necessarily lead to the application of a national system of private law, but to the application of other substantive legal systems, including *lex mercatoria*, precisely defined by Professor James Crawford as a *Buchrecht*, to wit, a law constructed from books, lacking reference to actual legal relation.

Both requirements concur in the present case. Heading VII of the Statement of Purposes of the SAA, clarifies that, under its Article 34.2, *«… the arbitrators are not bound by the act to a system of conflict of interest rules…»*. This same provision indicates that *«…failing any indication by the parties, the arbitrators will apply the rules they deem appropriate…»*. The concept of *rules of law* contained therein permits the Arbitrator to apply *lex mercatoria.*[186]

139. The Deed lacks any choice-of-law provision. Likewise, an agreement by the Parties as to the applicable substantive law of this arbitration is absent. The content of the pleadings and exhibits incorporated to the proceedings should be interpreted as implying a mutual intent of the Parties to avoid the other party's national law. Malaysia

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[185] LEW, J.D.M., «The UNIDROIT Principles as *Lex Contractus* Chosen by the Parties and Without an Explicit Choice of Law Clause: The Perspective of Counsel», ICC/UNIDROIT (Ed.), *Special Supplement, ICC International Court of Arbitration Bulletin: UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration*. 2002, pp. 85 – 94.

[186] *Societé Norsolor S.A. v. Societé Pabalk Ticaret Sirketi*. Award of the International Court of Arbitration of the International Chamber of Commerce, rendered on case 3131/1979; Judgement of the Cour d'Appel de Paris dated September 15, 1981 and November 19, 1982 [1983 *Rev. Arb.* 465] and of the Cour de Cassation on October 3, 1984 [1985 *Dalloz* 101]; Judgement of the Austrian Supreme Court (Der Oberste Gerichtshof der Republik Österreich) on November 18, 1982 [1983 *Clunet* 645].

seems to be reluctant to submit to foreign law[187] and Claimants –of Philippine nationality- will equally be unwilling to submit to local law of Malaysia.[188] It is the Arbitrator's view that the choice of *lex mercatoria* as the applicable substantive law of this arbitration may help to put the contractual relationship articulated in the Deed on a more even footing and thus maintain that equilibrium between the Parties.[189]

140. Claimants seek the application of the UNIDROIT Principles as the *lex causæ* in this arbitration, based on the contents of both the Brödermann Report and the Brödermann Report Addendum, which Respondent failed to rebut throughout this incidental proceedings, as a consequence of its voluntary decision not to intervene in this arbitration proceedings.

141. It is the Arbitrator's view that the election of the UNIDROIT Principles in this dispute is a valid option, as it complies with both the requirements and qualifications contained in Article 34.2 of the SAA –as extensively explained in the preceding paragraphs- and its wording.[190]

Professor James Crawford considered that, in the UNIDROIT Principles, the *Buchrecht* to which he referred is reduced to a single book, the Magna Carta of international commercial law,[191] according to Professor Dr. Berger's precise characterisation.

The UNIDROIT Principles reflect the character of generally accepted principles and rules of international commercial law.[192] They are merely drafted like norms composed of clearly defined legal duties and of general standards and duties of conduct, designed for the adaptation of the law to the changing circumstances of international trade and

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[187] Exhibits C 52 to C 54.

[188] Notice of Arbitration, ¶¶ 73 and 74; Exhibit C 39.

[189] *Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Units Member Firms and Andersen Worldwide Société Coopérative*. Final Award of the International Court of Arbitration of the International Chamber of Commerce, rendered on case 9797, made in Geneva on July 28, 2000 (Brödermann Report, ¶¶ 129 – 131; Exhibit ELO – EB No. 1.28).

[190] Brödermann Report, ¶¶ 98 – 161, supported with an extensive and detailed list of arbitral awards and national judgements. Award of the International Court of Arbitration of the International Chamber of Commerce, rendered on case 9419, made in Lugano on September 1998: «*…With regard to the Principles drawn up by UNIDROIT, it is quite true that these may be considered as a kind of codification of the* lex mercatoria, *but once again these are the results of highly commendable work of academic research and comparison, as well as the reflection of an increasingly eager aspiration to arrive, as it were, at a globalization of legal thinking, though without attributing any binding value to such Principles…*».

[191] BERGER, K.-P., *The Creeping Codification of the Lex Mercatoria*. Kluwer Law International. The Hague, London, Boston. 1999, p. 169.

[192] Brödermann Report, ¶ 75.

commerce.[193] The UNIDROIT Principles are particularly useful in those cases where –as is here the case- the Parties cannot agree on the choice of a particular domestic law as the one applicable to their contract. The reference to a systematic and well – defined set of rules as is the UNIDROIT Principles may avoid or, at least, considerably reduce the uncertainty accompanying vague concepts for the determination or terms such as *«…general principles of law…»* or *«…usages and customs of international trade…».* To that extent, the Preamble of the UNIDROIT Principles stipulates that their content may *«…provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law…»*, as occurs in the case at hand.

Its Article 1.5 further specifies that *«…the parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles…».* The rules laid down in the Principles are in general of a non-mandatory character, except a few provisions which are expressly indicated as such. Its exclusion or modification by the parties may be either express or implied. There is an implied exclusion or modification when the parties expressly agree on contract terms which are inconsistent with provisions of the Principles and it is in this context irrelevant whether the terms in question have been stipulated individually or form part of standard terms incorporated by the parties in their contract. As explained in precedent paragraphs of the Preliminary Award, the Parties failed to reach an agreement on this issue, so the Exhibits in these proceedings –as submitted by the Parties- provide no objective ground to conclude that the Parties had ever intended to repeal or exclude the application of the UNIDROIT Principles. Claimants, on the contrary, expressly sought its application as the *lex causæ* in this matter.

The Brödermann Report considers that the provision of the Preamble of the UNIDROIT Principles *«…opens the door to apply the UNIDROIT Principles when the parties have not chosen any law to govern their contract. This appears to be the case with regard to the 1878 Agreement…»*[194] and concludes that it *«…suggests that the UNIDROIT Principles offer themselves as a source to specify the applicable legal regime in such circumstances…».*[195]

142. In its Judgement of February 25, 2020,[196] the Cour d'Appel of Paris concluded that the decision of the arbitral tribunal to base its reasoning on the application of the 2010 UNCITRAL Principles was in accordance with the characterisation of the dispute

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[193] Brödermann Report, ¶¶ 67, 70 and 84. BERGER, K.-P., «The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts», *Law & Pol'y Int'l Bus.* 28 (1996): 943. BONELL, M.J., «The UNIDROIT Principles as *Lex Contractus* Chosen by the Parties and Without an Explicit Choice of Law Clause: The Perspective of Counsel», CARBONNEAU. T.E (Ed.), *Lex Mercatoria and Arbitration: A Discussion on The New Law Merchant*. Juris Publishing/Kluwer Law International. 1998, pp. 249 – 255.

[194] Brödermann Report, ¶¶ 58 and 59.

[195] Brödermann Report, ¶¶ 64 and 65.

[196] Judgement 17/18001 of the Cour d'Appel of Paris, Pôle 1, Chamber 1, of February 25, 2020, in https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2020/05/17-18001.pdf.

contract as *«…largely international…»* and the application of the direct route method (*voie directe*) for the determination of the *lex causæ*, as France being the place of arbitration and Article 1511 of the French Code of Civil Procedure applicable. As previously explained, this provision provides authority to the Arbitrator to engage the so called *voie directe*, as does Article 34.2 of the SAA.

143. Malaysia is and has been aware and supportive of the UNIDROIT Principles for many years.[197]

144. For all the preceding reasons, the Arbitrator is satisfied that the Claimants' plead on the application of the UNIDROIT Principles as the applicable substantive law of this arbitration is well founded. The Claimants' petition on this issue is upheld.

VIII. THE COSTS

145. Claimants sought a decision on costs of these incidental proceedings in their favour.[198] Respondent failed to provide any views on the issue, nor did they offered any justification, despite being aware of the existence of this arbitration and of the ongoing incidental proceedings. The Arbitrator will render a decision on the costs in this Preliminary Award.

146. Claimants' argument can be summarized as follows. The missing of twenty one deadlines established in the Procedural Orders rendered by the Arbitrator during the arbitration, the challenge of the legitimacy of this proceedings in ambiguous terms[199], the filing of baseless anti-arbitration injunction before Malaysian Courts[200] or its refusal to instruct a law firm to represent it in this arbitration conform, in the Claimant's opinion, some of the most relevant examples of Respondent's reiterated attempts at derailing this arbitration and, therefore, of its procedural bad faith. The Claimants concluded that *«…the Sole Arbitrator should not allow Malaysia to benefit from its own fault…»*.[201]

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[197] Brödermann Report, ¶¶ 254 – 257; Brödermann Report Addendum, ¶¶ 338 – 342 and 345.

[198] Preliminary Award, Heading IV.5 *supra*.

[199] Counter – Memorial on Jurisdiction, ¶ 120: *«…The Respondent's service argument, as articulated in the Uría Report, is simply another regrettable attempt by Malaysia to inappropriately disrupt the arbitration proceedings about which it has been notified every step on the way…»*.

[200] Counter – Memorial on Jurisdiction, ¶ 121: *«…Malaysia's decision to retreat to its home courts in a blatant attempt to derail the ongoing proceedings demonstrated utter contempt for not only the arbitration but for any essence of fair play…»*.

[201] Counter – Memorial on Jurisdiction, ¶¶ 118 y 123.

147. Article 37.6 of the SAA provides as follows:

> *«…Subject to the agreement of the parties, the arbitrators shall decide in the award on the costs of the arbitration, which shall include the fees and expenses of the arbitrators and, where applicable, the fees and expenses of counsel or representatives of the parties, the cost of the services provided by the institution administering the arbitration and the other expenses of the arbitral proceedings…».*

Based on these guidelines, the term *costs*, in the case at hand, includes:

A. The fees of the Arbitrator and his reasonable expenses incurred;

B. The legal and other costs incurred by the Parties in relation to the arbitration, to the extent that the Arbitrator determines that the amount of such costs is reasonable;

C. The reasonable costs of expert advice of the Parties;

D. The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the Arbitrator; and

E. The expenses related to the organisation of the proceedings.

148. It is acknowledged that the successful party is entitled to prosecute or defend its claims in the manner it considers necessary and appropriate, and arguably the party and its representatives are best placed to evaluate what resources are required to win the case. However, it will remain within the arbitrator's discretion to decide whether or not that party will recover its costs in full, according to the reasonability of the expenses incurred and to allocate the costs, weighting the concurring circumstances as he considers relevant.

When allocating costs in international commercial arbitration it may be necessary to consider other circumstances, where relevant, including the extent to which each party conducted the arbitration in an expeditious and cost-effective manner.

In the present case, Respondent's reiterated and unjustified refusal to comply with the deadlines granted were circumstances that contributed to delay the conduct of this arbitration and to incur additional costs. Respondent's uncollaborative attitude in the definition of relevant procedural issues (i.e., seat of arbitration, language of the arbitration, *lex arbitrii*, *lex causæ*) caused the submission of extensive pleadings by Claimants, which were not rebutted by Respondent, and has substantially –and, in the Arbitrator's view, unnecessarily- increased the amount of time the Arbitrator and each Party has had to devote to these incidental proceedings of the arbitration to determine the issues contained in the Preliminary Award. The relevance of the grounds for challenge of

the legitimacy and the jurisdiction of the Arbitrator raised by Respondent proved to be of limited importance for the proceedings.

The Arbitrator has considered all the circumstances to determine the most appropriate allocation of costs in these incidental proceedings.

149. As a rule, a party may seek reimbursement of its legal and other costs so far as those have been incurred in connection with these incidental proceedings of the arbitration; to wit, only expenses which were necessary for the preparation of the case and directly linked to the filing of the arbitration will be considered costs of the arbitration.

The Arbitrator needs to be satisfied that a cost was incurred specifically for the purpose of pursuing the arbitration, has been paid or is payable, and was reasonable.

The Claimants submitted a summary of detailed costs incurred in the incidental proceedings in this arbitration, including both Counsel (i.e. 4-5 Gray's Inn, B. Cremades & Asociados Abogados and Romulo Mabanta Buenaventura Sayoc & De los Ángeles), Expert Reports and Arbitrator's Fees and determined as follows:

Concept	Amount	
	$	€
1. Counsel's Fees	1,015,501.92	
2. Counsel's Costs	143,311.50	
3. Arbitrator's Fees	134,887.50	
4. Hearing Room & Hiring Costs		4,591.06
5. Experts' Costs	227,500.00	
Total	1,521,200.92	4,591.06

Respondent failed to submit any summary of its detailed costs incurred in this arbitration, nor did it rebut those amounts that Claimants submitted.

150. In the Preliminary Award, Claimants' positions prevailed. Respondent has been unsuccessful, and its jurisdictional objections have been fully dismissed. It is the Arbitrator's view that Claimants are entitled to be reimbursed by Respondent 100% of the costs and expenses of Counsel, and 100% of their experts' fees and costs incurred in these incidental proceedings of the arbitration.

The resulting figures are determined as follows:

Concept	Amount $
1. Counsel's Fees	1,015,501.92
2. Counsel's Costs	143,311.50
3. Experts' Fees and Costs	227,500.00
Total	1,386,313.42

Respondent is not entitled to be paid either any legal fees or any legal costs.

151. The Arbitrator records that Claimants have deposited a total of one million one hundred and fifty thousand US Dollars ($1,150,000) to cover the arbitration direct costs, which include the fees and expenses of the Arbitrator and other direct expenses and estimated charges related to the conduct of this arbitration including, amongst other, court reporting, interpretation, translations, courier and audio visual services.

152. Respondent never paid any funds towards the arbitration costs. Claimants paid the full amount of the initial deposit on July 2, 2019 ($125,000), on August 19, 2019 ($125,000), on December 23, 2019 ($400,000) and on January 7, 2020 ($400,000) on behalf of Respondent.[202]

Respondent shall reimburse Claimants the amount of five hundred and twenty-five thousand US Dollars ($525,000) for the Respondent's fifty per cent share of the deposit paid by Claimants on behalf of Respondent on August 19, 2019 and on January 7, 2020.[203]

153. The arbitration costs of these incidental proceedings of the arbitration are determined to be four hundred seventeen thousand one hundred ninety-five US Dollars ($417,195) and four thousand five hundred and ninety-one Euros and six cents (€4,591.06), comprised of the following:

Concept	Amount	
	$	€
1. Arbitrator's Fees	417,195	
2. Hearing Room & Hiring Costs		4,591.06
Total	417,195	4,591.06

[202] Procedural Orders 6 and 13.

The Parties were served with Procedural Order 6, issued on October 31, 2019. The Parties were served on the same day. Claimants acknowledged receipt on October 31, 2019, at 15:42 hours, Madrid Time. Respondent acknowledged receipt on October 31, 2019, at 13.25 hours, Madrid Time, through its then Counsel, Dr. Capiel. Exhibit C 54.

The Parties were served with Procedural Order 13, issued on February 25, 2020. The Parties were served on the same day. Claimants acknowledged receipt on February 25, 2020, at 14:20 hours, Madrid Time. Respondent was served by email on February 25, 2020. The Prime Minister of Malaysia and the Embassy of Malaysia in Madrid received this email on February 25, 2020, at 12:20 (Madrid Time) at their respective email addresses: pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on February 25 2020, at 12:21 (Madrid Time) and read it on February 26, 2020, at 08:12:29 hours, Malaysia Time. Respondent failed to acknowledge receipt of this email and Procedural Order 13, nor did it provide an acceptable excuse.

[203] Procedural Order 13.

Claimants paid ninety seven thousand one hundred and seventy seven US Dollars and fifty cents ($97,177.50) corresponding to Arbitrator's Fees to date and four thousand five hundred and ninety-one Euros and six cents (€4,591.06), corresponding to hearing rooms and hearing costs related with the Preparatory Conference and the Hearing on Jurisdiction.[204] These amounts were already deducted by the Arbitrator from the funds deposited with the Arbitrator by Claimants. The remaining balance of three hundred twenty thousand seventeen US Dollars and fifty cents ($320,017.50) will be drawn from the funds with the Arbitrator deposited by Claimants.

It is the Arbitrator's view that Respondent should bear all the arbitration costs.

IX. THE DECISION

For the reasons set forth above, having carefully considered all the Parties' arguments and submissions and the evidence before him, the Arbitrator makes the following award and order:

A. On the procedural aspects of the arbitration:

1. The Arbitrator decides, confirms and declares that the place of this arbitration be Madrid (Spain). This does not preclude the Arbitrator conducting hearings and meetings with the Parties and possible witnesses and experts at any other place, after consultation with the Parties, or communicating with the Parties by telephone conference calls or by other available electronic means of communication, if considered appropriate for the orderly and efficient conduct of the arbitration;

2. The Arbitrator decides that SAA is the *lex arbitrii* and declares that SAA apply to these proceedings, supplemented –where necessary- by the rules already determined in Procedural Order 1 and such further rules which the Arbitrator may determine, after consultation with the Parties throughout the proceedings;

3. The Arbitrator declares that the language of this arbitration should be English and decides that arbitration shall be conducted in the English language; and

4. The Arbitrators decides that Claimants' plead on the application of the UNIDROIT Principles as the *lex causæ* of this arbitration is well founded and

[204] Procedural Orders 6 and 13.

upheld. The Arbitrator declares that he should apply general principles of international law to the merits of the dispute and, specifically, the Principles of International Commercial Contracts endorsed by the International Institute for the Unification of Private Law, amended in 2016, to wit, the UNIDROIT Principles.

B. On the Respondent's objections:

1. The Respondent's objections are dismissed;

2. The Arbitrator decides and declares that the Arbitration Agreement is valid and ratifies the decision contained in the Judgment of March 29, 2019; and

3. The Arbitrator decides and declares that he has jurisdiction over the claims made by Claimants in their Notice of Arbitration.

C. On the costs:

1. The Arbitrator decides that Respondent should bear all legal and expert costs incurred by Claimants in the incidental proceedings in this arbitration. Claimants are entitled to be reimbursed by Respondent of these amounts. Therefore, Respondent is ordered to reimburse Claimants the amount of one million three hundred and eighty-six thousand three hundred and thirteen US Dollars and forty–two cents ($1,386,313.42), corresponding to Claimants' Counsel and Experts' fees and costs;

2. The Arbitrator decides that arbitration costs of the incidental proceedings are determined to be four hundred seventeen thousand one hundred and ninety–five US Dollars ($417,195) and four thousand five hundred and ninety-one Euros and six cents (€4,591.06) and that Respondent should bear all the arbitration costs of the incidental proceedings of this arbitration. Therefore:

   a. Respondent is ordered to reimburse Claimants the amounts of

      i. Four hundred seventeen thousand one hundred and ninety–five US Dollars ($417,195); and

      ii. Four thousand five hundred and ninety-one Euros and six cents (€4,591.06); and

   b. Respondent is ordered to reimburse Claimants the amount of five hundred and twenty-five thousand US Dollars ($525,000) for the Respondent's fifty per cent share of the deposit paid by Claimants on behalf of Respondent on August 19, 2019 and on January 7, 2020.

The remaining balance of three hundred twenty thousand seventeen US Dollars and fifty cents ($320,017.50) will be drawn from the funds with the Arbitrator deposited by Claimants.

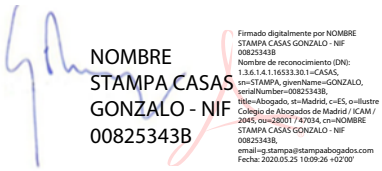
D. All requests and claims not otherwise dealt with in this Preliminary Award are rejected.

E. The proceeding shall continue under the schedule established in the Procedural Calendar.

Place of Arbitration: Madrid (Spain)

Date: May 25, 2020

Sole Arbitrator



Dr. Gonzalo Stampa