Title:
XIII.3.4 - Language of the arbitration

Content:
No. XIII.3.4 - Language of the arbitration

(a) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings, taking into account the parties' due process rights under Principle XIII.3.1.

(b) This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(c) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Commentary:

1. The language of the arbitration can be agreed upon by the parties. Party autonomy is particularly important here since the choice of the language affects the parties' position in the proceedings and the expediency and costs of the arbitration. If the parties have reached an agreement on the language to be used in the arbitration, due to the Principle of the priority of party autonomy, the tribunal has to accept the determination by the parties. Since the arbitral tribunal has no lex fori, the parties are not bound by mandatory provisions in force at the seat of the arbitration which provide that proceedings before domestic courts must be conducted in the language of that country.

2. In view of the extreme significance of the language issue in international commercial arbitration, where the parties usually come from different countries and speak different languages, Art. 17 (1) UNCITRAL Arbitration Rules provides that the arbitral tribunal shall determine the language of the arbitration "promptly after its appointment". This rule should generally be followed in international arbitration, even if, as in our case, the proceedings are not conducted under the UNCITRAL Arbitration Rules.

3. The tribunal is not completely free in determining the language. There are both practical and legal issues which the tribunal has to take into account in making its decision.

4. Firstly, the arbitrators have to take practical aspects into account, such as the language of contract documents (which is usually the language in which the arbitration clause was drafted) or correspondence between the parties, the parties' own language capabilities and the costs involved in extensive translations of oral proceedings and written submissions. In this context, Principle No. IV.4.2 may become relevant.

5. Secondly, the arbitrators have to be aware of the fact that the determination of the language in which the factual background of the case and the relevant legal arguments are to be presented to the tribunal affects the position of the parties in the arbitration and may touch upon their fundamental right to procedural due process (right to be heard and to be treated equally).