

Should an Arbitral Award be Appealed by the Parties?

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Abstract

After the World War II, with the impacts of the liberal theories and with the policies of free trade, remarkable, gradual developments and enlargements have been observed on the International Commercial Relations among states. Naturally, as a consequence of these improvements, traders or companies faced with crucial disputes in their relationships against counterparts. For this reason, these parties needed to solve trade disputes in an innovative and efficient ways. It can be said that International Commercial Arbitration has played a significant role to solve these obstacles both on legal bases and in a business manner. However, according to permanent settlement of International Commercial Arbitration, an arbitral award cannot be appealed by the parties. On the other hand, there is a common debate that ‘whether parties to international commercial arbitration should be permitted to appeal an arbitral award.’ This paper intends to analyse and provides a critical assessment on this trend topic. It will stress the importance of finality of the international commercial arbitration award in the trade area.

Keywords: Arbitral award, International Commercial Arbitration.

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Introduction

In the last decades, international commercial relations among states have had profound progresses both in terms of economic capacity and number of trade relations.² It is clear that with the impacts of ‘globalisation policies’ and liberal governmental actions, nearly all of the countries opened the markets, removed their borders and prevented the discrimination against foreign companies.³ In other words, with the effects of recent policies or developments in technology like easy money transferring on the internet between the parties and high qualified transportation facilities, a sharp increase has been observed regarding international commercial capacity among states.⁴ Especially developing countries like China, India and Brazil have carried a step further in particular, about the number of trade relations and its growth. The Secretariat of the World Trade Organization (hereinafter WTO) illustrated that the economic value and capacities of developing countries have been tripled between 2000 and 2008.⁵ In addition to this, the formal web pages of the United Nations Commission on International Trade Law (hereinafter “UNCITRAL”)⁶ shows that the number of the contracting states has reached 78 currently. This means that contractors of the CISG have been dominating more than 75 percentage of the International Commercial Growth among states.⁷ In a nutshell, these statistics and reports all indicate that International Commercial Relations have been improving day by day.

It should be emphasized that while these international commercial relations are improving, the traders are facing with various commercial disputes regarding their trade processes. Therefore, all the parties in the International Commercial relations try to solve these disputes in an efficient way without time consuming. Additionally, they are in search of paying less money and spending less

² WTO, ‘Trade Growth To Ease in 2011 But Despite 2010 Record Surge, Crisis Hangover Persists’ <http://www.wto.org/english/news_e/pres11_e/pr628_e.htm> as accessed on 01 November 2014

³ An enabling environment for development: the contribution of the multilateral trading system’ (2 July 1997) <http://www.wto.org/english/news_e/pres97_e/ecosoc.htm> Accessed 01 November 2014.

⁴ Paul Krugman, ‘Growing World Trade: Causes and Consequences’ Brookings Papers on Economic Activity, Vol. 1995, No. 1, 25th Anniversary Issue (1995), p 328 < <http://www.giszpenc.com/globalciv/krugman1.pdf>> Accessed 01 November 2014

⁵ World Trade Organization, Annual Report 2012, ‘Trade and Development’ < http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep12_chap6_e.pdf> Accessed 01 November 2014

⁶ As of December 2012, the United Nations reports that 78 states have adopted the CISG; see; < http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> Accessed 01 November 2014

⁷ Camilla B. Andersen ‘Recent Removals of Reservations under the International Sales Law – Winds of Change heralding a Greater Unity of the CISG?’ (2012) 7 Journal of Business Law at 699

time or no delays to conclude these commercial disputes. At his point, it is most probably true that International Commercial Arbitration is seen one of the most popular and effective way for solving the disputes between international companies or traders. To give an example, according to the database of International Chamber of Commerce (hereinafter ICC), “*ICC’s Dispute Resolution Services are particularly well suited to the resolution of disputes that have a commercial or international character.*”⁸ In addition to this, as everybody knows that a decision of arbitral tribunal namely an arbitral award is binding for the parties and this award can be enforced in nearly 150 states all over the world within the scope of both international and domestic enforcement authorities.⁹ We can understand from these expressions that Arbitration is one of the most preferable dispute resolution methods regarding solving the international commercial problems.

This paper firstly aims to elaborate the meaning and nature of the Arbitration and focus on importance of the International Commercial Arbitration regarding the role of resolving International Commercial conflicts among the commercial actors. Secondly, this essay intends to assess significant International Commercial Arbitration Conventions and rules such as New York Convention (1958) and UNCITRAL Model Law on International Commercial Arbitration 1985. Additionally, some effective theories like delocalisation theory and the seat theory will be explored critically with their impacts on judicial approaches on International Commercial Arbitration. In the meanwhile, the requirements for the enforcement of an arbitral award and appealable of arbitral awards will be discussed with the scope of International Arbitration Rules and theories. Thirdly, the discussion will move to the perspectives of traders, namely the parties of the International Commercial Arbitration. The question ‘whether parties to international commercial arbitration should be permitted to appeal an arbitral award?’ will be analysed in a business manner. Lastly, as a concluding remark, a personal engagement regarding the appealable of arbitral awards by the parties will be critically evaluated.

II) Nature of Arbitration and International Commercial Arbitration

⁸ See the ICC Dispute Resolution Services < <http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/> > Accessed 03 November 2014

⁹ United Nations Conference on International Arbitration Award, ‘CONVENTION on the recognition and enforcement of foreign arbitral awards’ < http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf > Accessed 02 November 2014.

Should an Arbitral Award be Appealed by the Parties?

Arbitration can be defined as a method of dispute resolutions which is based on an agreement among the parties to submit their disputes or conflicts to a neutral third party namely ‘impartial arbitrators’ for a binding award. Additionally, an arbitrator’s duty is deciding the parties’ rights with the scope of judicial rules by using evidence materials they acknowledged or submitted to him, ‘not by accounting his own knowledge.’¹⁰ However, there is no universal definition or no statutory of the arbitration since it can appear in various legal texts and it can be seen in numerous kinds.¹¹ On the other hand, there are main principles of the arbitration which are an arbitration agreement, a dispute among parties, ‘a reference to a neutral third party, and lastly, the third party’s namely arbitrator’s binding decision for the parties.’¹² It has also been illustrated that the period of arbitration must be judicial and the parties agree to implement of the arbitral award.¹³

As we said above, International Commercial Arbitration is playing a significant role about solving the disputes in the field of International Commercial Relations. For this reason, it is clear that the meanings of the terms ‘international’ and ‘commercial’ are lying at the heart of the International Commercial Arbitration. It should be pointed out that there are wide interpretations of these two terms. Pursuant to Article 1(3) of the UNCITRAL Model Law, arbitration is recognized or considered as ‘international’ in a various conditions.¹⁴ To give an example, In the case of *Fung Sang Trading Ltd v Kai Sun Sea Products and Food Co Ltd*¹⁵, two Hong Kong companies agreed on sale of goods. In this case, the court held that there was ‘internationality’ because, the place of good’s was China. Namely, although these two companies were from the same state-Hong Kong-, the court interpreted the Article 1 of the Model Law in a wide approach.¹⁶ Similarly, the term of the ‘commercial’ is seen too broad by the UNCITRAL Model Law Art 1(1).¹⁷ In the 306th meeting of

¹⁰ Roy Goode, *Goode on Commercial Law* (Ewan McKENDRICK, 4th edn, Penguin Books, 2010) at 1299

¹¹ S. Blake, C. Browne & S. Sime, *A Practical Approach to Alternative Dispute Resolution* (2nd edn, Oxford University Press, 2012) at 393

¹² P. Fouchard, E. Gaillard, and B. Goldman, *International Commercial Arbitration* (E. Gaillard and J. Savage eds) (Kluwer Law International, 1999)

¹³ Andrew Tweeddale, Keren Tweeddale, *Arbitration of Commercial Disputes, International and English Law and Practice*, (2nd edn, Oxford University Press, 2010) at 34-35

¹⁴ See the UNCITRAL Model Law Article 1(3), < http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf > Accessed 03 November 2014

¹⁵ *Fung Sang Trading Ltd v Kai Sun Sea Products and Food Co Ltd* (1992) 1 HKLR 40; CLOUT Case No 20; (1992) XVI Ybk Comm Arb 289-303

¹⁶ Andrew Tweeddale, Keren Tweeddale, n above 13 at 50

¹⁷ UNCITRAL Model Law Article 1(1) provides: The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions:...” < http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf > Accessed 04 November 2014

the UNCITRAL Commission it was illustrated that the detailed list of ‘commercial matters’ cannot be determined and as a consequence of this approach, the meaning of the word ‘commercial’ must be interpreted in a wide/broad interpretation.¹⁸ In a nutshell, in the lights of all these approach, we can understand that international commercial arbitration can be seen between individuals, companies, joint ventures and it may be related numerous industries like oil, gas, engineering or it can meet in some services such as banking and insurance services.

It is clear that although arbitration has a few challenges and disadvantages, it has various advantages for the parties in the area of international commercial disputes. In other words, with the negative impacts of litigation process on the parties, arbitration is seen preferable and its benefits are undeniable. For example, arbitration process has party autonomy which means that the parties should be free and could choose the law regarding how their dispute should be solved¹⁹, arbitral tribunal not bound by rules of evidence/procedure, confidentiality and arbitrators may be specialist in particular field and enforceability of an arbitral award internationally and nationally. The benefits of the International Commercial Arbitration will be elaborated in detailed in section IV with the critically assessment of whether parties should be allowed to appeal an arbitral award.

III) Important International Commercial Conventions and Rules with the Theoretical Aspects Regarding Appealable of the Arbitral Award.

It is most probably true to assume that UNCITRAL Model Law is the most significant legal base for the International Commercial Arbitration. Since, as it was indicated it has international legal texts to improve international trade law and non-legislative texts for commercial actors to use in their trade relations. It means that many states are using the UNCITRAL Model Law as a legal basis and this situation provides a similarity and availability of uniformity on the International Commercial Rules on most parts of the world. To give an example, The London Court of International Arbitration (hereinafter LCIA) and ICC are two preferred institutions in Arbitration

¹⁸ See the *Year Book of the United Nations Commissions on International Trade Law*, (1985), (Vol. XVI), < <http://www.uncitral.org/pdf/english/travaux/arbitration/ml-arb/306meeting-e.pdf> > Accessed 04 November 2014

¹⁹ See the UK No. 92, *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*, Supreme Court, 3 November 2010 in Albert Jan den Berg (ed), *Yearbook Commercial Arbitration* 2011-Volume XXXVI, (Kluwer Arbitration) pp. 357-362 < <http://www.kluwerarbitration.com.ezproxy3.lib.le.ac.uk/document.aspx?id=KLI-KA-1152041-n> > Accessed 04 November 2014

and these two institutions have many similar rules regarding the Arbitration.²⁰ In addition to this, another major actor is 1958 New York Convention (1958-Convention on the Recognition and Enforcement of Foreign Arbitral Awards-) which has been ratified by 148 parties²¹. This convention provides enforcement availability of the arbitral awards over the world compared that which is more difficult for the enforcement of court judgements. According to Mustill, The New York Convention is “*the single most important pillar on which the edifice of international arbitration rests*”²² From this point of view, it easy to say that the New York Convention and UNCITRAL Model Law are the hearts of the International Commercial Law. Also, the Arbitration Act 1996²³ for England and 1981 Decree²⁴ (NCPC Decree) for France are two significant rules for the International Commercial Arbitration. These two last legal bases will be evaluated below with the theoretical aspects of the arbitration.

a. Influence of the Seat and Delocalisation Theories

Undoubtedly, before explaining these theories, giving the definition of “lex arbitri” will be beneficial to understand the theories more deeply. As M. Ahmed provides; “*The lex arbitri can be defined as the procedural laws of the country within which the seat is located.*”²⁵ For this reason, it is true that the lex arbitri is fundamental in International Commercial Arbitration. The national courts may be allowed to interact if the parties do not agree for an arbitrator or if the arbitration agreement is inadequate regarding appointment of the tribunal.²⁶ After this explanation, as is evident from its name, the Seat Theory dictates the parties for using the procedural rules of the arbitration place law namely the lex arbitri in their arbitration processes. As it was indicated that the

²⁰ Andrew Tweeddale, Keren Tweeddale, n above 13 at 39.

²¹ See the Status, 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, < http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html > Accessed 05 November 2014

²² Lord Mustill, ‘Arbitration: History and Background’ (1989) 6 Journal of International Arbitration 43

²³ See the text of, Arbitration Act 1996, < <http://www.legislation.gov.uk/ukpga/1996/23/contents> > Accessed 05 November 2014

²⁴ Decree No.81-500 of 12 May 1981.

²⁵ M. Ahmed, ‘Exploring The Influence Of The Delocalisation And Seat Theory Upon Judicial Attitudes Towards International Commercial Arbitration’, (2011) 77(4) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, 406-422 – Westlaw <

<http://login.westlaw.co.uk.ezproxy3.lib.le.ac.uk/maf/wluk/app/document?&srguid=ia744d05e0000013df92e4a64d7d8c6ac&docguid=IE24B5FE1FC6211E08185A4FC38455391&hitguid=IE24B5FE1FC6211E08185A4FC38455391&rank=1&spos=1&epos=1&td=5&crumb-action=append&context=9&resolvein=true> > Accessed 06 November 2014

²⁶ Andrew Tweeddale, Keren Tweeddale, n above 13 at 233

Seat Theory was improved from the idea of '*siege d'arbitrage*'²⁷ by Professor Sausser-Hall almost 60 years ago and the seat theory is commonly preferred in the International Commercial Arbitrations.²⁸

As mentioned above, British Arbitration System is based on the Seat Theory. As a consequence of this, The English Arbitration Act 1996 is governed by the Seat Theory. If we look at the Section 3 of this Act, we can understand the meaning of the arbitration seat. If we critically assess our question which was 'whether the parties should be allowed to appoint for appealing of arbitral award', it is most probably true that according to Seat Theory, the arbitral awards can be appealed by the parties in International Commercial Arbitration Process. Because, The Arbitration Act 1996 s. 69(1) provides that a party can appeal the arbitral award to the court, unless otherwise consented upon by the two parts of the arbitration. It means that if there is no contrary agreement about the appealable of the award, the new judicial review is available in the scope of the British Arbitration Act 1996. At this juncture, one critic question should be answered; if there is no agreement/consent for appealing the award and if there is a party who are satisfied from the award, are the parties able to appeal the arbitral award with the frame work of the Arbitration Act 1996? It is clear that pursuant to s. 69(2)(b) of the Arbitration Act 1996, the party who is looking for reviewing of the award can ask permission of the court for the appeal. In the *Carr & Brookside Farm Trust Ltd. V. Gallaway Cook Allan*²⁹ Case, a clear example of the availability of the arbitral award within the scope of British Arbitration Act was observed. In a nutshell, with the impacts of the Seat Theory, British Arbitration System is permitting the parties the appellate procedure in the Commercial Arbitration. After mentioning the Delocalisation Theory we will keep discussing this trend topic from the perspectives of the businesses or traders in Part IV of our essay.

²⁷ See the, Annex II: Table on Conditional EU Merger Clearance Decisions Incorporating Commitments Over the Period 1992-2009 in Gordon Blanke and Philip Landolt(eds), *EU Antitrust Arbitration: A Handbook for Practitioners*, (Kluwer Law International 2011) pp.1925-2062 < [<http://www.kluwerarbitration.com.ezproxy4.lib.le.ac.uk/document.aspx?id=KLI-KA-KCL-1109255-n&query=AND\(content%3A%22siege%22,content%3A%22darbitrage%22\)](http://www.kluwerarbitration.com.ezproxy4.lib.le.ac.uk/document.aspx?id=KLI-KA-KCL-1109255-n&query=AND(content%3A%22siege%22,content%3A%22darbitrage%22)) > Accessed 08 November 2014

²⁸ Andrew Tweeddale, Keren Tweeddale, n above at 233

²⁹ Campbell Walker, '*Carr & Brookside Farm Trust Ltd. v. Gallaway Cook Allan*, High Court of New Zealand' Case No. CIV-2012-412-000417, 28 June 2012 A contribution by the ITA Board of Reporters, Kluwer Law International. < [<http://www.kluwerarbitration.com.ezproxy4.lib.le.ac.uk/document.aspx?id=KLI-KA-1232570&query=AND\(content%3A%22arbitration%22,content%3A%22act%22,content%3A%221996%22\)](http://www.kluwerarbitration.com.ezproxy4.lib.le.ac.uk/document.aspx?id=KLI-KA-1232570&query=AND(content%3A%22arbitration%22,content%3A%22act%22,content%3A%221996%22)) > Accessed 09 November 2014

The Delocalisation Theory stresses that International Commercial Arbitration must be independent and any National Judicial system cannot review the arbitral award. In other words, the seat of arbitration is not allowed to restrict or control over the International Commercial Award and it must be 'detached' from the National Procedural Law and there should not be any causal link between the Law of International Commercial Arbitration and *lex arbitri*.³⁰ From this point of view, it is true that the delocalisation theory does not have an influence or any domination on the arbitral process and it should be autonomous. Some Civil Judicial System such as France, the Netherlands, Portugal, Switzerland, Egypt adopt the Delocalisation Theory in their Arbitration Processes.³¹ French Arbitration can be considered to be one of the most popular and 'friendly' Arbitration system which its municipal courts cannot control over the International Commercial Arbitrations. Additionally, French Arbitration Law has been developing day by day in favour of the Delocalisation Approach. For example, the French Code of Civil Procedure has been amended in 2011³² which provide more power to the arbitrators and emphasize the significance of the Party Autonomy in arbitration procedures.³³ It is directly related with our discussion topic that, the arbitral award cannot be appealed in this method. As a consequence of this situation and with the help of all these improvements, the French Arbitration will keep going as the most preferred Arbitration system in International Commercial Arbitration among traders and the parties will select Paris and ICC as the Seat of Arbitration. We will deeply analyse the appealable of the arbitral award from the perspectives of traders and arbitral lawyer in our last part of essay.

IV) Critical Analyse of Whether the Parties Should be Permitted to Appeal an Arbitral Award From The Perspective of the Traders or Arbitral Lawyers

While some theories are favour of the appealable of the arbitral award, others are underlying the autonomous, independent and non-appealable International Commercial Arbitration process. However, this controversial topic should be assessed with the approaches of the most important actors of the International Commercial Arbitration and it should be evaluate with the spirit of the International Commercial Relations. In this part of the essay, we will evaluate this phenomenon on

³⁰ M. Ahmed, n above 25

³¹ Andrew Tweeddale , Keren Tweeddale, n above 13 at 246

³² (Ministry of Justice and Civil Liberties, *Report to the Prime Minister concerning Decree No.2011-48 of January 2011 reforming arbitration* ("the Report") <
http://www.parisarbitration.com/uploads/FRENCH_LAWÖNÄRBITRATION.pdf>Accessed 07 November 2014

³³ Hong-Lin Yu, Masood Ahmed, 'The New French Arbitration Law: An Analysis', (2012) 15(1), 20-29, International Law Review, West Law UK.

two fundamental bases, discussion with ‘commercial approach’ and uniformity of the International Commercial Arbitration Principles. To start with the trader’s perspective, it is easy to say that every businessman or every company do not want challenges or obstacles in their trade relations. Moreover, if they have some commercial disputes, they try to overcome and solve their disputes in an efficient way and in a business manner. As it is known that ‘time’ is the one of the significant element of the trade and ‘being on time’ is seen indispensable for the trustable commercial relations among them. For this reason, International Commercial Arbitration is the most attractive method for resolving International Commercial Disputes with its advantage which is taking less time for the traders. In other words, traders or parties tend to prefer the arbitration than litigation since arbitration is seen much quicker and cheaper than litigation.³⁴ I think this issue is the heart of our discussion. It can be said that nearly all traders’ goal is getting the binding arbitral award in a short time period. Moreover, assume that the parties are permitted to appeal the award. In this case, the party who are dissatisfied from the arbitration result tend to appeal of the award. Naturally, it will prevent the enforcement of the award and cause challenges for the other party. Not only the contended party but also the other party will have to wait extra time for the appeal period.³⁵ In the meanwhile, while this situation is causing the delay and time consuming for the parties, it will also increase the arbitration process. Besides, availability of appealing the arbitral award will put some barriers in terms of its finality and disturb its ‘sui generis’ spirit in the International Commercial Arbitration system. As a consequence of all these issues, the commercial actors, namely the parties of arbitration, are seeking the finality and autonomous process in the International Commercial Arbitration.

Another fundamental issue regarding our topic is uniformity of International Commerce and International Commercial Arbitration System. If the parties are permitted to appeal the award, as we noted above, it will prevent the harmonisation and uniformity of International Commercial Relation among states. Most of the states are trying to promote more trade and they are have been encouraged by WTO regulations for implementing ‘liberal’ Commercial Laws and governmental

³⁴ Sameer Sattar, ‘National Courts and International Arbitration: A Double-edged Sword?’, *Journal of International Arbitration*, Kluwer Law International 2010 Vol 27 Issue 1 pp. 51-73.

³⁵ J. Paulsson, ‘Arbitration Unbound: A ward Detached From The Law of Its Country of Origin’, (November 1981), *The International and Comparative Law Quarterly* 358

Policies.³⁶ It is worth saying that availability of appealing the award may have negative effects on both legal and the practical areas of the International Commercial Arbitration. From this point of view, it is essential to say that International Commercial Relations and International Trade Policies among states will sustain an injury as a consequence of this situation. To figure out this situation, it should be emphasized that the answer of the question, ‘Which law will be appointed in the period of appealing the arbitral award?’ is vital and it may cause irregularity and confusion in the Commercial Arbitration System. In addition to this, as Goode indicates that “*the arbitral award now has greater degree of finality than a judgment*”³⁷ and if the parties are permitted to appeal the award, it is clear that the finality of the arbitral award will be lost. In the meanwhile, it must be stressed that in many International Commercial Arbitration Cases, the subject matter of arbitration refers huge amount of money. It is easy to predict that many International Commercial Relations among the parties, and indirectly among states, will suffer because of the non-uniformity of the International Arbitration Appealing System.

Conclusion

In the lights of all issues we discussed above, it is obvious that permitting the parties to appeal the arbitral award in the International Commercial Arbitration will create some obstacles for the harmonisation of International Commercial Arbitration System. It will also put some barriers in front of the improving Trade Relations between states. As we accepted that Commercial Parties, namely traders, prefer the Arbitration Process to get major advantage like finality of the arbitral award, wide enforceability over the globe, confidentiality and etc. Allowing the appealing of the award cause not only time-consumption for the parties but also it will create more stressful period apart from normal arbitration process for the parties. Besides, this long time period may cost more than the litigations and it may reduce the popularity of the International Commercial Arbitration. This long period will cause huge delays in the Trade Relations among the parties. Therefore, as a concluding remark, it will be beneficial that the parties should not be permitted to appeal the arbitral award for the survival of the International Commercial Arbitration System which is the popular method for solving the disputes in the commercial area.

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³⁷ Roy Goode, n above at 1301

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3. The Annex II: Table on Conditional EU Merger Clearance Decisions Incorporating Commitments Over the Period 1992-2009 in Gordon Blanke and Philip Landolt(eds), *EU Antitrust Arbitration: A Handbook for Practitioners*, (Kluwer Law International 2011) pp.1925-2062 < [http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/](http://www.kluwerarbitration.com.ezproxy4.lib.le.ac.uk/document.aspx?id=KLI-KA-KCL-1109255-n&query=AND(content%3A%22siege%22,content%3A%22darbitrage%22)> A >4. The ICC Dispute Resolution Services <
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