

In the matter of an arbitration under the UNCITRAL Arbitration Rules

between

1. GRAMERCY FUNDS MANAGEMENT LLC
2. GRAMERCY PERU HOLDINGS LLC

Claimants

v.

THE REPUBLIC OF PERU

Respondent

PROCEDURAL ORDER NO. 2
(ON THE SEAT OF THIS ARBITRATION)

ARBITRAL TRIBUNAL
Juan Fernández-Armesto (Presiding Arbitrator)
Stephen L. Drymer
Brigitte Stern

SECRETARY OF THE TRIBUNAL
Marisa Planells-Valero

ASSISTANT TO THE PRESIDENT
Luis Fernando Rodríguez

Paris, June 29, 2018

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WHEREAS

1. This arbitration arises between Gramercy Funds Management LLC and Gramercy Peru Holdings LLC [**“Gramercy”** or **“Claimants”**] and the Republic of Peru [**“Peru”** or **“Respondent”**] under the United States-Peru Free Trade Agreement signed on April 12, 2006 [the **“Treaty”**]. The 2013 UNCITRAL Arbitration Rules [**“UNCITRAL Rules”**] govern this arbitration, except to the extent modified by the Treaty¹.
2. By communication A-2, dated March 9, 2018, the Arbitral Tribunal convened a case management conference call, which took place on May 4, 2018. The Parties and the Tribunal discussed the draft Terms of Appointment, the draft PO1, and the Procedural Timetable. During the conference call, the Parties were unable to reach an agreement regarding the seat of this arbitration.
3. By communication A-9, dated May 7, 2018, the Tribunal encouraged the Parties to confer and agree on the legal seat of this arbitration by June 5, 2018. Otherwise each Party would submit its position on this issue by the same date, for the Tribunal to decide upon.
4. On May 22, 2018, the Tribunal and the Parties executed the Terms of Appointment. Paragraph 68 provides that, after receiving the Parties’ positions on the matter, the Tribunal shall establish the place of arbitration in a separate order.
5. On June 5, 2018, the Parties advised they could not reach an agreement and submitted their positions on the seat of this arbitration².

PROCEDURAL ORDER NO. 2

I. THE PARTIES’ POSITIONS

1. CLAIMANTS’ POSITION

6. Gramercy requests that the Tribunal designate London as the seat of arbitration or, in the alternative, Paris. Gramercy rejects Madrid, as Peru proposes.
7. Gramercy proposes London as its first choice for the following reasons³:
 - London is a neutral seat, as it is not the home of any of the Parties, their counsel or the members of the Tribunal.

¹ Terms of Appointment, para. 62.

² C-23 and R-21.

³ C-23, p. 2

- London is a well-regarded arbitral seat, with English courts having issued decisions in support of many investment-treaty arbitrations.
 - London is also conveniently located for all participants, and both Claimants' counsel and Respondent's counsel have offices in London.
 - London operates in English, which is one of the two languages of the arbitration. If court involvement is required at any point, the underlying materials from the arbitration will not need to be translated.
8. Gramercy rejects Madrid since it is not aware of any prior investment treaty proceedings seated in Madrid and Peru's counsel has offices in Madrid, while Gramercy's counsel does not⁴.
9. In the alternative, Gramercy is willing to accept Paris as the seat of this arbitration. Gramercy considers Paris equally "credible" and "likely to be superior to any other alternative"⁵.
10. Finally, Gramercy points out that the Parties might have objections to any other alternative besides London and Paris⁶.

2. RESPONDENT'S POSITION

11. Peru would rather have Madrid as the seat of this arbitration, opposes Gramercy's suggestion about London, and is open to Paris.
12. Peru avers that Madrid would be a suitable seat for the following reasons⁷:
- Spain has a modern arbitration law based on the UNCITRAL Model Law, and courts that have shown a pro-arbitration approach.
 - Spain is a signatory, without reservation, to the New York Convention since 1977.
 - Spain has a civil-law tradition like Peru, Peruvian law being applicable to the bonds.
 - Spanish is the official language of Peru, one of the languages of the proceeding, the language of the agrarian reform bonds and various hearing participants.
 - Madrid has excellent infrastructure, is affordable, and has direct flights from New York, Washington, Toronto, Paris or Lima.
13. Peru strongly opposes Gramercy's suggestion of setting London as the seat, on the following grounds⁸:

⁴ C-23, p. 1.

⁵ C-23, p. 3.

⁶ C-23, p. 3.

⁷ R-21, p. 2.

⁸ R-21, pp. 2 and 4.

- London is less neutral than Madrid, Paris or Geneva because Gramercy has an entity and an office there.
 - London is more expensive and less convenient for all participants.
 - London is a common-law jurisdiction.
14. Peru is open, in the alternative, to accept Paris as the seat of this arbitration, for the following reasons⁹:
- France has been a party to the New York Convention since 1959.
 - France has had long-standing and up-to-date arbitration legislation.
 - French courts are generally familiar with the law and practice of international arbitration and have an abundant jurisprudence favourable to arbitration at all stages of the proceedings.
 - Paris is a popular seat for investor-State arbitrations.
 - France, like Peru, is a civil-law jurisdiction, whose law is applicable to and critical to understanding the bonds.
 - Paris offers many modern arbitration facilities.
 - Gramercy's and Peru's counsel both have offices in Paris. Moreover, Paris also offers direct flights from Lima, Washington, DC, and New York.
 - The costs of an arbitration in Paris are lower than in London.
15. Finally, Peru also remains open to consider Geneva as a potential seat¹⁰.

II. THE TRIBUNAL'S DECISION

1. APPLICABLE STANDARD

16. In making a decision on the seat of this arbitration, the Tribunal should follow the directions of the Treaty and the UNCITRAL Rules, which govern the proceedings¹¹.

17. Article 10.20.1 of the Treaty provides as follows:

“1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 10.16.3. If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with

⁹ R-21, pp. 3 and 4.

¹⁰ R-21, p. 4.

¹¹ Terms of Appointment, para. 62.

the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention”.

18. Art. 18.1 UNCITRAL Rules provides the following:

“1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration”.

19. As Respondent suggests¹², Note 3(b) of the UNCITRAL Notes on Organizing Arbitral Proceedings provides some non-binding guidelines to take into account:

“Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is 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 have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; and (e) location of the subject-matter in dispute and proximity of evidence”.

2. THE TRIBUNAL’S DISCUSSION

20. The Tribunal acknowledges that, although the Parties have different first-choice preferences for the seat, both propose and expressly consent to Paris being the seat of this arbitration, as their second choice. Given the mutual agreement in this regard, the Tribunal is only left to check whether Paris fulfills the applicable legal standard applicable to deciding this issue.

21. The Tribunal considers that it does, for the following reasons:

22. First, Paris satisfies the condition set out in Art. 10.20.1 of the Treaty, which requires the legal seat to be a place in the territory of a State that is a party to the New York Convention. France ratified the Convention in 1959.

23. Second, the Tribunal finds that the “circumstances of the case” – as per Art. 18.1 UNCITRAL Rules – also support Paris as a fitting legal seat for this arbitration. The Parties themselves have already highlighted some of these circumstances. Peru furnishes an enumeration of Paris’s advantages as a seat, while Gramercy has described Paris as equally “credible” than London and “likely to be superior to any other alternative”¹³.

24. Third, the Tribunal concurs with the Parties that many of these advantages make Paris a suitable seat for this specific arbitration, for instance:

- Neither Party nor the dispute has any connection with France.

¹² R-21, p. 1.

¹³ C-23, p. 3.

- Paris is a world-renowned seat of international arbitration proceedings. For example, Paris has served – as Respondent points out – as the seat for at least 14 different matters under the UNCITRAL or ICSID Additional Facility Rules¹⁴.
- France also offers a time-tested legislation on arbitration and a judicial system familiar to investment arbitration.
- Paris offers good travel connections and both counsels' firms have offices in this location.

25. In light of these considerations, the Tribunal finds Paris to be, under the specific circumstances of this case, a suitable seat that meets all the legal requirements and to which both Parties have given their express consent.

26. Therefore, the Tribunal does not see any reason to consider any other alternative.

3. DECISION

27. For all the foregoing reasons, the Arbitral Tribunal decides that the seat of this arbitration is Paris (France).

[signed]

Juan Fernández-Armesto
Presiding Arbitrator

Date: June 29, 2018

¹⁴ R-21, p. 4. Respondent refers to the information available at the ICSID database advanced search system: <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>.