

**IN THE MATTER OF AN ARBITRATION UNDER
THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF BELARUS
AND THE GOVERNMENT OF THE REPUBLIC OF LITHUANIA ON THE PROMOTION AND
PROTECTION OF INVESTMENTS**

- and -

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL
TRADE LAW 1976**

- between -

OPEN JOINT STOCK COMPANY “BELARUSKALI”

(the “Claimant”)

and

THE REPUBLIC OF LITHUANIA

(the “Respondent” and, together with the Claimant, the “Parties”)

(PCA Case No. 2024-03)

PROCEDURAL ORDER NO. 2

Seat of the arbitration

Tribunal

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

Professor Azzedine Kettani (Arbitrator)

Professor Zachary Douglas KC (Arbitrator)

Tribunal Secretary: Dr Johannes Fahner

Registry: Permanent Court of Arbitration

20 June 2024

The Tribunal, having consulted the Parties, issues the following Procedural Order.

1. INTRODUCTION

- 1.1 Since the start of these arbitration proceedings, the Parties have expressed opposing views on the choice of the seat of this arbitration. The Claimant initially proposed Hong Kong and later Singapore, while the Respondent proposed The Hague, alternatively Geneva.
- 1.2 In the Terms of Appointment concluded between the Parties and the Members of the Tribunal on 21 May 2024, it was agreed that “[t]he Tribunal will determine the seat of arbitration in accordance with Article 16 of the UNCITRAL Rules”.
- 1.3 This Procedural Order contains the Tribunal’s determination on the seat of arbitration.

2. POSITIONS OF THE PARTIES

- 2.1 In the draft Terms of Appointment circulated by the Tribunal to the Parties on 17 January 2024, the Tribunal suggested Geneva as seat while noting that it was “*open to other proposals*”.

The Claimant’s position

- 2.2 In its mark-up of the draft Terms of Appointment sent to the Tribunal on 26 January 2024, the Claimant noted that it had “*yet to express a position*” on the choice of the seat.
- 2.3 In its letter of 7 February 2024, the Claimant proposed Hong Kong. It objected to a seat in the Netherlands (as proposed by the Respondent) or in Switzerland, in light of the sanctions imposed by the EU and Switzerland on the Claimant. According to the Claimant, the arbitration should be “*conducted under the legal framework of a neutral Seat, i.e. a Seat that is (i) neutral to the Parties and (ii) to the Parties’ condition in the unusual circumstances where one Party, acting in sovereign capacity as a member of a bloc of 27 countries, has sanctioned the other – non-sovereign – Party*”.
- 2.4 During the procedural hearing held on 8 February 2024, the Claimant stated that it did not doubt the independence of Swiss or Dutch judges, but noted that a neutral forum was important to the Claimant as sanctions were politically, legally, and emotionally sensitive.
- 2.5 On 22 February 2024, the Claimant sent a letter to the Tribunal, noting that “[t]he chosen seat of arbitration can have significant implications for the sanctions-related obligations of the Members of the Tribunal and other participants in the process”. The Claimant further noted that “*neither the Netherlands nor Switzerland can be deemed a neutral ‘seat of arbitration’ given their sanctions policy with respect to the Claimant*”.
- 2.6 The Claimant then proposed Singapore as “*the best option for both parties and the Tribunal*”. It noted that “*Singapore’s status as a neutral territory would allow the Members*

of the Tribunal to perform their functions independently, without being excessively influenced by the sanctions rules of any specific jurisdiction". The Claimant also noted that "the Members of the Tribunal possess significant expertise in Singapore arbitration, which was a significant factor for the Claimant's proposal of Singapore".

The Respondent's position

- 2.7 In its mark-up of the draft Terms of Appointment sent to the Tribunal on 26 January 2024, the Respondent proposed The Hague as the seat of the arbitration.
- 2.8 During the procedural hearing held on 8 February 2024 and in its letter of 8 March 2024, the Respondent argued that The Hague is a common seat for PCA-administered UNCITRAL proceedings, located in an arbitration-friendly jurisdiction with experienced courts. Moreover, according to the Respondent, Dutch courts are neutral and independent from the Dutch government. In any event, these courts would not consider substantive issues related to sanctions, as the seat would only be relevant for annulment proceedings or questions of jurisdiction.
- 2.9 On a practical level, the Respondent noted that the PCA's premises in The Hague would be a practical venue for the hearings, even if the location of hearings is not necessarily dependent on the chosen seat. Moreover, pursuant to the PCA's Headquarters Agreement with the Netherlands, all participants in the arbitration would benefit from immunity under Dutch law.
- 2.10 The most suitable alternative to The Hague, according to the Respondent, would be Geneva. Switzerland is known as an arbitration-friendly jurisdiction with experienced courts. The Respondent further noted the convenient location and time zone of Geneva.

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- 2.12 As regards the Claimant's proposal for Singapore, Lithuania argued that choosing a seat "as far as Singapore" would only be justified by legitimate concerns about the neutrality of European seats, which had not been evidenced by the Claimant.

3. ANALYSIS

3.1 This arbitration is governed by the UNCITRAL Arbitration Rules 1976. Article 16(1) of such Rules grants the Tribunal the power to set the seat, failing an agreement by the Parties:

Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.

3.2 In determining the seat of the arbitration, the Tribunal takes guidance from the *UNCITRAL Notes on Organizing Arbitral Proceedings* (2016), which list legal and factual criteria to be considered when choosing the seat:

29. Selection of the place of arbitration is influenced by various legal and other factors, the relative importance of which varies from case to case. Among the more prominent legal factors are:

(a) The suitability of the arbitration law at the place of arbitration;

(b) The law, jurisprudence and practices at the place of arbitration regarding: (i) court intervention in the course of arbitral proceedings; (ii) the scope of judicial review or of grounds for setting aside an award; and (iii) any qualification requirements with respect to arbitrators and counsel representation; and

(c) Whether the State where the arbitration takes place and hence where the arbitral award will be made is a Party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") and/or to any other multilateral or bilateral treaty on enforcement of arbitral awards.

30. When it is expected that hearings will be held at the place of arbitration, other factors may become relevant in selecting the place of arbitration including:

(a) The convenience of the location for the parties and the arbitrators, including travel to the location;

(b) The availability and cost of support services;

(c) The location of the subject matter in dispute and proximity of evidence; and

(d) Any qualification restrictions with respect to counsel representation.

3.3 The seat is a legal notion, as opposed to a geographical place. The selection of a seat makes the (international) arbitration law of the seat applicable to the arbitration proceedings, gives jurisdiction to the local courts in aid and control of the arbitration, and

determines the place where the award is deemed to have been made for purposes of enforcement.

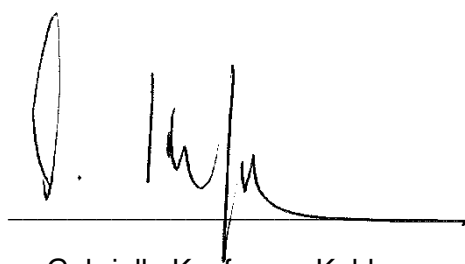
- 3.4 In the current proceedings, several options for the seat have been proposed by the Parties: The Hague, Singapore, and Geneva. The Tribunal understands from the Claimant's letter of 22 February 2024 that it no longer proposes Hong Kong, in light of the concerns voiced by the Respondent, to which the Claimant has not responded. In any event, the Tribunal's concerns about the remoteness of Singapore (which will be discussed below), equally apply to Hong Kong.
- 3.5 Taking into consideration the factors mentioned above, the Tribunal notes that each of the Netherlands, Singapore, and Geneva, are suitable seats in respect of their arbitration-friendly legislation, their jurisprudence and the extensive experience of the local courts in international arbitration, including in the area of investment disputes. Moreover, each of the three States are members of the New York Convention.
- 3.6 When assessing the differences between the three proposed seats, it seems more natural to choose a seat in the part of the world where the parties and arbitrators are located rather than a seat situated on another continent, even if hearings need not be and often are not held at the seat. There might be situations where compelling reasons mandate otherwise. In the present circumstances, the Tribunal cannot identify any such reasons.
- 3.7 The Claimant argues that The Hague and Geneva would not be 'neutral' seats because of sanctions imposed on the Claimant by the European Union and Switzerland. More specifically, it asserts that if the seat is located in a country that has imposed sanctions on the Claimant, "*the Members of the Tribunal in the conduct of the arbitration will have to comply with the sanctions regulations also of that country*". The Claimant has not, however, specified such obligations or explained why compliance with such obligations would affect the conduct of the arbitration proceedings. In this context, the Tribunal notes that the Parties agreed in the Terms of Appointment that they "*do not currently expect that such sanctions will pose an obstacle to the conduct of the arbitration*".
- 3.8 In practice, one of the main if not *the* main consequence of the choice of a seat is that, in the event of a challenge, the courts of the jurisdiction of the seat decide over the annulment of the award. In this context, the Claimant appears to imply that the judgment of Swiss and Dutch courts would somehow be affected because they sit in countries which have adopted international sanctions. Yet, the Claimant has not demonstrated why sanctions imposed by the Dutch or Swiss government would jeopardise the neutrality of the forum. To the contrary, it has stated that it had no doubts about the independence of the Dutch or Swiss courts. The Tribunal cannot see how the fact that one of the litigants may be under sanctions may taint the local courts' independence and impartiality in any manner whatsoever.
- 3.9 The Claimant's proposal for Singapore is based on two reasons: (i) the alleged neutrality of Singapore in comparison to the Netherlands and Switzerland; and (ii) the Claimant's understanding that "*the Members of the Tribunal possess significant expertise in*

Singapore arbitration”, which “*was a significant factor for the Claimant’s proposal of Singapore as the seat of arbitration*”. The Tribunal has already rejected the first reason. As concerns the second reason, it is not entirely clear what the Claimant has in mind. In any event, the Tribunal considers that its members, collectively, have more experience with arbitrations seated in Geneva than in Singapore. Since the Claimant considers the Tribunal’s experience a “*significant factor*”, this factor would weigh in favour of Geneva rather than Singapore.

3.10 Thus, there remains the choice between The Hague and Geneva. Neutrality of the forum in international arbitration is often understood as designating a seat in a state that is in neither parties’ home state. In that sense, Geneva may be a preferable choice because it is not located in the European Union, unlike The Hague, in the Netherlands, which is an EU Member State like Lithuania.

3.11 Furthermore, unlike in the Netherlands, setting-aside or annulment requests are heard in Switzerland by a single instance, the Swiss Federal Tribunal. The proceedings are conducted in writing only, and memorials can be filed in English. The relatively fast and efficient annulment process in Switzerland compared to the Netherlands also weighs in favour of Geneva.

3.12 Accordingly, the Tribunal determines that Geneva shall be the seat of arbitration.

A handwritten signature in black ink, consisting of a large, stylized initial 'G' followed by a series of loops and a long horizontal stroke extending to the right.

Gabrielle Kaufmann-Kohler
(Presiding Arbitrator)

On behalf of the Tribunal