How Should a Court Asked to Apply Article 8 of the Model Law Approach its Task: Challenges for the Arbitral/Court Interface (I)

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A crucial issue in arbitration is determining the proper relationship between courts and the arbitration process. In addition to court challenges to preliminary jurisdictional decisions by arbitrators and court applications to annul awards or prevent enforcement, a number of other court actions also raise relationship issues. This blog is concerned with scenarios such as commencement of court proceedings or applications for leave to serve court proceedings out of the jurisdiction which are then contested on the basis of an alleged arbitration agreement;[fn] For example, *Accentuate Ltd v ASIGRA Inc* [2009] EWHC 2655[/fn] applications for an injunction restraining an arbitrator from proceeding,[fn] For example, *Weisfisch v Julius* [2006] EWCA Civ 218; [2006] 2 All ER (Comm) 504.[/fn] or even applications to a court in support of arbitration,[fn] For example, a request for assistance in appointing a tribunal or a request for interim measures or an anti-suit injunction.[/fn] where that is then opposed on the basis that the arbitration agreement is not valid. In most jurisdictions, such applications may lead to a contest under either Article 8 of the UNCITRAL Model Law, Article II (3) of the New York Convention, or provisions with equivalent effect. The court is asked to stay or deny jurisdiction in a case allegedly commenced in violation of an arbitration agreement,[fn] Civilian jurisdictions decline jurisdiction, while common law jurisdictions tend to stay judicial proceedings, but the effect in each case is the same, recognising and respecting the arbitration agreement and declining to proceed with litigation. [/fn] or to refrain from assisting arbitration based on alleged defects in the arbitration agreement.

In such instances, the court must consider the status of the alleged arbitration agreement that is contested. Such courts may be asked to consider whether the alleged agreement is in fact an arbitration agreement, whether it relates to a dispute capable of settlement by arbitration and whether it avoids being seen as "null and void, inoperative or incapable of being performed."[fn] Article 8(1) Model Law and Article II(3) New York Convention [/fn] These elements arise from the combined language of Article 8 Model Law and Article II New York Convention. If the agreement does not fall foul of these criteria, the court must deny litigation access where that is sought contrary to the arbitration promise.[fn] In the scenarios where injunctive relief is sought in aid of either arbitration or litigation, a court may, in addition to considering these gateway elements of validity, also consider its own additional discretionary domestic principles as to when to allow such relief, such as the balance of convenience test, even if it finds the arbitration agreement to be valid or invalid. In the context of this blog, a court asked to support arbitration through some interim measure may also

need to form a more definitive view as to arbitral validity, as a precursor to consideration of such a discretion.[/fn]

A plaintiff required to demonstrate arbitral invalidity so as to pursue litigation, would naturally assert such invalidity if reluctantly brought before an arbitral tribunal. Thus, both courts and arbitral tribunals might be called upon to address the question of validity. Because the Model Law and New York Convention criteria are found in provisions directed at courts, judges hearing the applications may consider that they have a duty to consider whether the criteria are satisfied or not.[fn] The Full Federal Court in Australia opined that it remains a discretionary matter in *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170[/fn] At the same time, Article 16(1) Model Law expressly grants competence to a tribunal to consider any jurisdictional challenge. In addition, Article 8(2) Model Law expressly allows a tribunal to continue with its processes, notwithstanding a conflicting application to a court. Hence, the Model Law expressly allows both courts and tribunals to consider validity, but makes no express stipulations as to methodology or standard of proof, and gives no indication as to whether one such empowered decision-maker should defer to a determination made by the other.[fn] This blog only addresses jurisdictions that apply the Model Law or whose *lex arbitri* have the same policy structure. In some other jurisdictions, express variations can either promote the relative role of the courts, or clearly express a position that greater deference should be given to tribunals. [/fn]

There are three main questions as to the approach that courts should then take to such applications. First, what is a court essentially being asked to do, given that there is also express competence given to an arbitral tribunal? Secondly, and related to the first question, what is the appropriate standard of proof for the court to apply to any Article 8 determination? As to the latter, should a court in which litigation is sought to be pursued, make a final independent determination of arbitral validity or invalidity, or should it merely undertake a preliminary analysis, and if so, defer to the tribunal in the first instance where there may be a reasonable possibility of validity? Thirdly, by what legal principles of interpretation and by what relevant evidence, will any such question of arbitral validity be determined? Even in jurisdictions with a strong pro-arbitration tradition, an alarming disparity of approaches to these questions is discernible.

As to the first two questions, it is submitted that a proper contextual and purposive interpretation of the Model Law should see courts take a deferential approach and simply determine whether the arbitration agreement may reasonably be valid in cases where court proceedings are opposed on the basis of a submitted arbitration agreement.[fn] As noted above, the situation is different where the court is asked to aid arbitration via some injunction against pursuing court action or via some interim measure in aid of the arbitration. Here a court would need to be satisfied of arbitral validity before taking such steps.[/fn] In aid of this argument, one should consider Article 8(1) both in legal and practical context. As to legal context, there is a need for each court to find a coherent interpretation that integrates the Model Law's express grant of jurisdictional competence to a tribunal under Article 16(1), as supported by Article 8(2), and the Model Law's acceptance of a court's power to consider limited jurisdictional questions at a point in time when Article 8(1) is enlivened. Most importantly, that contextual interpretation should also be integrated with a purposive approach, acknowledging the policy underpinning Article II (3) NYC, as this provision was the impetus for Article 8(1). Article II (3) acknowledged the need for courts to recognise arbitration agreements as well as awards if arbitration is to be viable. On this view, one would not wish to see both courts and tribunals hearing all available evidence concurrently and potentially coming to different conclusions on validity questions. One would instead wish to see all courts interpret the structure of the Model Law as calling for deference to tribunal competence, leaving it to annulment and enforcement courts to comprehensively review if asked. Yet courts must be allowed to do something. The logical corollary of a deferential interpretation would be that courts exercising an Article 8 mandate are asked to recognise arbitration agreements and allow a tribunal to exercise its competence, unless the material before the court

shows that no reasonable tribunal could find validity. Article 8 is essentially about promotion of recognition, albeit with a limited exception, and should be interpreted as such.

The practical context aids this argument when one considers the types of proceedings and the potential venues where applications will be made under Article 8. As to type, these will be preliminary applications. In some legal systems, such applications are not even dealt with by a judge. In most cases, presentation and testing of detailed evidence via contemporaneous documents and cross-examination of witnesses would not be the norm. Certainly, most domestic litigation systems would allow a court to hear evidence on these applications, but being preliminary matters, there would invariably be reluctance to allow a full hearing with cross-examination, or allow for the generation of a full body of relevant material evidence, including by way of document production requests. It then makes further sense to conclude that the obligation on a court dealing with an Article 8(1) application is to seek at most a reasonable indication of a valid arbitration agreement. Otherwise, the court would be seeking to make a definitive ruling on arbitral validity without a full body of evidence, and in violation of due process norms that would invariably apply in that jurisdiction.[fn] The preferred approach would also be consistent with the due process spirit of Article 18 of the Model Law, even though that provision is not directed at courts.[/fn] If the court instead sought full evidence to overcome this problem, it would duplicate the arbitral process and allow for messy arguments about admissibility and inconsistency of evidence between the two fora.

Such duplication is even more problematic when one considers the likely venue of an Article 8(1) skirmish. The courts that will most likely be asked to consider Article 8 applications, will either be courts in the defendant's country, the plaintiff's country, or at times, the place of performance of the contract, being the range of places where litigation standing is typically found. In the many cases where a neutral Seat has been selected, the court hearing the application will not even be the designated supervisory court of the alleged arbitration and could not bind the supervisory court. This is a further reason to support a deferential approach.

A majority of national courts state that they do indeed take a deferential approach, although there are significant exceptions and certainly no consensus view as to the proper interpretation of the Model Law. Even courts stating that they are adopting this deferential approach seem to diverge as to the question they purport to consider under such an analysis. Most do not seem to ask the above question as to whether a reasonable tribunal could find validity, but instead, seem to opine as to the validity of the agreement. Some seek to do so definitively, while others see their role as at least seeking to find prima facie validity. Neither a definitive nor prima facie analysis that held against validity and allowed litigation to proceed where a reasonable tribunal could nonetheless find validity, would be consistent with the latter standard.

Inconsistency also arises when courts see a need for identification of an applicable law of the arbitration agreement to assist in determining its validity. Courts then often allow conflict of laws principles to be determinative. Such courts typically note the autonomy of arbitration clauses as enshrined in Article 16 Model Law. They then invariably conclude that even a broad choice of law clause in a contract does not inherently apply to the arbitration agreement. In the absence of an express or implied choice applicable to the arbitration agreement, many courts will default to their domestic conflicts rule for contracts, at least where the arbitration agreement is contractual. In the common law world, this will be the closest connection test. These courts will then use any express, implied or default applicable law, in that order of priority, to determine when and on what basis, the arbitration agreement could be said to be "null and void, inoperative or incapable of being performed." None seem to speak of what a tribunal might legitimately do as to applicable law in determining validity, even when this ought to be the corollary of the deference they acknowledge. Stated differently, they purport to be deferential, but use a default rule of applicable law, not binding on the tribunal.

Differences are also apparent as to the means to determine both express and implied intent as to applicable law. While all courts accept the doctrine of separability, not all agree on the way that it should impact upon applicable law. Some suggest that a general choice of law clause drafted in broad terms, could still evidence an express agreement as to applicable law for all parts of the contract.[fn] A tentative suggestion to this effect can be found in the judgment in *Arsanovia Ltd & Ors v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), although the presiding judge did not so hold as it was not argued. One may agree or disagree as to the conclusion of fact, but that is separate to the core question in this blog as to whether and why there should be a default rule in the absence of express or implied choice.[/fn] Some courts instead see such a selection as a rebuttable inference of an implied agreement that such law should be used to interpret the arbitration agreement.[fn] *SulAmérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A.* [2012] 1 Lloyd's Rep 671. The case was outside the main thrust of this blog as it dealt with an application to stay foreign litigation. In such a case, a court needs to take a view on balance that the arbitration agreement is valid before exercising such a power. Even then, it must if necessary, consider by what applicable law that should be determined. The case is problematic as much for how it is likely to be seen to have set up a presumption as to intended law that this blog suggests should not apply to classic Art 8 ML scenarios. It should also be noted that the court held against the presumption it proposed, based in part on an unproven (and unlikely) argument that the clause would have been invalid under Brazilian law, the proper law of the contract. Furthermore the key judgment noted that applicable law was not needed to support its conclusion of validity, yet opined at great length on the issue of how to discern that law. It is also not clear whether the aim of the supposed presumption is to shift the onus of proof in a common law setting, which would be undesirable. [/fn] Some courts consider instead, that selection of a Seat provides a rebuttable inference of an implied agreement that the law of the Seat should be used.[fn] *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12[/fn]

Inferences as to intent are always problematic, particularly when articulated in generalist terms by appellate courts, as the relevant inferences are about essentially factual questions that will often be dependent on the circumstances.[fn] In this sense, cases seeking to apply *SulAmérica* or any other presumption, are likely to take less note than they should of Lord Neuberger's salutary reminder in that case, that as implied intent is a factual question, it will need to be considered on a case by case basis, hence properly situating and undermining the value of any presumption. [/fn] It is one thing to use such presumptions in favour of deferential pro-arbitration determinations by courts hearing Art 8(1) applications. This can be supported on the basis that such a conclusion of fact is open to a tribunal, so invalidity cannot be presumed. The real danger is if later courts noting the appellate determination, seek to apply some illogical inverse, holding that if the agreement would be invalid under the presumptive law, it should be concluded to be invalid by any court in that jurisdiction hearing an Art 8(1) application, no matter what a tribunal might legitimately do.

Common law courts then suggest that if such inferences cannot be drawn, a default closest connection test should apply. Presumably, in applying a default rule, such courts feel that being national courts, they must determine and apply national conflict of laws rules to these uncertain international matters. In the common law world, this often simply flows from opposing counsel presuming that this must be so. There is simply no reason for that view to prevail. For Model Law countries, each court should simply be seeking to give effect to its government's intent to incorporate the Model Law into domestic legislation. While the Model Law is not a treaty, it operates in not dissimilar manner when individual countries adopt it verbatim and subject their courts to the international interpretation called for by its provisions, in particular, Article 2A. It is argued above that a contextual and purposive interpretation should lead to a deferential approach so as to acknowledge that Article 8(1) is the embodiment of the Art II(3) obligation to recognise arbitration agreements and is coupled with the express competence of tribunals to determine their validity when asked to do so.

For a court that rightly takes a deferential approach on this twin basis, that should mean deferring in situations where a tribunal might find jurisdiction.

For these reasons, the court should simply ask whether a reasonable tribunal hearing all evidence could find validity. To engage in such an exercise can only mean considering the factors that a tribunal may consider. Otherwise there is no real deference. Most importantly, when considering which law to apply to determine validity of the arbitration agreement, the actual or potential arbitrator[fn] Dependent on whether arbitration has commenced or is only proposed.[/fn] is not limited by any particular domestic court's conflict rules. In many cases, a tribunal is not even bound to apply any national system of law to questions of validity.[fn] The substantive rules approach accepted in France is also available to most arbitrators and would not normally be overturned by annulment courts.[/fn] It then makes no sense for a court that might not even be the supervisory court, to apply a single domestic conflicts default rule from its own country in answering the validity question solely for the purpose of mandated recognition of arbitration agreements under the New York Convention. Default conflicts rules were developed unilaterally so as to deal with cross-border matters within the court's jurisdiction. They were never intended to be the basis for the mandated international interpretation of the Model Law and the treaty promise to recognise arbitration agreements under the New York Convention. That becomes obvious when one sees that there is no consensus as to the default rule for interpreting arbitration agreements, some looking to the otherwise applicable law, with others looking to the law of the Seat.

The key point is that the deferential approach proposed in this blog, is not a normative suggestion as seems to be propounded by some commentators, but is instead, an argument as to the proper way to interpret Article 8 of the Model Law purposively and contextually, which would eschew both parochial conflicts rules or definitive determinations by Art 8(1) courts. The related thesis is that it is also illogical to claim that a deferential approach is being applied, but then ignore the options available to a tribunal and instead apply a domestic default rule or presumption as to implied intent.

Part II continues the analysis, including consideration of the applicable law norms in NYC and Arts 35 and 36 Model Law.