Kluwer Arbitration Blog

# How Should a Court Asked to Apply Article 8 of the Model Law Approach its Task: Challenges for the Arbitral/Court Interface (II) & Request for Comments "Procedure and Evidence in International Arbitration"

Jeffrey Waincymer (National University of Singapore, Faculty of Law) · Saturday, June 2nd, 2018

Part 1 of this blog argued that courts that are asked to resolve Article 8(1) Model Law disputes should adopt a deferential approach to tribunal competence under both a contextual and purposive interpretation of the Model Law or similar provisions aimed at giving effect to Art II(3) NYC. On this proposed view, such a court should consider validity under any law that a tribunal could properly apply. If a clause is valid under a law that could reasonably have been selected under the tribunal's discretion, then the court should not be in a position to conclude to the contrary as to invalidity under the Article 8(1) test. In engaging in this exercise, the court should consider the *lex arbitri* powers of the tribunal as to applicable law, not its own domestic conflicts rules. In circumstances where the court bars litigation on this approach, it is not concluding that the agreement is valid. It is simply noting that it cannot conclude that the agreement is invalid. In so holding, it would simply be honouring its obligation to recognise an agreement that might be valid,[1)] leaving it to an annulment or enforcement court to have the final word and only if asked to so rule.

The only practical argument to the contrary would be to the effect that if the court proceedings were in the supervisory court and the evidence showed invalidity, why not have this determined at that stage so as not to force wasted costs via an arbitral determination. There are a number of responses to this. First, if invalidity is clear, the court can so hold and should do so. If it is debatable in circumstances where a tribunal would be more likely than not to find no jurisdiction, there would be little in extra wasted time and cost if the court stayed on the basis of a reasonable possibility of validity without a detailed evidentiary enquiry. To undertake a detailed factual analysis of debatable circumstances in a jurisdiction where even an annulment court has no pre-emptive powers barring a tribunal's own determination of jurisdiction, would be decidedly wasteful and more-so for courts other than the putative supervisory court.

Secondly, if the court being asked to intervene was not the supervisory court, it not only cannot prevent the tribunal deciding the issue if asked, it is certainly unable to prevent the actual supervisory court reviewing that determination.[2)] So any detailed determination by such a court would be inherently wasteful. There cannot be differing interpretations of Article 8(1) dependent upon whether the court approached is in the Seat or not or whether a court in the Seat has pre-

emptive powers.

These questions must also consider the limited evidence before the Article 8(1) court as noted in Part 1. When validity is unclear in arbitration, the tribunal might hear a very broad range of evidence. Even in cases where the common law parol evidence rule must be considered, there will usually be sufficient ambiguity in the impugned arbitration agreement to allow for evidence of the background to the negotiations and to the contract's drafting. An Article 8(1) court dealing with early procedural challenges is unlikely to be considering the same breadth of such evidence as might be presented to a tribunal. Deference should then apply both as to possible applicable laws and possible evidence. The court would effectively only conclude that an arbitration agreement is "null and void, inoperative or incapable of being performed," if no reasonable tribunal could come to any other conclusion on potentially applicable law and on available and potentially admissible evidence.[3)]

The drafting history of the key provisions does not undermine this view. It shows that Article 8 was inspired by Article II (3) of the New York Convention, which was in turn inspired at the eleventh hour, by the 1923 Geneva Protocol on Arbitration Clauses.[4)] Nothing readily discoverable in the travaux preparatoires contradicts the thesis in this blog, although there is more to be found as to the Geneva Protocol and it is also true to say that very little discussion occurred as to the above questions of applicable law and standard of proof.

Even in the absence of such guidance, some commentators still suggest that contextually, it would only be logical to apply the same default law to Article II (3) NYC, as is mentioned in Article V (1)(a) NYC, that is, the law of the place where the award was made. The same argument could be made as to the Model Law, inviting the applicable law for Article 8(1) purposes, to be discerned from Articles 34(2)(a)(i) and 36 (1)(a)(i), which repeat the default rule found in Article V(1)(a) NYC. The first point to note is that there is a difference between looking to the arbitration law of the Seat as to how it determines validity,[5)] and instead, utilising the Seat's domestic contract law for such purposes. Where the Seat has a Model Law based *lex arbitri*, it gives a broad discretion to tribunals that would not be problematic if viewed deferentially by an Article 8(1) court. Only an interpretation that reverts to the domestic contract law as "the law of the place where the award was made" would be truly problematic, not being binding in any way on a tribunal. The balance of this blog deals with that concern.

While it seems appealing to argue against the application of different governing laws to one and the same question posed at different stages or in different places, the thesis of this blog is that it is not in fact one and the same question. The thesis is that in interpreting Article 8(1) as it typically applies at early stages in litigation, one should adopt a deferential approach, looking to see whether there is reasonable potential for a tribunal to find validity under the applicable lex arbitri or arbitral rules. The proper question in that context, different to an enforcement court, is to discern what a tribunal may do methodologically, not what an annulment or enforcement court must do methodologically if the provisions are interpreted to allow recourse to a contract law of the Seat. If a court is then to ask itself the question that a tribunal would consider, it makes no sense to impose any binding default conflicts rules that do not equally bind the tribunal.

Articles V(1)(a) NYC and Articles 34(2)(a)(i) and 36 (1)(a)(i) Model Law are not truly analogous as they all deal with different scenarios. In these scenarios, annulment or enforcement courts respectively, are asked to definitively either support or overturn the award or definitively support

or bar enforcement of the award. Each is making a final determination and must base this on the grounds both positive and negative as contained within the Model Law and the Convention and must limit themselves to the mandated methodology of those provisions, including as to applicable law. Even then, annulment and enforcement courts are given a discretion, even if the grounds for challenge are made out. There is also no guarantee that annulment or enforcement challenges would be brought or that the discretion to uphold would not be applied, even if the default rule led to invalidity.

The only logic in favour of an approach advocating use of the law of the Seat is to stand in the shoes of an annulment court. As noted in Part 1, any court can find invalidity if that is clear. But if it is not clear and if an annulment court may take a different view, its jurisdiction should not be pre-empted. Even if the grounds are made out, how would a different court stand in the shoes of the supervisory court's discretion, or would it decide that there is no discretion, as none is mentioned expressly in Article 8(1)? If the court considering Article 8(1) was the putative supervisory court, it could rule if clear, but even then, would the exercise of the discretion not be better served by waiting until that country's *lex arbitri* contemplated annulment proceedings?

Another way to look at this is to note that the New York Convention had no intention or mandate to decide on the general validity of arbitration agreements as they might found arbitrations. That was to be determined under the relevant *lex arbitri*. Yet if any non-Seat court could readily find invalidity under a law not binding on a tribunal, this would be the unintended effect.

Stated differently as to applicable law, is it conceivable that the drafters intended that the court and a tribunal each bound by the Model Law could employ different applicable laws in undertaking this exercise, simply because of default annulment and enforcement tests? For what policy reason consistent with Article 2A Model Law and its call for international interpretation of provisions such as Article 8(1), could that be justified? Certainly, an individual country's court could have a parochial reason for doing so, but that could not be found within a coherent and international interpretation of the Model Law itself.

For the foregoing reasons, it is urged that Model Law courts hearing Article 8 applications should restrict themselves to asking whether a reasonable tribunal could find jurisdiction under the discretions available to it and if so, should respect the intent to recognise arbitration agreements and leave it to annulment and enforcement courts to comprehensively review if asked. Domestic conflicts default rules and presumptions as to implied intent have no determinative place in such an exercise, save when used in support of a finding of prima facie validity.

The author is preparing an article expanding on the above, which will include an analysis of the approach taken in various jurisdictions. Readers with particular thoughts/comments/experiences and/or criticisms of the above argument are invited to contact the author at jeffreywaincymer@gmail.com.

## Request for comments – second edition – Procedure and Evidence in International Arbitration

This is a call for feed-back following on from the above. I am in the process of completing a

second edition of my treatise, *Procedure and Evidence in International Arbitration*, published in 2012 by Kluwer and also available on Kluwerarbitration (accessed from the homepage). The work aims to deal with all aspects of the arbitral process from beginning to end and aims to combine policy and comparative analysis with as many practical guides and comments as possible. It also seeks to engage with any differences in view on contentious questions, setting these out for the reader's own reflection.

A work of this magnitude, seeking to cover arbitral practice anywhere in the world, and from beginning to end, will inevitably have gaps and errors. I would be most appreciative of comments from those blog readers who have used the work, as to such gaps, errors and possible misstatements and about any important new developments that I might not easily have been able to find and which I should seek to incorporate. Appropriate acknowledgement will be given unless commentators prefer to remain anonymous.

I am also very happy to receive general comments about style and how readers have found the work and any modifications that might improve its utility. The second edition will be broken into two halves, one on procedure and one on evidence. It will again take a broad approach to the notion of procedure and will as a result again also cover choice of law, remedies, interest and costs. The second edition will have a much-improved index to go with the comprehensive table of contents, each aiming to make it as easy as possible for users to find answers to their queries.

Comments can be sent to me at jeffreywaincymer@gmail.com. Ideally, comments should be sent by the end of July to guarantee that they can receive full attention, although I will aim to include whatever I can up until hand-over date.

***To make sure you do not miss out on regular updates on the Kluwer Arbitration Blog, please subscribe here.***

---

References

?1 A case that simply applies a default rule and then finds validity, is not problematic if it simply does so as part of this exercise, that is, finds that a default rule available as part of the tribunal's discretion would support validity. Such cases are of concern, however, if they purport to set up the only possible default rule, or if the language in the judgment could be wrongly interpreted to that end, particularly if that then supports a finding of invalidity on future occasions.

?2 A determination by a court outside the Seat made contrary to the wishes of the party asserting arbitral validity could hardly be *res judicata* for the supervisory court granted that jurisdiction under the applicable *lex arbitri*.

?3 The one exception to the above thesis is where the court can validly conclude that, not-withstanding the fact that other jurisdictions might respect such a tribunal determination, from the perspective of their own country, the relevant arbitration agreement could never be accepted as valid. But this would not arise from some technical application of conflict of laws rules, but would instead be a result of domestic limitations on the concept of arbitrability.

?4 27 League of Nations Treaty Series 158 (1924). English translation available here (date accessed 20/11/2017). E/AC.42/2 16 February 1955 ECOSOC.

?5 E.g. *Dallah Real Estate and Tourism Holding Company (Appellant) v The Ministry of Religious Affairs, Government of Pakistan (Respondent)* [2010] UKSC 46

This entry was posted on Saturday, June 2nd, 2018 at 6:33 am and is filed under Applicable Law, Arbitration, Arbitration Agreement, Courts, New York Convention, UNCITRAL Model Law
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.