Similar Test, Different Outcomes: Comparing BNA v BNB and Kabab-Ji's Determination of the Proper Law of an Arbitration Agreement

Kluwer Arbitration Blog
April 24, 2020

Louis Lau Yi Hang (Singapore Management University)

Please refer to this post as: Louis Lau Yi Hang, 'Similar Test, Different Outcomes: Comparing BNA v BNB and Kabab-Ji's Determination of the Proper Law of an Arbitration Agreement', Kluwer Arbitration Blog, April 24 2020, http://arbitrationblog.kluwerarbitration.com/2020/04/24/similar-test-different-outcomes-comparing-bna-v-bnb-and-kabab-jis-determination-of-the-proper-law-of-an-arbitration-agreement/

The significance of an arbitration agreement's proper law cannot be understated, given its importance vis-à-vis the arbitration agreement's validity and consequent implications on the tribunal's jurisdiction and the arbitral award's enforceability. Notwithstanding this, parties rarely specify the arbitration agreement's proper law – hence the need for a clear legal framework governing its determination.

In *BNA v BNB* [2019] SGCA 84 ("***BNA***"), the Singapore Court of Appeal ("**SGCA**") clarified the applicable framework in determining the arbitration agreement's proper law (the "**Choice-of-Law Framework**"):

- The parties' express choice of proper law governing the arbitration agreement is first identified (the "**Express Choice-of-Law Analysis**").
- Absent any express choice, the court turns to ascertain the parties' implied choice based on their intentions (the "**Implied Choice-of-Law Analysis**").
- Where an express/implied choice is absent, the arbitration agreement's

proper law adopts the system of law with the closest connection to it.

Three weeks after *BNA*, the English Court of Appeal ("**ECA**") applied the same framework, but in a different manner, in *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 ("***Kabab-Ji***"). This article compares the two approaches and argues that the former's approach is correct in principle and to be preferred.

The SGCA's approach in *BNA*

In *BNA*, the underlying contract's governing law was the law of the People's Republic of China ("**PRC**"). The arbitration agreement provided for any disputes to be settled by "*arbitration in Shanghai*" but did not expressly stipulate a proper law. When a dispute was brought to arbitration, the jurisdiction of the arbitral tribunal was challenged on the ground that the arbitration agreement's proper law is PRC law and the arbitration agreement is invalid under PRC law.

Notwithstanding the potential risk that the arbitration agreement and the tribunal's jurisdiction would be rendered invalid, the SGCA found that PRC law is the arbitration agreement's implied proper law. Applying the Choice-of-Law Framework, the SGCA reasoned that:

- The Express Choice-of-Law Analysis did not apply as the parties had not expressly chosen the arbitration agreement's proper law (*BNA* at [56]).
- Under the Implied Choice-of-Law Analysis, there is a presumption that the parties' choice of the underlying contract's proper law (i.e. PRC law) also reflects the parties' implied choice of the arbitration agreement's proper law (*BNA* at [61] and [62]).
- This presumption can be displaced should the *lex arbitri* be materially different from the arbitration agreement's implied proper law. However, displacement was unnecessary in the present case since the phrase "*arbitration in Shanghai*" in the arbitration agreement was construed as the parties' choice of arbitral seat and therefore the *lex arbitri* was also PRC law (*BNA* at [62], [69] and [94]).

The SGCA's analysis in *BNA* on, among others, the proper law of the arbitration agreement, has been analysed in another blog post.

The ECA's approach in *Kabab-Ji*

In *Kabab-Ji*, Article 15 of the contract stated that underlying contract's governing law was English law. The arbitration agreement was set out in Article 14 and did not expressly stipulate a proper law. Subsequently, one party commenced arbitration against the other party's parent company. The issue was whether the parent company was also party to the arbitration agreement and therefore subject to the tribunal's jurisdiction. It was undisputed that this fell to be determined by the arbitration agreement's proper law.

Applying the Express Choice-of-Law Analysis, the ECA held that Article 15 also amounted to an express choice of the arbitration agreement's governing law. The ECA reasoned as follows:(*Kabab-Ji* at [62] and [63]).

- Article 1 of the contract provides that "*[t]his Agreement*" comprised all the provisions that followed it, including Articles 14 and 15.
- Article 15 provides that "*[t]his Agreement shall be governed by and construed in accordance with the laws of England*".
- Consequently, reading Articles 1 and 15 together, the parties had expressly chosen English law to govern all the terms of the parties' contract, including the arbitration agreement in Article 14.
- This conclusion is fortified by Article 14.3, which provides that "*the arbitrator(s) shall apply the provisions contained in the Agreement*".

The ECA also cited *Arsanovia v Cruz City* [2013] 2 All ER (Comm) 1 for the principle that "*[e]xpress terms do not stipulate only what is absolutely and unambiguously explicit*" and held that if the express words the parties used in Articles 1, 15 and 14.3 demonstrate a clear intention that the entire contract is to be governed by English law, then it does not matter that Article 14 itself does not expressly state this choice of proper law (*Kabab-Ji* at [67]).

Conflating the Express and Implied Choice-of-Law Analyses

The ECA's application of the Express Choice-of-Law Analysis in *Kabab-Ji* has been analysed favourably in another blog post. However, with respect, I find the ECA's

application doubtful.

The Express Choice-of-Law Analysis has traditionally been conducted by examining whether the arbitration agreement's plain wording expresses a choice of proper law. For example, in *Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd* [1999] QB 740, the court found Swiss law to be the governing law of an arbitration clause which expressly provided for "*the laws of Switzerland*" as its governing law (*Westacre* at 749 and 750). Conversely, where parties only included a governing law clause for the underlying contract, courts have always turned towards the Implied Choice-of-Law Analysis since that is an interpretative approach that involves construing the contract in its entirety to determine what system of law the parties had implicitly intended as the arbitration agreement's governing law. Hence, in *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102, an express proper law governing the underlying contract was a relevant consideration under the Implied Choice-of-Law Analysis (*Sulamérica* at [11]).

In *BNA,* the SGCA did not consider the parties' express provision of the underlying contract's proper law to be an express provision of the arbitration agreement's proper law when it applied the Express Choice-of-Law Analysis. Rather, barring any express wording to the contrary, that was merely an indication of the parties' implied intention to have the arbitration agreement governed by the same proper law as the underlying contract, and therefore relevant to only the Implied Choice-of-Law Analysis.

In contrast, the ECA in *Kabab-Ji* affirmed that an interpretative approach is equally applicable under the Express Choice-of-Law Analysis. It considered that since Articles 1, 14 and 15 all contained the phrase "*this Agreement*", and Article 14.3 in particular mandated the arbitrators to apply all the provisions of "*this Agreement*" including Article 15, a true construction of the underlying contract pointed to an express choice of English law to govern the arbitration agreement. The ECA applied the approach normally undertaken in an Implied Choice-of-Law Analysis at the Express Choice-of-Law Analysis stage.

Its interpretative approach is an erroneous conflation of the Express Choice-of-Law Analysis and the Implied Choice-of-Law Analysis. It is illogical to say that something which is "implied" can also be "express". Following this, while the use of defined terms (such as a capitalized "Agreement") in contract drafting evinces the parties' intention have such terms applied consistently throughout the contract, it is

incorrect to, for example, say that the use of defined terms in two provisions means that the effects of one provision is expressly provided for in another provision. An express term cannot possibly exist without express words, and so any term that is not spelt out in the contract can only be considered implied and not express.

Implication of terms in fact

Kabab-Ji also observed that the Implied Choice-of-Law Analysis involves the implication of terms in fact, although it did not elaborate further (*Kabab-Ji* at [53] and [70]). However, it is submitted that these two analyses are conceptually distinct.

Under Singapore law, the SGCA in *Sembcorp Marine v PPL Holdings Pte Ltd* [2013] SGCA 43 ("***Sembcorp***") drew a principled distinction between the process of contractual interpretation and the implication of terms in fact: interpretation involves ascertaining the meaning of contractual *expressions*, whereas implication involves filling a contractual gap with a term that gives effect to the parties' *presumed* intentions which could not be achieved by the terms already present within the contract (*Sembcorp* at [27] to [29]). Given that the Implied Choice-of-Law Analysis seeks to uncover the parties' intended proper law governing the arbitration agreement by examining the terms present in the contract as well as the consequences of choosing the proper law of the underlying contract (*Sulamérica* at [26]), it is arguably more consistent to characterise that process as an interpretative one (which the SGCA has done), rather than a process involving implication of terms in fact (which the ECA has done).

Further, the high threshold required for implying a term in fact renders its application practically impossible in determining the parties' implied choice of proper law governing the arbitration agreement.

In *Marks & Spencer plc v BNP Paribas Securities* [2015] UKSC 72, the UK Supreme Court held that implication of terms in fact will only be carried out "*if it is necessary for business efficacy*" (*Marks & Spencer* at [14] to [32]). The high threshold of "necessity" is practically impossible to satisfy, since it is impossible to conclude that it is necessary for business efficacy for the arbitration agreement to be governed by the laws of one particular jurisdiction and not others. In *Kabab-Ji*,

there were good, arguable reasons both for finding that the proper law was English law or French law. More importantly, the successful performance of a contract's primary obligations is independent of the need for the arbitration agreement's proper law.

Additionally, coming back to Singapore's position, *Sembcorp* also prefaces the business efficacy test with the requirement of demonstrating a "*true*" contractual gap arising from the parties' failure to contemplate the relevant issue (*Sembcorp* at [94], [95] and [98]). In most cases, however, it is suggested that commercial parties would likely have contemplated that the governing law clause in the underlying contract would also apply to the arbitration agreement (which is typically a clause within that same written contract). If so, failing to expressly provide for the arbitration agreement's proper law would not amount to a true gap allowing for the implication of a term in fact.

To conclude, *Kabab-Ji* misapplied the Express Choice-of-Law Analysis and, further, mischaracterised the Implied Choice-of-Law Analysis as involving the implication of terms in fact. The approach in *BNA* should be preferred.