Jurisdiction Clause in the Liability Limitation Provision of the New LCIA Rules 2020: Reactive to Proactive, But is That Enough?

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The newly released LCIA Rules 2020 have brought some exciting developments, which have already been subject to detailed analysis on this blog. However, there is more to the new rules than what catches the eye. This post addresses the new jurisdiction clause in the liability limitation provision (Article 31) of the LCIA Rules 2020. The same provision was last amended in the LCIA Rules 2014, and it left some ends open. However, the amendment brought by the LCIA Rules 2020 attempts to tie those loose ends by clearing the air around the competent court to deal with actions against the LCIA. But does it cover the ground entirely?

Brief History of Liability Exclusion and Limitation Provisions in Institutional Rules

Before getting into the nuances of the new jurisdiction clause in liability limitation provisions of the LCIA Rules 2020, it is crucial to introduce some historical context.

The oldest available version of the LCIA Rules can be traced back to 1998. Article 31 of the LCIA Rules 1998 was titled, "exclusion of liability" and that is what it purported to achieve. Article 31.1 excluded all the liability of the LCIA and the related actors. The only exception to the exclusion was the conscious and deliberate wrongdoing committed on the part of the LCIA or the related actors namely the President of the LCIA Court, Vice Presidents, individual members, the Registrar, the deputy Registrar, the arbitrator(s) and expert(s) to the Arbitral Tribunal.

The provision under the contemporary set of rules, i.e., the ICC Rules 1998 also purported to achieve the same effect. In fact, Article 34 of the ICC Rules 1998 was also titled, "exclusion of liability". However, this provision did not contain any exceptions and sought to exclude the liability absolutely.

This position changed after the decision by the Paris Court of Appeal in SNF SAS v. ICC in 2009. In this case, the holder of two annulled awards, the SNF SAS, filed a liability lawsuit against the ICC before the Paris Tribunal of Grande Instance ("TGI") alleging miscalculation of the costs by the ICC, excessive duration of the proceedings, and the ICC's failure to follow the public policy of the seat despite the scrutiny of the award. The TGI ruled that the ICC was not liable for any losses caused in the course of the proceedings due to the presence of Article 34. The SNF SAS filed an appeal before the Paris Court of Appeal. While the Court did not hold the ICC liable, it declared Article 34 of the ICC Rules 1998 unlawful under French Law. The Court reasoned that Article 34 by excluding liability "for any act or omission in connection with the arbitration", would contradict the very scope of the contract for organisation of arbitration that the ICC enters into with the parties through its rules. In other words, the Court ruled that Article 34 would exclude the liability emanating from the core contractual duties of the ICC, which is why such a provision would be unlawful.

The immediate effect of the SNF SAS ruling was evident on the ICC Rules 2012. The renumbered Article 41 was now titled "limitation of liability", and it only excluded liability to the extent permitted by the applicable law. Similarly, under the LCIA Rules 2014, Article 31 was retitled to "limitation of liability" and it excluded liability to the extent permitted by the applicable law in addition to the previous exception of conscious and deliberate wrongdoing.

Understandably, such adaptation was essential for the ICC since it has its *siège*

social in Paris. Absence of any such provision would have created a legal vacuum for the ICC's liability considerations. But what prompted the LCIA to do it?

Some commentators[fn]Maxi Scherer, Lisa Richman and Remy Gerbay, *Arbitrating under the 2014 LCIA Rules. A User's Guide* (Kluwer Law International 2015) 377-378.[/fn] have argued that this change was indeed brought due to the SNF SAS case and in order to harmonise the LCIA Rules to the applicable law, which might not always be English law. In other words, the LCIA brought this change in anticipation of any future actions arising out of LCIA arbitrations where applicable law is, for example, French law. By virtue of being the applicable law, French law would have made the application of the liability exclusion clause invalid.

This approach was clearly reactive, which is why both the LCIA Rules 2014 and the ICC Rules 2012 fell short of addressing a connected and an arguably critical issue – what would be the appropriate court of action? With this issue not clarified, the parties could go forum-shopping or initiate multiple parallel proceedings and get an order against the institution. In fact, in 2013, the ICC faced a liability lawsuit in the US. This action was unsuccessful, however, without any mention of *forum non conveniens* and agreeably so because the ICC Rules 2012 or 2017 never really excluded the jurisdiction of the US Courts.

Jurisdiction Clause in the Liability Limitation Provision

The new addition to the LCIA's liability limitation provision seeks to address the very problem outlined above. The newly added Article 31.3 states that "the courts of England and Wales shall have exclusive jurisdiction to hear and decide any action, suit or proceedings between [the] party [to an LCIA arbitration] and the LCIA […]."

This will have three-fold benefits. Firstly, it will prevent forum-shopping. Secondly, it will make it convenient for the LCIA to deal with the lawsuits at one place. Thirdly, from an enforcement perspective, an action in England and Wales would be preferable for the party initiating the claim.

However, the jurisdiction clause is not entirely unsusceptible to controversy. While the courts are certainly influenced by contractual exclusive jurisdiction clauses, they are not bound by it. The Supreme Court of India has ruled that Indian courts

can exercise jurisdiction over a matter despite the exclusive jurisdiction clause should it be essential in the interest of justice.

Additionally, with the Brexit and England's inclination towards the Lugano Convention, a new set of issues arise. For example, the Lugano Convention's inability to tackle with the Italian torpedo (an act of initiating a claim in a different jurisdiction despite the exclusive jurisdiction clause). Hence, even if England manages to accede to the Lugano Convention, the effectiveness of this exclusive jurisdiction clause remains to be seen.

Moreover, post-Brexit transition period (31 December 2020), England plans to accede to the Hague Convention in its own capacity. However, the Hague Convention would only apply to the exclusive jurisdiction clauses entered into after the convention comes into force for England (presumably 1 January 2021). The new LCIA Rules 2020 come into effect on 1 October 2020.

Hence, while the jurisdiction clause is certainly helpful, it could be subject to some short-term turbulence in the near future.

The Applicable Law Question

While this new addition to the rules is undoubtedly a welcome step, there is one subsidiary issue that deserves analysis – what would be the applicable law to the lawsuit against the LCIA? Two approaches emerge: English law or the law applicable to the arbitration.

The first approach emanates from Article 4(1)(b) of Rome I Regulation, that the applicable law in the service provider contract is the law of the habitual residence of the service provider, in this case, English law. With the new jurisdiction clause in Article 31.3, this applicable law approach will naturally result in the application of *lex fori*. This choice of law approach is not readily dismissed due to Brexit because according to Article 66(a) of the withdrawal agreement, Rome I Regulation will apply to contracts concluded before the end of the transition period.

The second approach builds upon the argument[fn]Maxi Scherer, Lisa Richman and Remy Gerbay, *Arbitrating under the 2014 LCIA Rules. A User's Guide* (Kluwer Law International 2015) 377-378.[/fn] that the applicable law to the liability action

would depend upon the law applicable to the arbitration. This follows from the fact that international arbitration as an object anchored in one jurisdiction could be administered by an arbitral institution domiciled in another jurisdiction. If the performance of the contractual obligations of the LCIA is in a foreign jurisdiction (the seat) and not in England, the applicable law to the contractual obligations of the LCIA would be foreign law, which would not only be *lex arbitri* (of the arbitration) but also *lex contractus* (of the contractual relationship between the parties and the LCIA). Consequently, in the light of the new Article 31.3, the English courts being the competent courts would decide the liability action against the LCIA by applying foreign law.

Under Common Law, foreign law is treated as a fact which needs to be pleaded by the claiming party. If the trial court makes an error of fact, it is not appealable because appeals are generally reserved for questions of law. Hence, in jurisdictions like Australia, misapplication of foreign law as fact would be unreviewable. In England, however, foreign law is treated as "fact of a peculiar kind" and hence reviewable by appeal.[fn]Parkasho v. Singh [1968] P 233.[/fn]

While both applicable law approaches do not cause any controversy within themselves, it remains to be seen how the courts will deal with the tension between *lex fori* and *lex contractus*.

Conclusion

The LCIA has pioneered several developments in the sphere of international arbitration. From being the first institution to release the reasons for its decisions on the challenges against the arbitrators to now adding a jurisdiction clause to its liability limitation provision, the LCIA has once again set a benchmark for efficient institutional practice. However, the new jurisdiction clause is not immune from the debate, particularly in light of Brexit. Additionally, there's an argument to be made that instead of using the term "applicable law" in the liability limitation provision, the LCIA could have put "choice of law" clause, putting to rest this tension between *lex fori* and *lex contractus*.

Nevertheless, this new provision would lead to more certainty for everyone involved, and it is another step in the process of creating a more balanced arbitral system.

The opinions of the author are personal and do not represent the opinion of the organisations he is affiliated with.