Kluwer Arbitration Blog

When is the ‘Venue’ of an Arbitration its ‘Seat’?

Phillip Capper (White & Case LLP) · Wednesday, November 25th, 2009 · White & Case

The seat of an arbitration is a crucial factor. It determines the lex arbitri and the courts with supervisory jurisdiction over the arbitration.

The important consequences of the seat require parties to choose the seat carefully. Cases where no seat is chosen by the parties are not uncommon. The English High Court in Shashoua v Sharma [2009] EWHC 957 (Comm) addressed an interesting aspect of this issue: does the selection of a ‘venue’ for arbitration imply choice of the ‘seat’? This decision has been the subject of considerable commentary relating to West Tankers [2009] EUECJ C-185/07, but the ‘seat’ aspects have received relatively less attention.

Shashoua v Sharma concerned a joint venture developing an exhibition and convention centre in India. The joint venture company was incorporated in India, and the law governing the shareholders agreement was Indian law. The shareholders agreement contained an arbitration clause which provided for ICC arbitration and stated that “the venue of the arbitration shall be London, United Kingdom”. A dispute arose between the parties and an ICC tribunal was constituted in London. The tribunal made an interim award against the defendant concerning costs of several procedural applications. The claimants were granted leave to enforce the award by the English court, but the defendant challenged the jurisdiction of the English court and brought proceedings in India to set aside the award. The claimants applied for an anti-suit injunction from the English courts to restrain proceedings in India, and the defendants resisted the application on the ground that proceedings in India were justified because, according to them, the seat of arbitration was in India.

The Court of Appeal in C v D [2007] EWCA Civ 1282 had confirmed that any setting aside of an award is to be only in the courts of the seat of the arbitration, so in Shashoua v Sharma the English court first had to make a determination concerning the seat. The arbitration agreement provided for London as the ‘venue’ of the arbitration but was silent as to the ‘seat’. The Arbitration Act 1996 provides in section 3 that, in the absence of designation by the parties, the arbitral institution or the tribunal (if authorised by the parties), the seat must be determined “having regard to the parties’ agreement and all the relevant circumstances”. Cooke J concluded that the designation of London as venue of the arbitration – in an arbitration clause that provides for arbitration to be conducted in accordance with the ICC Rules – provided sufficient evidence to satisfy the court that London was the juridical seat of arbitration intended by the parties. He did not consider that other “relevant circumstances” were weighty enough to counter this inference. Indeed, he noted that there was “great force” in the argument that if the parties had intended to name a ‘venue’ that was distinct

from the ‘seat’, they would have specifically named both.

In reaching the above conclusion, Cooke J rejected the two main arguments made by the defendant. First, the defendant argued that because the lex causae was Indian law, the law of the arbitration agreement must also be Indian law. Cooke J recalled his decision in C v D [2007] EWHC 1541, approved by the Court of Appeal, that the law of the arbitration agreement is much more likely to coincide with lex arbitri rather than lex causae. He considered the defendant’s argument to be circular and accorded little weight to it. Second, the defendant noted that the arbitration agreement provided for each party to bear its own costs of the arbitration – a position which is inconsistent with section 60 of the Arbitration Act 1996. Therefore, the defendant suggested, the parties could not have intended London to be the seat or English law to be the lex arbitri. Cooke J dismissed this argument as “weak” because he considered that the parties would not have contemplated this section of the Act in particular when agreeing to share costs. He also noted that there were provisions in the arbitration agreement which were inconsistent with the Indian Arbitration Act and, therefore, on the defendant’s reasoning, unhelpful to the position that the parties intended India to be the seat.

Two authorities relied on by the defendant were distinguished from the present case. In **Dubai Islamic Bank PJSC v Paymentech [2001] 1 LLR 65** there was no designation of a seat or venue at all and Mr Justice Aikens determined the seat having regard to all the relevant circumstances. In Braes of Doune v Alfred McAlpine [2008] EWHC 426 there was a potential conflict between the law of the arbitration agreement and the law of the seat, and Mr Justice Akenhead was persuaded that reference to the ‘seat’ was merely a designation of the place where the arbitration was to be held, where all other references showed the parties agreeing that the seat and the curial law was that of England and Wales.

Cooke J noted that ‘London arbitration’ is a “well-known phenomenon”, and London is often chosen by foreign nationals as the seat of the arbitration with a different lex causae because of the English legislative framework and the reputation of English courts. Accordingly, he concluded:

> “When therefore there is an express designation of the arbitration venue as London and no designation of any alternative place as seat, combined with a supranational body of rules [ie ICC] governing the arbitration and no other significant contrary indicia, the inexorable conclusion is, to my mind, that London is the juridical seat and English law the curial law.”

The decision in Shashoua v Sharma provides helpful guidance on the question of how much weight the English courts are prepared to accord to circumstances of a case in determining the seat of the arbitration. Certainly, the designation of a ‘venue’ will be considered as strong evidence of intention that the seat should be in the same jurisdiction. In contrast, the lex causae or the geographical connection of the facts of the case or the parties will not necessarily be regarded as conclusive.

Would the English courts have come to the same conclusion if the venue of the arbitration had been outside England (perhaps an ‘exotic’ jurisdiction not popular with English judges) and the lex causae had been English law? Conveniently, the venue of the arbitration in Shashoua v Sharma (and the seat in C v D) was London!

By Phillip Capper, Dipen Sabharwal, Clare Connellan

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Wednesday, November 25th, 2009 at 6:00 am and is filed under Arbitration Agreements, Arbitration Awards, Arbitration Institutions and Rules, Arbitration Proceedings, Commercial Arbitration, Domestic Courts, Enforcement, Europe, Jurisdiction, National Arbitration Laws, Seat of the arbitration
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.