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The Brazilian dispute with the 'close' connection to England & Wales

Guy Pendell (CMS Cameron McKenna LLP) · Friday, August 10th, 2012 · YIAG

On 16 May 2012, the Court of Appeal of England & Wales ("CA") dismissed an appeal against an anti-suit injunction restraining three insured entities from pursuing proceedings in the Brazilian courts against their insurers (Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638). This is the latest in a series of decisions in Brazil and in England & Wales testing the approach of the courts in both jurisdictions to the enforcement of arbitration agreements in circumstances where there are contradictory provisions in the contract.

A consortium of Brazilian construction companies (the "Insureds"), working as the contractor for the construction of one of the world's largest hydro-electric facilities, in Jirau – Brazil, entered into two all risk insurance policies (the "Policy") with a group of Brazilian insurance companies (the "Insurers"). In March 2011, incidents caused damages at the construction site, which led to the Insureds to claim under the Policy. The Insurers, in response, commenced arbitration proceedings in London on 29 November 2011, seeking declarations of non-liability.

The Policy's relevant terms (translated from Portuguese) provided:

> Condition 7 – Law and Jurisdiction:
>
> It is agreed that this Policy shall be governed exclusively by the laws of Brazil.
>
> Any dispute arising under, out or in connection with this Policy shall be subject to the exclusive jurisdiction of the courts of Brazil.
>
> Condition 12 – Arbitration:
>
> In case the Insured and the Insurer(s) fail to agree as to the amount to be paid under this Policy through mediation as above [condition 11], such dispute shall then be referred to arbitration under ARIAS Arbitration Rules. …
>
> The seat of the arbitration shall be London, England. …

The tale of two jurisdictions starts at the end of 2011, when both sides referred the matter to court:

• On 12 December 2011 the Insureds (relying on condition 7) initiated proceedings in Brazil, challenging the enforceability and scope of arbitration agreement, and the requirement for mediation before commencing arbitration. The Insureds also applied for an ex parte interim order to restrain the Insurers from proceeding in arbitration until the issue was finally decided by the Brazilian courts. The ex parte application was refused.

• On 13 December, the Insurers made a without notice application to the Commercial Court in London and obtained an interim anti-suit injunction to restrain the Insureds from continuing the injunction proceedings in the Brazilian court.

• On 16 December 2011, a single judge of the São Paulo Court of Appeal ("TJ-SP"), on an interlocutory appeal from the refusal to grant the ex parte application, granted an interim order preventing the Insurers from continuing with the arbitration in London.

• On 19 January 2012, the Commercial Court, on the Insurers' request for continuation of the interim anti-suit injunction in London, decided that (i) English law was applicable to the arbitration agreement as a result of it having the closest and most real connection with the law of the seat of the arbitration; (ii) the Insureds be restrained from pursing proceedings in Brazil; (iii) there was no binding obligation to mediate before arbitration; (iv) the scope of the arbitration agreement covered any dispute, without restriction; (v) the Insurers could continue with the arbitration; and (vi) the exclusive jurisdiction clause at condition 7 of the policy, was superseded by the arbitration agreement (*SulAmerica CIA Nacional De Seguros S.A. & Ors v Enesa Engenharia S.A. & Ors* [2012] EWHC 42 (Comm)).

• On 19 April 2012, a majority decision of a full bench of the TJ-SP, confirmed the previous interim order in Brazil against the Insurers and determined that (i) the Insurers were prevented from continuing with the arbitration in London until the enforceability of the arbitration agreement was finally decided by Brazilian courts; and (ii) a fine of approximately US$200,000.00 per day be imposed on the Insurers if and for as long they continued with the arbitration (TJ-SP, AI no. 0304979-49.2011.8.26.0000 *Energia Sustentável do Brasil S/A e outros v Sul América Companhia Nacional de seguros S/A).*

• On 16 May 2012, the CA dismissed the Insureds' appeal.

The CA's decision (against which the Insureds are seeking leave to appeal) maintained the decision of the Commercial Court that the applicable law of the arbitration agreement is English law, although with different reasoning.

The TJ-SP's decision did not decide on the law applicable to the arbitration agreement, but the courts have taken substantially different positions. The Insurers can now continue the arbitration (as far as the English court is concerned) so but face a substantial daily fine by the Brazilian courts in doing so.

Whether the applicable law of the arbitration agreement is English law or Brazilian law may have a significant effect on its enforceability. If the arbitration agreement is governed by English law, as established by the Commercial Court and CA decisions, the arbitration agreement is enforceable notwithstanding a submission to the jurisdiction of the Brazilian court in the same contract. Brazilian arbitration law, on the other hand, imposes additional requirements on arbitration clauses in adhesion contracts[1)] (art. 4°, §2° Law 9,307/96) and the regulatory authority of the insurance

industry in Brazil also requires specific provisions in order to arbitrate in insurance contracts (rules 256/2004, SUSEP). In essence the secondary consent of the Insureds is necessary before arbitral proceedings can be commenced. Accordingly, in this case, the Insureds assert that the arbitration agreement is subject to Brazilian law and, by virtue of the nature of this agreement, the Insureds' (secondary) consent is required before arbitration proceedings can be brought, although this has yet to be decided in Brazil.

The Policy's contradictory provisions (conditions 7 and 12), were recognized by the English court. The approach under English law is to favour the arbitration agreement, leaving a jurisdiction clause applicable in only very limited circumstances. Where the seat of arbitration and the jurisdiction of the chosen court are different, the value of the jurisdiction clause is limited even further. In fact, the Brazilian Superior Tribunal of Justice ("STJ") has previously reached similar conclusions that a jurisdiction clause does not invalidate an arbitration agreement, and results in national courts having only residual competence to assist the arbitration (*Empreendimentos e Participações A. B. F v Arco Engenharia Com Ltda*, Ag 1.088.705/MG).

In addition, the STJ supports the principle of competence-competence that issues of existence, validity and efficiency of the arbitration agreement shall be decided by the arbitral tribunal itself (*Interclínicas Planos de Saúde S/A v Saúde ABC Serviços Médicos Hospitalares*, Resp 14.295-SP).

In the circumstances, the current decision of the Brazilian court is hard to explain but seems to turn on the question of whether (assuming the arbitration agreement is governed by Brazilian law) the Insureds are required to give a secondary consent. In Brazil the case is expected to be appealed to the STJ, as the final competent court to decide the matter, although this may take years. Based on the pro-arbitration stance taken by the STJ in previous arbitration cases, the expected outcome will be the referral of the question to the arbitral tribunal. However, the STJ may come to the conclusion that, since the arbitral tribunal's hands are tied given the position taken by the CA, the STJ has no choice but to determine the question itself.

The conflict over the applicable law of the arbitration agreement remains. The CA in its reasoning departed from the Commercial Court and questioned the approach taken in recent cases which simply link the applicable law of the arbitration agreement to the seat of the arbitration. (See *XL Insurance Ltd v Owens Corning* [2001] 1 All E.R. (Comm) 530 and C v D [2007] EWCA Civ 1282.) The CA recognized that in many cases the applicable law of the arbitration agreement will or should be the same as the applicable law of the contract of which it forms part. In concluding that the parties must have intended that the arbitration agreement was subject to English law, the CA seemed to take the position that English law should be preferred, as Brazilian law gave rise to the possibility of the secondary consent requirement. This ignores the fact that the Brazilian court has not yet decided if the secondary consent requirement applies. If under Brazilian law, that is not the case, it would seem that the reasoning relied on by the CA cannot be sustained. Lord Justice Moore-Bick posed the question: "with which system of law does the agreement have the closest and most real connection". On this question in Brazil, the Insureds argue in the ongoing proceedings that (i) the case involves Brazilian parties; (ii) the Insureds project is located in Brazil; (iii) the project is financed by the Brazilian Development Bank; (iv) the events which triggered the claim for compensation took place in Brazil; (v) the agreement includes an exclusive jurisdiction clause in favor of Brazilian courts; and (vi) the proper law of the contract is Brazilian. On the other hand, the CA considers that one has to distinguish the connection to the substantive contract (which is undoubtedly connected to the arbitration agreement) and the system of law by which the substantive contract is governed.

The simple question arguably is this, did the parties chose arbitration in London and intend that, despite all other connections to Brazil, the arbitration agreement would be governed by English law? One doubts the issue crossed the parties' minds at all (although if asked one suspects rather than agreeing to English law, the seat of arbitration might have changed). The circumstances of this case highlight the flaw in simply linking the applicable law of the arbitration agreement to the seat of arbitration, and the doubt cast on this by the CA is welcomed. If leave to appeal is granted, the Supreme Court will have the opportunity to recast the test, which may permit appropriate weight to be given to all circumstances under the arbitration agreement and the substantive contract of which it forms part.

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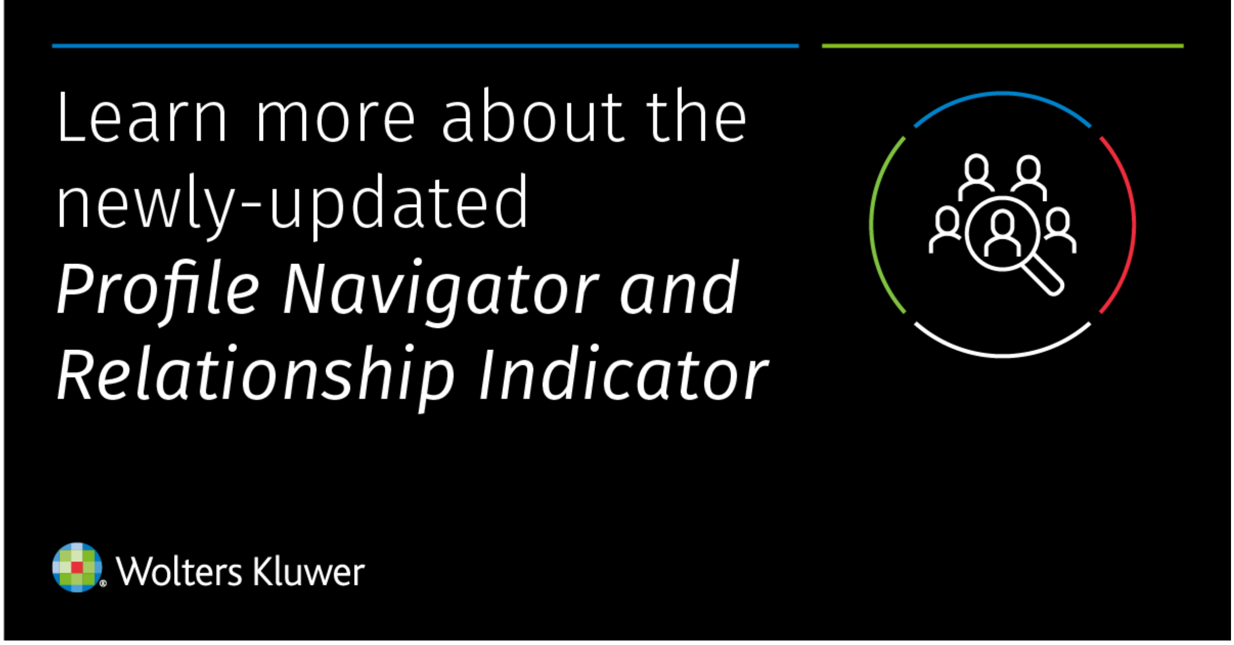

References

?1 An adhesion contract is a contract with standard terms and conditions, typically imposed by one party on the other. An insurance policy under Brazilian law may be an adhesion contract, but this will depend on the facts.

This entry was posted on Friday, August 10th, 2012 at 6:46 pm and is filed under Anti-suit injunction, Arbitration Agreements, Brazil, Enforcement of an arbitration clause, English Law
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