Further Thoughts on Sulamerica: What About Transnational Rules?

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The English Court of Appeal's recent decision in *Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, which is discussed in a recent post by Guy Pendell, underscores an important weakness in the international arbitration system's legal framework. While everyone accepts that the arbitration agreement is the foundation of an international arbitral tribunal's adjudicative power, no consensus has emerged on how to answer a simple yet fundamental question: what law governs that agreement? The controversy surrounding this issue does disservice to the system's users, who—as is well known—greatly value certainty and predictability.

Of course, the problem could be addressed at the drafting stage. Undoubtedly, arbitral tribunals and courts ought to give effect to a provision of the arbitration agreement specifying the law applicable thereto. But how often have you come across an arbitration clause containing such a provision? The dearth of provisions on applicable law is not too surprising, as—for reasons that have always escaped me—most drafting guides and checklists are silent on the issue. The need for a consistent approach on the law governing the arbitration agreement in absence of an express choice by the parties is thus very real.

Sulamerica is typical of the manner in which many debates about the law applicable to the arbitration clause are framed: one party will rely chiefly on the choice-of-law clause inserted in the substantive contract to support an argument

that the law designated in that clause should also govern the arbitration clause, while the other party will object to that reasoning on the basis of the separability presumption and contend that the arbitration clause ought to be governed by the law of the seat of arbitration. In such cases, the underlying assumption is that the arbitration clause ought to be governed by domestic law. But is that assumption justified?

In a typical international arbitration, the parties—hailing from different countries—will have selected arbitration rules that are international in nature and scope, and they will have chosen to seat the arbitration in a neutral jurisdiction. So, for example: Party A from Canada, Party B from India, ICC clause designating Geneva as the seat. Now, consider what the parties would answer if they were asked what *kind* of arbitration they were contemplating when they concluded the contract. Would they be more likely to characterize the process as a *Swiss* arbitration or as an *international arbitration* merely *seated* in Switzerland? And suppose that the substantive contract also contained an English choice-of-law clause. Would that make the parties more likely to characterize the process as an *English* arbitration?

The features of an arbitration clause found in a typical international contract—submission to rules of arbitral procedure that are international in nature and scope, selection of a neutral jurisdiction as the seat of arbitration—strongly suggest that the parties implicitly intend to internationalize their chosen dispute resolution process, most likely on grounds of neutrality and efficiency. For that reason, in the above example, wouldn't they be more likely to answer that what they were contemplating was not so much a Swiss arbitration, but rather an international arbitration that happened to be—in some respects only—connected to the Swiss legal order?

Now, if that is the case, does it really make sense for the arbitration agreement to be governed by domestic law? As that agreement is the very foundation of arbitral jurisdiction, there seems to be a compelling argument that the default choice-of-law rule ought to reflect the parties' conception of the nature of that process. In a typical international arbitration case, where several factors will suggest that the parties intended to internationalize the dispute resolution process, subjecting the arbitration agreement to transnational rules—*i.e.* rules that are very widely, if not unanimously, followed in states that support the international trading system—seems to be a more satisfying solution.

Of course, *Sulamerica* is not a typical international arbitration case, as it involves a dispute located in Brazil and involving Brazilian parties. That said, the parties did agree to arbitrate in a foreign jurisdiction (*cf.* Art. 1(3)(b)(i) of the Model Law: an arbitration is "international" if the place of arbitration is located in a foreign jurisdiction), and to do so in accordance with procedural rules which—according to the ARIAS (UK)'s website—are international in scope as they purport to be "the preferred procedural rules for arbitrations of insurance disputes not just in England but wherever the seat of arbitration may be." Those factors make it highly unlikely that the parties had in mind a *Brazilian* arbitration, so the Court of Appeal's rejection of the argument that the choice-of-law clause relating to the substantive contract ought to extend to the arbitration clause is convincing. But those factors are also indicative of an intention to internationalize the arbitral process, and for that reason, doubts remain as to whether subjecting the clause to English law really was the most convincing conclusion.