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Revisions to the HKIAC's Model Clauses address uncertainty regarding the law governing arbitration clauses

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The Hong Kong International Arbitration Centre ("**HKIAC**") has amended its Model Clauses in order to include an optional provision that specifies the parties' choice of law to apply to an arbitration clause. The express designation of a particular law to govern an arbitration clause does not displace the parties' choice of law to govern the substantive contract. However, as noted on the HKIAC's website, "the law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause." The growing body of discordant judicial decisions on this issue demonstrates that it is important for parties to expressly agree upon the law that will govern an agreement to arbitrate.

As a starting point, one of the following three laws may apply to an arbitration clause:
1. The law expressly chosen to apply to an arbitration clause;
2. The law applicable to the substantive contract; or
3. The law of the seat of arbitration.

For some time there has been considerable uncertainty regarding courts' approaches where the parties have not expressly agreed upon the law to apply to an arbitration clause.

For example, in 2012 the English Court of Appeal decided the case of *Sulamérica CIA Nacional de Suguros SA and others v Enesa Engenharia SA and others* [2012] EWHC 42 (Comm), in which the Court determined that (1) it is not proper to assume that the law of the arbitration clause will follow the law of the contract; and (2) the law of the arbitration clause will be determined by a three-stage inquiry into (i) an express choice, (ii) an implied choice, or (iii) the law with the closest and most real connection to the arbitration clause. In addition, the *Sulamérica* Court applied a rebuttable presumption that an express choice of law to govern the substantive contract would also apply to the arbitration clause. Whilst the Court ultimately determined that the law of the seat of the arbitration (England & Wales) governed the arbitration clause, the case illustrated that failing to specify the law of the arbitration clause could have dramatic results. If the Court had instead determined that the substantive law of the contract (Brazil) applied to the arbitration clause, under Brazilian law the claimant would not have had a right to initiate the arbitration due to the nature of the contract.

However, in a very recent case (*FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12) the Singapore High Court took a different approach and declined to apply the rebuttable presumption applied by the English Court of Appeal. The Singapore High Court instead ruled that in the absence of contrary indications, parties will have impliedly chosen the law of the seat of the arbitration to govern the agreement to arbitrate.

The uncertainties surrounding the law applicable to agreements to arbitrate may lead to difficult and expensive litigation, particularly in situations in which – as in the *Sulamérica* case – the application of one or another potentially applicable body of laws could dramatically change the landscape of a dispute. Whilst many lawyers have considered the impacts of the developing jurisprudence in their contract drafting advice to clients, among arbitral institutions other than the HKIAC, the London Court of International Arbitration ("**LCIA**") has taken action to address this concern. The recently revised arbitration rules of the LCIA – which will go into effect on 1 October 2014 – provide that the law of the arbitration clause will be the law of the seat of the arbitration, unless otherwise specified. By revising its Model Clauses at this time to address the needs of commercial parties for certainty, the HKIAC too has demonstrated its continued initiative to remain at the vanguard of international best practices in arbitration.

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