Kluwer Arbitration Blog

Perspectives on the New York Convention under the Laws of the United States: Agreement in Writing

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The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The New York Convention") is the engine that makes international arbitration an effective mechanism to resolve disputes. The national courts of each signatory state give meaning to the New York Convention's terms by rendering decisions interpreting the text of the document. Decisions are not necessarily consistent from national court to national court, or even among courts within the same state. Hence, there is a premium on the knowledge of the lines of authority that are controlling within a given state because that knowledge may impact strategic decisions made at the time of contract formation, during the arbitration proceedings, and throughout the stage of the enforcement of an award.

Regarding the form of an arbitration agreement, the New York Convention provides a uniform rule: an agreement 'in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams' (Article II(2)). When is an agreement to arbitrate regarded as signed, especially when the agreement to arbitrate is incorporated by reference in a contract?

Signature? What's in a Comma?

In Sphere Drake Ins. PLC v. Marine Towing, Inc., (16 F.3d 666, 669 (5th Cir. 1993), reh'g & reh'g en banc denied, 21 F.3d 1110 (1994), cert. denied, 513 U.S. 871), the argument on appeal was a straightforward one: Marine Towing contended that, because it did not sign the insurance contract including the arbitral clause, the policy could not provide the agreement in writing. The court of appeals held that the phrase after the comma in Article II(2) did not apply to both of the antecedent clauses, but only the latter one:

> "We would outline the Convention definition of "agreement in writing" to include either (1) an arbitral clause in a contract or (2) an arbitration agreement, (a) signed by the parties or (b) contained in an exchange of letters or telegrams." (Id. At 669.)

It did not take too long for another circuit court to disagree with the Fifth Circuit's decision. Kahn Lucas Lancaster, Inc. v. Lark International Ltd., (186 F.3d 210 (2d Cir. 1999)), involved Lark, a Hong Kong purchasing agent for businesses seeking to buy and import clothing made in Asia, and

Kahn Lucas, a New York entity that bought clothing from importers and resold it to retailers.

The case turned on the question of whether the phrase "signed by the parties or contained in an exchange of letters or telegrams" applied to both "an arbitral clause in a contract" and "an arbitration agreement," or just to "an arbitration agreement." The court of appeals held that it applied to both clauses. Explaining that treaties are construed in "much the same manner as statutes," (id. at 215), the court held that the comma separating the two antecedent clauses from the modifying phrase "signed by the parties" can serve no other grammatical purpose, (id. at 217), other than to modify both "elements in the series": "among the rules of punctuation applied in construing statutes is this: When a modifier is set off from a series of antecedents by a comma, the modifier should be read to apply to each of those antecedents." (See Bingham, Ltd. v. United States, 724 F.2d 921, 925–26 n. 3 (11th Cir.1984)); (see also Elliot Coal Mining Co. v. Director, Office of Workers' Comp. Programs, 17 F.3d 616, 630 (3d Cir.1994) (noting that the "use of a comma to set off a modifying phrase from other clauses indicates that the qualifying language is to be applied to all of the previous phrases and not merely the immediately preceding phrase")).

Finally, because the New York Convention requires that an arbitral clause in a contract is signed by the parties or contained in an exchange of letters or telegrams, the court rejected the holding in the *Sphere Drake* decision, and held that purchase orders containing the arbitration clause did not bind Lark since it never signed the purchase orders.

Past Conduct Instead of a New Signature or Exchange?

Can an agreement to arbitrate be implied based on the past conduct of the parties, or even shoehorned into a separate arbitration agreement under Article II(2)? The court in the case of Maritima de Ecologica, S.A. de C.V. ("Marecsa") v. Sealion Shipping Ltd. ("Sealion") (2011 U.S. Dist.LEXIS 41148 (S.D.N.Y. Apr. 15, 2011)) answered "no" to this question.
The case illustrates the practice in international trade where the parties entering into numerous agreements sometimes pay little attention to dispute resolution clauses, as they tend to get lost in the magnitude of international trade deals.

Marecsa and Sealion first entered into an agreement in 2002, but that agreement did not contain an arbitration clause. The Side Letter, concluded between the same parties, provided for English law as governing law and for the reference of '*any disputes to arbitration in London under the London Maritime Arbitrators Association (LMAA) rules*' (Id. at 2-3).

In 2003, Marecsa was awarded a five-year contract by PEP to supply a well-testing vessel owned by Sealion. Marecsa and Sealion then entered into a Joint Venture Agreement and a related Subcontractor Agreement to administer the PEP contract. Both agreements contained the same arbitration and choice-of-law provisions as the one contained in the Side Letter. So far so good as far as the 'in writing' requirement goes.

The PEP contract expired in 2008. At that time, there were disputes pending between Marecsa and Sealion. The parties, nevertheless, entered into a Transaction Agreement, which again provided for the application of English law and the resolution of disputes by arbitration in London. Before that, the Transaction Agreement was executed, and PEP awarded Marecsa a second contract. On that same day, Marecsa and Sealion entered into two separate agreements relating to the second PEP contract. Both of these documents provided for the application of English law and for arbitration in London in case of any disputes. The second PEP contract expired in 2010. Therefore, until 2010,

the ‘in writing’ requirement was still met.

The trouble began when PEP, Sealion, and Marecsa were negotiating a third PEP contract, and at the same time the Deepwater Horizon oil rig spill occurred in the Gulf of Mexico. BP plc (BP) hired Sealion’s vessel to assist in the cleanup of the spill. Sealion’s agent in New York approached Marecsa to arrange for Marecsa to provide personnel to operate the vessel. This agreement was never put in writing, as it was concluded at the moment when the calamities with disastrous impact *superseded* the need for the formalities required by Article II of the New York Convention. The practice of international trade and such calamities demonstrate how the law sometimes cannot keep up with the pace of businessmen and the urgency of dealing with the regional disastrous consequences of something like an oil spill.

Sealion initiated arbitration using the dispute resolution clause in the Joint Venture Agreement and the Subcontractor Agreement, both concluded in 2003, even though the breaches related to the cleanup of the BP oil spill. Sealion’s motion to compel arbitration was eventually denied.

Sealion had attempted to persuade the court to establish the existence of a valid arbitration agreement by arguing that English law permitted the court to *imply* an agreement to arbitrate on the basis of all the previous agreements between the parties, which contained arbitration agreements in writing. The court was not persuaded: it held that the United States law was applicable, and that this law provided no basis to imply an agreement to arbitrate solely from the past conduct of the parties. In other words, the court established that the US pro-enforcement stance has its limits.

Lessons from the U.S. “Agreement in Writing” Jurisprudence

There is no substitute for thoughtfulness when it comes to ensuring the applicability of the New York Convention. If a party is relying on an arbitral clause in a contract, have the contract signed. If a party is relying on an arbitration agreement, have the agreement signed. If a party is relying on incorporation by reference, make sure that the incorporation is clear and unequivocal in the contract document and in the arbitration clause being incorporated.

The *Sphere Drake* decision should still give one pause if the exchange of letters or telegrams makes no reference to the arbitral clause even if attachments to those letters or telegrams do make reference to one.

Finally, prior arbitration agreements related to the business relationship in issue will not control the creation of an arbitration agreement under Article II(2). In other words, do not rely on implication, but instead rely on execution.

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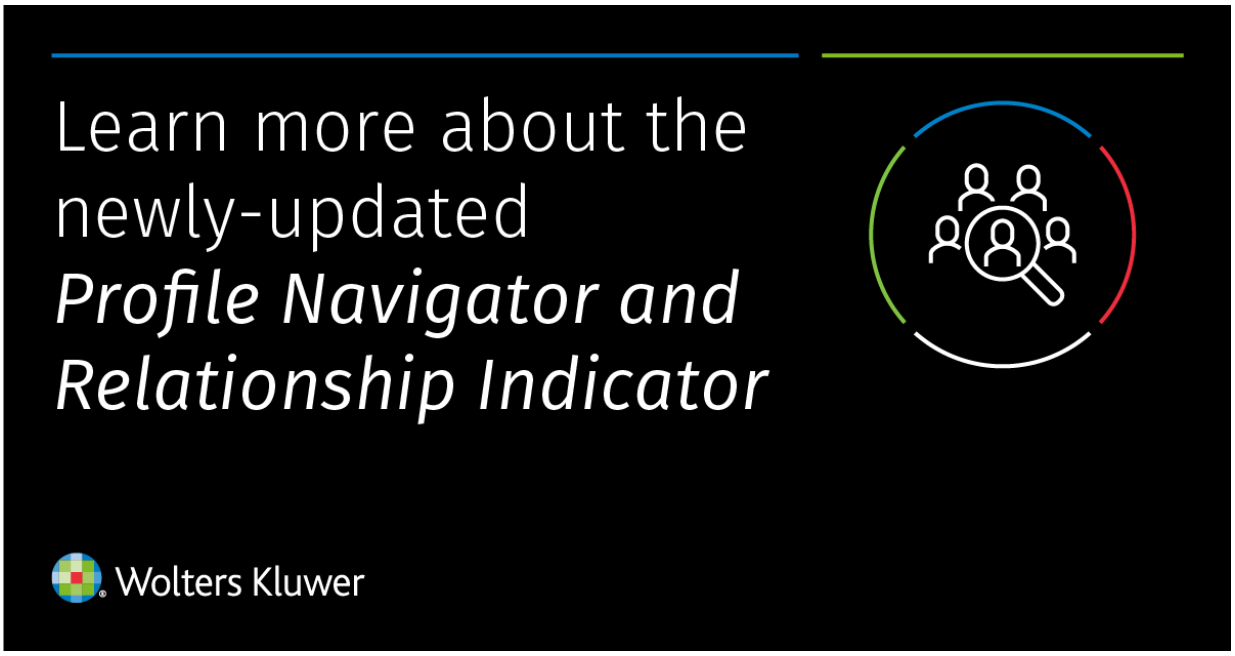

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