Kluwer Arbitration Blog

From the Archives: Follow the Yellow Brick Road to Danubia, Procedural Guidance for this Year's Vis Moot

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Introduction

Each spring, the global international arbitration community arrives in Vienna for the Willem C. Vis International Commercial Arbitration Moot and in Hong Kong for its younger counterpart, the Vis Moot East. Students, after many months of research, drafting, and practice, are eager to present the fruits of their hard work through oral advocacy. Practitioners, for their part, seek to regroup with colleagues and friends over coffee, tea, sachertorte, and dim sum, while supporting students in their advocacy development. The common thread is an interest in emerging topics in commercial arbitration and sales law, as presented by the current Vis Moot problem. This year is no exception.

No matter if you will soon travel to Hong Kong or Vienna, the editors of the Kluwer Arbitration Blog seek to saddle you (pun intended) with guidance from our archives.

This year's backdrop is the Hong Kong International Arbitration Centre (***HKIAC***)'s newly revised Administered Arbitration Rules. Shortly after their release in October 2018, Joe Liu, Deputy Secretary-General of the HKIAC, wrote on the Blog to introduce the Rules and explain key highlights and revisions. No doubt, these changes should be the starting point for any procedural analysis of the Vis problem.

The Issue

Contracts are rarely perfectly suited for the events that later unfold. This is precisely what we see in this year's Vis problem. The Frozen Semen Sales Agreement identifies the choice of Mediterranean law for the main contract and selects Vindobona, Danubia as the place of arbitration. But the drafting history suggests that perhaps the intended choice of law for the arbitration procedure was different.

In our past discussion of the 2014 HKIAC Model Clauses, our authors noted 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." If only the parties to the contract had followed this advice…

Wisdom From Our Archives

So what should parties do under these circumstances? Follow the yellow brick road, as paved by our Blog contributors, of course!

In 2012, we introduced our readers to *Sulamérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A* (***Sulamérica***)[1] and *Abuja International Hotels Limited v Meridien SAS* (***Abuja***),[2] two English cases which confirmed the test to determine the proper law of an arbitration agreement in the absence of the parties' express choice. The three stages of this inquiry are:

1. whether the parties expressly chose the law of the arbitration agreement;
2. whether the parties made an implied choice of the arbitration agreement; and
3. in the absence of express or implied choice, identification of the law with the "closest and most real connection" to the arbitration agreement.

In *Sulamérica*, the Court recognized the distinct identity afforded to arbitration agreements under the doctrine of separability. In both cases, the Court emphasized that the analysis is fact-specific, but where the parties have agreed to England as the seat, the Court will not hesitate to find that English law has the closest connection to the agreement.

In 2014, we revisited the *Sulamérica* test through the lens of *Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS and VSC Steel Company Ltd*. (***Habas***),[3] an English Commercial Court decision. In *Habas*, the Court found that the law of the arbitration agreement was the law of the country of the seat, *i.e.* English law. In *dicta*, the Court added nuance to the three stage Sulamérica test: It observed that Stage (2) often merges into Stage (3), though as a matter of principle the stages should be embarked upon separately and in order. As our author noted, "The Court's observation in *Habas* thus has the potential to muddy the waters surrounding the determination of the law of the arbitration agreement, not helped by the fact that the Court did not apply it to the case at hand."

Sulamérica and *Habas* were soon incisively considered by the Supreme Court of India in *Enercon India v. Enercon GMBH*.[4] In 2014, we discussed the fact-specific complexities of this case. The arbitration agreement (1) designated Indian law as the substantive law, (2) stated that the Indian Arbitration and Conciliation Act, 1996 (***Indian Arbitration Act***) was applicable, and (3) identified London as the "venue" for arbitration proceedings. The Court considered whether the word "venue" was intended to be used interchangeably with "seat" or "place" of arbitration – a legally loaded designation – or whether London was designated as only the venue of the hearings. Applying the *Sulamérica* test and Indian precedent, the Court determined that the parties actually intended New Delhi be the seat of arbitration, vesting the courts in India with exclusive supervisory jurisdiction. The Court assumed that, by expressly making the Indian Arbitration Act applicable, Indian law was designated as both the procedural and substantive law.

A post in 2016 considered a similar problem – how to proceed when the parties have failed to clearly designate a seat? Although our author's discussion is tangential to this year's Vis problem, it very helpfully presents the Swedish perspective and discusses international views regarding the "default" approach of applying the law of the seat as the law of the arbitration.

Not to be left out of the debate, the Singapore High Court has also grappled with the tension between the procedural law of an arbitration agreement and the substantive of a contract.

In the 2012 decision, *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* (***FirstLink***),[5] the Singapore High Court ruled that in the absence of contrary indications, parties impliedly choose the law of the seat of the arbitration to govern the agreement to arbitrate. Our authors observed that case signaled an international (horse) race to the bottom – ongoing difficult and expensive litigation could result each time a court is presented with this question. They further identified the HKIAC's Model Clauses, which include an option to designate the law of the arbitration, as reflecting industry best practices. This observation was repeated by another author who considered its impact on Chinese arbitration practice through the lens of a case before the China Supreme People's Court.

In 2017, our authors considered another case from Singapore, *BCY v BCZ*.[6] Echoing the priorities of the *Sulamérica* test and applying *FirstLink*, the Court followed the three-step inquiry and focused on Step (2) – the implied choice of the parties. The Court also added a nuance: if the arbitration clause is part of a main contract the "governing law of the main contract is a strong indicator of the governing law of the arbitration agreement unless there are indications to the contrary." The choice of a seat different from the law of the governing contract could justify moving away from the starting point of applying the governing law of the main contract. However, it could not in itself suffice to displace the starting position. In contrast, if the arbitration clause is a freestanding arbitration agreement and there is no express choice of law of the arbitration agreement, the law of the seat would most likely govern the arbitration agreement.

In this last case, the parties agreed that there was no material difference between the two choices of governing arbitration law (New York law or Singapore law, respectively). The Court proceeded to determine the governing law of the arbitration agreement in an effort to settle the debate on this issue.

Where the applicable law is determinative, as it is in this year's Vis problem, the stakes are much higher. For analysis in this respect, have a look at our contributor's recent views regarding conflict of laws analysis in arbitration generally.

Concluding Thoughts

The Vis problem offers many fact-specific cues that allow for a persuasive argument in either direction. If following the *Sulamérica* test, it seems impossible to move past Step (2) of the analysis – the record includes enough negotiating history to suggest that Mediterranean law was intended to govern the arbitration agreement. Yet the importance of the arbitral seat cannot be minimized.[7] It is not merely a convenient place for the hearings, but rather a designation of legal framework for the arbitral proceedings.

No matter whether you are more persuaded by the arguments of Claimant or Respondent, we hope you found this foray into our archives illuminating and wish you all happy mooting!

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References

?1 [2012] EWCA Civ 638.

?2 [2012] EWHC 87 (Comm).

?3 [2013] EWHC 4071 (Comm).

?4 [Civ. App. 2086/7 of 2014].

?5 [2014] SGHCR 12

?6 [2016] SGHC 249.

?7 See also Gary Born, International Commercial Arbitration (2d ed.), Vol. 2 (Selection of Arbitral Seat in International Arbitration) (Kluwer Law International, 2014).

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