Kluwer Arbitration Blog

Kabab-Ji: Determining The Governing Law For The Arbitration Agreement Under English Law, The Emerging Focus On The Express Choice Of The Parties

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Introduction

Whenever the court is confronted with the task to determine the governing law of an arbitration agreement on the basis of knowing only (1) the stipulated governing law of the main contract and (2) the seat, a three-folded test will be applied. It inquires into (i) express choice, (ii) implied choice and (iii) closest and most real connection (*Sulamérica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* [2012] EWCA Civ 638 at para 25).

Usually, the court (and the lawyers) will *directly* resort to the second and third stage, as with the observations in *Arsanovia Ltd & Ors v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), para 22, noting that the lawyer 'felt unable in light of authority to contend at first instance that the parties made an express choice'. This seems to be a well-established approach as it was applied in cases such as *Sulamérica*, and has also been analysed in the literature.[1)] When determining the implied choice of the parties, there is a rebuttable presumption that the law of the main contract applies, since the 'fair' and 'natural inference is that the parties intended the proper law chosen to govern the substantive contract to also govern the agreement to arbitrate'.[2)] This shows the high relevance of the law governing the substantive contract in the court's opinion. Its pertinence is further reinforced by a recent case discussed below where the court found it to be the express choice of the parties after taking into account other contractual terms.

The Emerging Focus on the Express Choice

However, in the recent English Court of Appeal case of *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* ([2020] EWCA Civ 6), the Court applied a less usual approach by focusing on the first stage of the *Sulamérica* test – *i.e.* on the express terms. This decision was previously discussed on the blog from the perspective of the Court's findings on "no oral modification" clauses.

On the facts, the arbitration was expressly designated to be in Paris, and the main agreement on development was stated to be governed by English Law (Para 1). On its face, there was not an explicit clause providing for the governing law of the arbitration agreement. The arbitrators

concluded that the governing law is French Law, and found that the defendant ('KFG') was a party to the arbitration agreement (Para 3). Under section 103(2)(a) and (b) of the English Arbitration Act 1996, KFG challenged the enforcement of the award in England and Wales (Para 5). It was undisputed that the law governing the validity of the arbitration agreement governs the question of whether KFG became a party to the arbitration agreement (Para 10).

Three clauses of the main contract are particularly relevant. In simplified terms, Art. 1 of the main contract provides that 'This Agreement consists of' all the terms listed therein. Art. 14 provides that the dispute is to be settled by arbitration in Paris. Art. 15 provides that 'This Agreement' shall be governed by English law.

It was held that since Art. 1 states that 'This Agreement' includes all the terms of the agreement, it would also include Art. 14 (the arbitration clause). Additionally, Art. 15 further states that 'This Agreement' would be governed by English law. As such, this would cover also Art. 14 (Para 62). This constitutes an express choice of the parties. The Court, thus, saw no need to determine whether there was an implied choice (Para 70).

The Court also expanded on the proper understanding of the concept of 'separability', which does not denote that the arbitration clause has to be interpreted in isolation from other clauses. Instead, '[t]he rationale of separability is that it ensures that the dispute resolution procedure chosen by the parties survives the main agreement becoming unenforceable for example because of fraud or misrepresentation' (Para 66).

Whilst having a different focus from the conventional cases like *Sulamérica* and *C v D* ([2007] EWCA Civ 1282), this approach of focusing on the express choice is not entirely new. In the less-discussed case of *Arsanovia*, it was also stated that:

When the parties expressly chose that "This Agreement" should be governed by and construed in accordance with the laws of India, they might be thought to have meant that Indian law should govern and determine the construction of all the clauses in the agreement which they signed including the arbitration agreement (para 22).

The profound implication is that the parties do not have to argue on the implied choice or the close-connection issue. The second, especially the third, stage could create a lot of room for arguments on various factors that the court would usually take into account in the absence of an express choice. The factors would include, for example, the place of contracting, the place of performance, the nature of the subject matter and the place of business of the parties.[3] Parties inevitably would feel obliged to dwell on each factor with lengthy arguments. The resolution process could get very complicated if a complex factual matrix is involved (*e.g.* business projects involving multiple jurisdictions to similar extents, or multiple equally important parties from different jurisdictions). It has even been noted that the 'closest connection' test cannot feasibly be applied at all when it involves 'complex business relationships with a multitude of sub-contracts'.[4] In any event, it can often be very difficult to weigh among equally persuasive factors. Furthermore, the adjudication of these contextual factors inevitably involves subjective and discretionary evaluation, potentially leading to different conclusions by different judges, who accord different weight to different factors. These could lead to uncertainty for the parties as it would prove hard to predict the conclusion.[5]

By contrast, focusing on the first stage – the express terms of the contact – is an objective process and arguably simpler. The arguments concentrate solely on the semantics and drafting. Most importantly, this case demonstrates that the issue of interpretation is unlikely to be a complicated one. This is because, as long as there is a 'This Agreement includes all the terms' clause, the court could easily find an express choice, which would reduce any potential room for arguing on the proper interpretation. This would provide more certainty, as any suggested implied choice 'cannot overcome the clear effect of the express terms' (Para 68). Moreover, this would save the parties' time and resources by eliminating the need for lengthy and convoluted arguments.

The conclusion reached by this straightforward approach is persuasive since the parties' adoption of an inclusive definition of 'This Agreement' (as covering the arbitration agreement/clause) logically and powerfully accounts for the lack of a direct and separate clause for the governing law of the arbitration agreement. However, if this is not the actual intention, parties should now be advised to be extra careful when drafting an all-encompassing 'This Agreement includes all terms' clause.

In sum, this case vitally confirms and reinforces the emerging focus on paying adequate attention *first* to the question of whether there is an express choice. This marks a sway from the usual practice/assumption to directly skip to the implied choice and/or close-connection enquiries under the *Sulamérica* test. Lawyers should now carefully check whether there is a 'This Agreement includes' clause, which is a fairly common one. This development is very welcomed as the focus on the express choice, by simple reference to whether such clause exists, provides straightforward guidance to determining the applicable law. To some, this may be a more preferable approach than the 'vague criterion of "closest connection"'.[6)]

References

?1 See, *e.g.*, Tan Sri Dato' Cecil Abraham, Aniz Ahmad Amirudin & Daniel Chua Wei Chuen, Interaction of Laws in International Arbitration: An Asian Perspective, in Neil Kaplan QC and Michael Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration* (Kluwer, 2018).

?2 *Sulamérica* at paras 11 and 26; see also the Singaporean position.

?3 *See, e.g.*, *Sulamerica* at [10]; Simon Greenberg, Christopher Kee, and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) at 111; *England Coast Lines Ltd. Hudig & Veder Chartering NV* [1972] 1 All ER 451.

?4 Christiana Fountoulakis, *Set-off Defences in International Commercial Arbitration: A Comparative Analysis* (Bloomsbury Publishing, 2010) at 186.

?5 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Wolters Kluwer, 2012) at section 13.5.3; Emmanuel Gaillard and John Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Wolters Kluwer, 1999) at 434.

?6 Joachim G. Frick, *International Arbitration Law Library: Arbitration in Complex International Contracts* (Wolters Kluwer, 2001) at 60; Tony Cole and Pietro Ortolani, *Understanding International Arbitration* (Routledge, 2019) at section 5.2.

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