

# 2020 in Review: Proper Law of Arbitration Agreement

## **Kluwer Arbitration Blog**

January 1, 2021

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*Please refer to this post as: Mihaela Maravela and Keilin Anderson (Assistant Editor for Australia, New Zealand and the Pacific Islands), Nick Papadimos (Assistant Editor for Australia, New Zealand and the Pacific Islands), '2020 in Review: Proper Law of Arbitration Agreement', Kluwer Arbitration Blog, January 1 2021, <http://arbitrationblog.kluwerarbitration.com/2021/01/01/2020-in-review-proper-law-of-arbitration-agreement/>*

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2020 saw important case law developments concerning the proper law of arbitration agreements, where the seat of the arbitration is in a different jurisdiction from the governing law of the main contract, particularly in the UK. However, various jurisdictions have adopted different approaches to this issue. It remains to be seen which jurisdictions will follow the latest UK jurisprudence. This year, we covered on our Blog some of these approaches in a few select common law and civil law systems. We summarise below our coverage as well as include further comments from our Europe and Australia editorial teams.

## **Common law approach**

### ***English courts***

Discussions on the law governing the arbitration agreement may and do arise when jurisdiction of the arbitral tribunal is contested (e.g. whether a party has agreed to submit a dispute to arbitration, as in *Svenska Petroleum Exploration AB v Lithuania* [2005] EWHC 2437 (Comm), *Arsanovia Ltd & Ors v Cruz City 1*

*Mauritius Holdings* [2012] EWHC 3702 (Comm), *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* ([2020] EWCA Civ 6), or whether there is a valid arbitration agreement, as in *Abuja International Hotels Ltd v Meridien SAS* [2012] EWHC 87 (Comm)), or when anti-suit injunctions are sought (e.g. *XL Insurance Limited v Owens Corning* [2001], *C v D*, [2007] EWCA Civ 1282, *Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] EWCA Civ 574), at the set aside or at the enforcement stage.

This year saw important developments in the English courts on this issue. In English courts, the applicable law to the arbitration agreement is determined by applying the three-stage test required by English common law conflicts of law rules for determining the law governing contractual obligations (as the Rome I Regulation does not apply to arbitration agreements), namely (i) is there an express choice of law? (ii) if not, is there an implied choice of law? (iii) if not, with what system of law does the arbitration agreement have its closest and most real connection?

First, as reported by our contributor, we experienced at the beginning of the year an emerging focus on the express choice, as the England and Wales Court of Appeal (EWCA) determined in *Kabab-Ji* that the question can be answered at the first stage not only if exceptionally there is an express choice of the law of the arbitration agreement, but also in other cases. As such, the express choice of law in the main contract may amount to an express choice of law of the arbitration agreement, if the construction of the contract so mandates (essentially "This Agreement" clauses, which means that the law agreed for the main contract covers all clauses, including the arbitration clause). Both the EWCA (para. 90) and the Supreme Court (paras. 43, 52, 60) endorsed this ruling in *Enka*.

With respect to the second stage of the inquiry, as we have reported on the Blog, we saw the EWCA departing from *Sulamerica* in its decision handed down in April, as it held the seat of arbitration as an **implied** choice of law of the arbitration agreement, subject to any countervailing factors in the relationship between the parties or the circumstances of the case (e.g. if the arbitration agreement would be invalid under the law of the seat).

The Supreme Court disagreed and ruled in October this year, as explained on the Blog, that at the second stage of the inquiry, prevalence should be given to the

parties' intention when agreeing on the law of the main contract; where the parties have (expressly or impliedly) chosen the law applicable to the main agreement, it would normally govern the arbitration agreement as an **implied** choice.

At the third stage, the Supreme Court held in *Enka* that the arbitration agreement is most closely connected with the law of the seat if the parties had chosen one, as, *inter alia*, this is the most used connecting factor and it is also consistent with international law and legislative policy, such as the New York Convention.

In practical terms, it means that under English law, as it currently stands, the law of the seat would govern the arbitration agreement in those (presumably limited) cases where parties do not agree (expressly or impliedly) on the law applicable to the main contract. In *Enka* the majority found there is no express or implied choice for the main contract and, moving to the third stage of the inquiry, determined that the applicable law of the arbitration agreement is English law, as the seat was London.

Also, the UK Supreme Court expressly confirmed the existence of the validation principle under English law to realign UK jurisprudence with the transnational approach to the proper law of the arbitration agreement, as another contributor explained at length.

### ***Singapore courts***

This year has seen continued discussion (see [here](#), [here](#) and [here](#)) of the late 2019 decision of the Singapore Court of Appeal in *BNA v BNB and another* [2019] SGCA 84 ("*BNA*"). The Court of Appeal overturned the earlier High Court ruling and provided authoritative guidance on the applicable principles in determining the proper law of an arbitration agreement. By applying the three-stage analysis, the Court of Appeal expressly endorsed the approach taken in *Sulamérica* that in the absence of an express choice of the proper law of the arbitration agreement, the implied choice of law should presumptively be the proper law of the underlying contract.

However, unlike the UK Supreme Court, the Singapore Court of Appeal did not decide on the applicability of the validation principle. Whilst the validation principle was rejected by the High Court, this issue was not considered by the Court of

Appeal and arguably it remains unsettled law. Singapore courts may also have to deal with the apparent conflict between Singapore contract law principles and the choice of law principles in the New York Convention.

## ***Australia***

Australian courts have yet to consider a test to determine the applicable law governing an arbitration agreement in the absence of an express choice of law. Time will tell whether Australian courts will be persuaded by the majority opinions in the UK Supreme Court's *Enka* decision, the approach of the Singapore Court of Appeal in *BNA*, or if a different approach is adopted altogether.

## ***Pacific Islands***

Whilst the courts in the Pacific Islands have also not had the opportunity to rule on this topic, the Pacific Islands region saw more fundamental developments in arbitration this year. 2020 was the year that saw the Kingdom of Tonga and Palau accede to the New York Convention. They now join other Pacific states to have done the same, such as Fiji, Papua New Guinea, the Marshall Islands and the Cook Islands. With more and more countries acceding to the New York Convention each year, there is an obvious benefit in Pacific Islands' jurisdictions seeking to streamline their domestic approaches to the position adopted under the New York Convention, for consistency with other jurisdictions.

## **Civil law approach**

### ***French courts***

We mentioned above the findings of the English courts on the law applicable to the arbitration agreement in *Kabab-Ji*. The effect was that both the High Court of England and Wales and the EWCA refused to enforce the award on the basis that it was rendered against a non-party to the arbitration agreement. However, as explained in detail by our contributors, on the other side of the channel, the Paris Court of Appeal dismissed the application for the same award to be set-aside,

confirming the arbitral tribunal's findings upholding jurisdiction over a third party to the arbitration agreement. The different solution was triggered by the application of a different law to the arbitration agreement: the English courts applied English law, while the Paris Court of Appeal applied the French law and extended the arbitration agreement to a non-signatory. Our contributors explain that the solution is in line with the French case law allowing such extension if the non-signatory was involved in the performance of the contract.

When determining the law applicable to the arbitration agreement, the Paris Court of Appeal gave prevalence to the law of the seat, on the ground that the parties' choice in the governing law of the main contract (in this case English law) could not override their ulterior choice in favour of Paris as the seat of arbitration, and French law as (i) the law applicable at the seat of arbitration; and (ii) thus, to the arbitration agreement.

### ***Swedish courts***

Earlier this year, our Blog revisited a judgment of the Svea Court of Appeal handed down in late 2019. The court considered whether an arbitral award rendered by a tribunal some years earlier should be set aside on the grounds it lacked jurisdiction to decide the dispute.

The court applied a statutory provision in the Swedish Arbitration Act. That provision, in effect, requires that if parties have not agreed on the choice of law for an arbitration agreement, then the law of the forum country applies. In resolving the case, the court arguably applied a strict approach to interpreting whether the parties have agreed on the choice of law for an arbitration agreement, seemingly recognising only *explicit* statements to that effect within the contract itself.

As the parties had not *explicitly* agreed on a choice of law for the arbitration agreement (only for the 'main agreement'), the court found that Swedish law applied as the law of the forum country. From there, the court used customary principles of contract interpretation under Swedish law to find that a valid arbitration agreement existed between the parties. On that basis, there was no reason for the court to set aside the arbitral award on the ground that the tribunal lacked jurisdiction to decide the dispute.

On its face, the statutory provision applied by the court broadly mirrors the approach advocated by Articles V(1)(a) and II(3) of the New York Convention in recognising that, absent the parties agreement as to the governing law of an arbitration agreement, the law of the forum country applies. However, by recognising only explicit agreement as to a choice of law (rather than also implicit agreement), the position in Sweden now arguably departs from the position under New York Convention (see *Enka* at 129 and 130 and a recent Blog post here). Time will tell whether subsequent decisions in Sweden will interpret the statutory provision in such a way as to better align it with the broader interpretation of Articles V(1)(a) and II(3) of the New York Convention, now supported by the UK Supreme Court in *Enka*.

## **Conclusion**

The common and civil law approaches seem to converge in that where there is no agreement of the parties on the law applicable to the arbitration agreement, the law of the seat would govern it (either by statutory grounds, or by applying the closest connections test). However, as the law currently stands, what differs is a more lenient approach in common law courts – at least the English courts – on what amounts to parties’ agreement (either as an express choice by way of construction, e.g. *Kabab-Ji*, or by implied choice, e.g. *Enka*), leaving less cases to be governed by the law of the seat compared to the civil law approach.

The UK courts’ judgments this year provided welcome clarity on how UK courts will seek to determine the governing law of an arbitration agreement where the parties have not made an express choice. However, whether or not the reasoning of the majority is persuasive in developing or clarifying this area of law in other (at least common law) jurisdictions around the world remains to be seen. We look forward to continuing our Blog’s global coverage on this topic in 2021.