Kluwer Arbitration Blog

The Seat's Law Reigns: The Case for Aligning Governing Law of the Arbitration Agreement With the Seat

Anushka Aggarwal · Friday, May 2nd, 2025

Recently, the UK Arbitration Act received royal assent, bringing in several important changes. The commentators have been quick to discuss these changes from various angles, including, for example, from the perspective of LCIA arbitrations. One of the notable changes is the introduction of Section 6A, which introduces a new default rule: unless the parties expressly agree otherwise, the governing law of an arbitration agreement will be the law of the seat. It also clarifies that the governing law chosen for the matrix contract of which the arbitration agreement forms a part, does *not* constitute an express agreement that the same law also applies to the arbitration agreement. This marks a significant departure from the previous English law stance as laid down in *Enka v Chubb*, where, in the absence of an express choice, the law of the matrix contract governed the arbitration agreement.

The earlier approach created uncertainty since the courts had to first examine the law of the matrix contract before considering the law of the seat. The *Enka* case itself illustrates this uncertainty: while the Court of Appeal found that the matrix contract was governed by Russian law, the UK Supreme Court disagreed, ultimately applying the law of the seat. The factors that the Court of Appeal considered sufficient to demonstrate the choice of matrix contract as Russian law, such as the place of performance, contractual language, payment currency, and bank account location, were not considered conclusive by the Supreme Court. Section 6A eliminates this ambiguity by providing a clear default rule. This evolution of jurisprudence has been touched upon in this blog before.

A previous discussion on this blog analyses the impact of this amendment, among others, on LCIA Arbitration, where such a default rule already existed. This shift is noteworthy for even jurisdictions like India, where the legislature and the courts have not yet addressed the law governing arbitration agreements directly. In India, determinations about the governing law have typically arisen only as a secondary issue when assessing the jurisdiction of Indian courts in international commercial arbitration. The change is also in line with celebrated international law frameworks such as the New York Convention. Thus, the change in the UK provides a compelling example for both Indian lawmakers and courts to consider when resolving similar questions. I argue that this change is justified by two fundamental legal principles: separability and *dépeçage*. While separability ensures that an agreement's arbitration clause remains separable and enforceable, even if the matrix contract is disputed, *dépeçage* allows different aspects of a contract to be governed by distinct legal systems. Together, these principles strengthen the case for reform by prioritising party autonomy and ensuring legal certainty.

Separability: The Procedural Nature of Arbitration Agreements

The UK Law Commission Report strongly supports this change by reaffirming the presumption of separability**,** which establishes that an arbitration agreement remains separable from the matrix contract. Originally designed to preserve the arbitration clause's validity even if the matrix contract is challenged, this principle is explicitly recognised under Section 16 of the Indian Arbitration and Conciliation Act, 1996. The provision affirms separability *primarily* to confer jurisdiction on arbitral tribunals when the validity of the main contract is in dispute. However, the phrase "for that purpose" does not necessarily limit separability to jurisdictional questions alone. Unlike restrictive terms such as "exclusively" or "only that purpose," the language of Section 16 leaves room for broader application, particularly in choice-of-law determinations.

The landmark *N.N. Global* case (seven-Judge Bench) should not be relied upon to advocate for a broader application of separability, as a closer examination of the judgment reveals that its primary issue was whether an unstamped arbitration agreement is void and unenforceable, a question fundamentally determinative of the arbitral tribunal's jurisdiction. Consequently, the observations on applicability of separability in any other context should be regarded as mere *obiter dicta*, not the binding ratio of the case. Additionally, the judgment relies on Gary Born's scholarship to support the notion of separability as a "free-standing" principle, i.e., a *general rule* on the substantive independence of an arbitration agreement. However, a comprehensive reading of Born's work reveals that he does not advocate for separability as an isolated rule. In subsequent paragraphs of the same text, Born clarifies that separability arises from the arbitration agreement's procedural character rather than from a free-standing, detached principle:

> *[T]he separability of the arbitration agreement arises from the agreement's character (as a "procedural" contract), terms, and objectives, which are all fundamentally different from those of the underlying commercial contract. The separability of an arbitration agreement for purposes of validity is a product of these differences, and not a free-standing and isolated rule, detached from the character and purposes of agreements to arbitrate (Section 4.04)*

As Born argues, the procedural nature of arbitration makes the arbitration agreement fundamentally different from the matrix contract. This procedural nature becomes relevant in a choice-of-law analysis. In practice, the arbitration clauses become operative only when a dispute arises, shifting the parties' focus from the performance of contractual obligations to ensuring fairness and neutrality in the resolution process. Consequently, the "commercial approach" previously endorsed by the English courts, that a choice of law clause for a matrix contract would reasonably be expected to govern the *entire* contract including the arbitration agreement, lacks logical coherence when applied to an arbitration agreement since it is primarily concerned with the procedural framework for resolving disputes.

Due to this procedural nature of an arbitration agreement, it is closely connected to the law of the seat. The seat courts exercise supervisory jurisdiction and oversee critical aspects of the arbitration process, including the constitution of the tribunal, the conduct of proceedings, and the setting aside of awards. This supervisory role creates a significant overlap between the matters governed by the

law of the seat and those governed by the arbitration agreement itself, underscoring their intrinsic link. The principle that the law of the place most closely connected to an (arbitration) agreement should govern it, in the absence of an explicitly specified law, finds support in the Rome Convention on the Law Applicable to Contractual Obligations as well. This approach is both logical and practical, as the law of the seat is typically chosen for its neutrality and procedural advantages, making it a natural default governing law for the arbitration agreement. Indian courts, including the High Courts of Bombay and West Bengal, have affirmed this principle, recognising that the arbitration agreement often has a closer and more real connection with the place where the parties have chosen to arbitrate, rather than the place governing the matrix contract. This reasoning further aligns with the doctrine of separability, which emphasises the distinction between the law governing the *dispute* and the law governing the *arbitration agreement*. While the law of the matrix contract may have a close connection to the substantive dispute, the law governing the arbitration agreement is more closely tied to the law of the seat due to its procedural nature. This distinction highlights why the law of the seat, rather than that of the matrix contract, should serve as the default governing law for the arbitration agreement.

Dépeçage: Upholding Parties' Intention in Choice-of-Law

Dépeçage allows different parts of a single contract to be governed by distinct legal systems. This means that parties may *intentionally* choose to subject the arbitration agreement to a law different from that governing the main contract. For example, in *Hamlyn v. Talisker Distilleries*, Lord Herschell emphasised that a different law could apply to the arbitration agreement, not because it is a separate agreement, but because it is part of the same contract yet governed by a different law to reflect the parties' intentions. This reasoning underscores the flexibility afforded by *dépeçage*, enabling parties to tailor the legal framework of the arbitration agreement to suit its procedural nature, distinct from the substantive provisions of the matrix contract. By recognising *dépeçage*, the legal system accommodates the practical realities of international arbitration, where parties often prioritise neutrality and procedural efficiency in their choice of governing law for the arbitration agreement, even if it differs from the law applicable to the matrix contract.

While it may appear unusual to apply separate legal frameworks to different components of a single agreement, this practice is not uncommon in the context of arbitration agreements due to the varying degrees of arbitration-friendliness across jurisdictions. For instance, Singapore has emerged as a preferred seat for arbitration globally because its courts are renowned for their support of international arbitration and their commitment to upholding the arbitration agreements. Allowing a distinct legal framework for the arbitration clause respects the parties' intent and autonomy, ensuring that disputes are managed under a regime they have specifically chosen for its flexibility and neutrality.

Conclusion

Aligning the governing law of an arbitration agreement with the law of the seat, unless the parties expressly choose otherwise, reflects the distinct, procedural nature of the arbitration. This approach, grounded in the principles of separability and *dépeçage*, ensures efficiency, and certainty in arbitration proceedings, serving as a potential model for jurisdictions like India, that have not

directly addressed the issue.

…

A special thanks to Rushil Batra for his valuable research assistance.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Friday, May 2nd, 2025 at 8:41 am and is filed under England, English Arbitration Act, Reform, Seat of the arbitration
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.