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A Broader Perspective

Alert

International Arbitration Team

To: Our Clients and Friends

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Does your chosen jurisdiction clause extend to the arbitration agreement?

Introduction

It is quite rare for an agreement to state expressly which law shall be applicable to the arbitration clause, because it normally forms part of the agreement. It has been accepted in many cases as well as in the leading commentaries, that the arbitration clause is governed by the same law as the main agreement.

However this traditional approach seems to be changing with more case law suggesting that the arbitration clause shall be seen as constituting an independent agreement to arbitrate which is subject to the law of the chosen seat of arbitration rather then the law applicable to the rest of the agreement.

Even if an arbitration clause is invalid under the law applicable to underlying contract, the English courts may still take a view that validity under the law of the seat is sufficient for an arbitration to go ahead.

Separability of the Agreement to Arbitrate

There is nothing new about the separability of the agreement to arbitrate from the rest of the agreement. However this concept is usually being applied to make sure that even if the underlying agreement is invalid, the arbitration agreement is still enforceable, so that the parties' choice of the dispute resolution mechanism is given effect to.

On 16 May 2012 the English Court of Appeal issued its judgment in the case of *Sulamerica CIA Nacional de Seguros S.A.[2012] EWCA Civ 638* in which it went beyond the established separability principle referred to above.

The decision in the Sulamerica case

In the Sulamerica case the agreement was expressly made subject to Brazilian law. The arbitration clause contained in the agreement specified London as the place of arbitration. It was held by the Court of Appeal that, despite the fact that there are a number of authorities suggesting that the question of validity of an arbitration clause should be subject to the same law as the rest of the agreement, in this case the arbitration clause should be governed by the English law by virtue of a chosen seat of arbitration.

The Sulamerica case was distinguished from earlier cases on the basis that if the Brazilian law was to be applied to the arbitration clause, this would mean that the arbitral proceedings could only be commenced provided that the other side agreed to this.

Some arbitration clauses expressly provide for arbitration only at the option of one or the other side. However in this case one-sided arrangement was not expressly incorporated into the arbitration clause but was rather a consequence of the application of Brazilian law.

The Court of Appeal took the view that on interpretation of the dispute resolution provisions of the agreement as a whole, the parties' intention was to be able to refer any disputes arising out of the agreement at either party's choice and with no implied restrictions. As a result, it was held that in the Sulamerica case the law applicable to the arbitration clause is the law of the chosen seat of arbitration, i.e. English law.

Conclusion

The idea of seeing the arbitration clause as subject to the law of the seat of arbitration rather than substantive law has been expressed in England before, for example as an obiter point in the case *of C v D [2008] 1 ALL ER (Comm)* 1001, on which the Sulamerica judgment relied quite heavily.

The Sulamerica approach is not very unusual in an international context. For example s.48 of the Swedish Arbitration Act 1999 provides that arbitration agreement shall be governed by the law of the seat when parties did not make an express choice. Swiss Federal Statute of Private International Law provides that for an arbitration agreement to be valid it has to conform either "to the law chosen by the parties or to the law governing the subject matter or… Swiss law…"

However, it is probably still too early to say that the new approach for the determination of the law applicable to the arbitration agreement has been fully adopted in England.

The Court in the Sulamerica case looked at the intentions of the parties and the specific factual circumstances surrounding the case. It remains to be seen whether certain special circumstances need to be established first before the Sulamerica principle can be applied or whether the English Courts will generally be adopting the view that law governing the arbitration agreement is always the question of procedural rather than substantive law.

To avoid any uncertainty in this area, if the chosen seat of arbitration is in England, it is important to state expressly which law shall govern the agreement to arbitrate, even if the agreement to arbitrate is incorporated into the main agreement as a clause forming part of the main agreement, which already contains a jurisdiction clause.

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