Singapore High Court finds that parties are presumed to have chosen the law of the seat as the proper law of the arbitration agreement

The Singapore High Court recently found in *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12 that where there is no express choice of law, the proper law of the arbitration agreement is generally the law of the seat (typically chosen out of a desire for *neutrality*), rather than the law of the substantive contract.

The law of the arbitration agreement - a much neglected creature

As a fundamental principle of arbitration law, the arbitration agreement – even where it is presented in the form of clause or section of a larger agreement – is separable from the main contract. It is therefore subject to its own governing law. In the same way as parties can expressly choose the governing law of the main contract and the seat of arbitration, they may also choose the law of the arbitration agreement.

In practice, parties in commercial negotiations rarely give thought to the law of the arbitration agreement. This is perhaps understandable – in the course of a straightforward arbitration, the law of the arbitration agreement does not often come under scrutiny.

But where issues such as the validity of the arbitration agreement or its scope come into play, i.e., in the context of a jurisdictional challenge, the law of the arbitration agreement often becomes relevant. If the parties have not expressly chosen the law of the arbitration agreement, they can find themselves embroiled in a technical legal argument on what the applicable law should be. This issue has caused courts and tribunals some difficulty.

The decision in *FirstLink Investments Corp Ltd v GT Payments Pte Ltd and others* [2014] SGHCR 12 ("**FirstLink**") offers some well-reasoned clarity on this issue from the Singapore perspective.

The decision in FirstLink

Not uncommonly among commercial parties, the Plaintiff and Defendants in FirstLink did not expressly provide for a choice of law to govern their arbitration agreement when they concluded their main contract.

After a dispute arose, the Plaintiff commenced court proceedings in Singapore against the Defendants for a loan amount of S$1,010,000. The first Defendant relied on the arbitration agreement contained in the main contract to apply for a stay of the court proceedings.

Key points

- Parties should ideally expressly stipulate a choice of law to govern their arbitration agreements.
- If no express choice is made, in Singapore the law of the seat is likely to be taken as the parties' implied choice of law governing the validity of the arbitration agreement.

"Given that rational businessmen must commonly intend their arbitration awards to be binding and enforceable, their attention with regard to the validity of their arbitration agreements would primarily be focused on the law of the seat, as opposed to the substantive law."

***FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12 at [14]**

As the Plaintiff resisted the stay application on the basis that the arbitration agreement was invalid, the Assistant Registrar considered in some detail the question of the applicable law governing the arbitration agreement, in order to determine its validity.

It was first noted by the Assistant Registrar that the leading decision is that of the English Court of Appeal in *SulAmerica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A.* [2012] 1 Lloyd's Rep 671 ("**SulAmerica**") where a three-stage enquiry was laid down to determine the law governing an arbitration agreement:

1. The parties' express choice.
2. The parties' implied choice in the absence of an express choice.
3. Where the parties had not made any choice, the proper law would be the law which the arbitration agreement has its closest and most real connection with.

In relation to Stage Two (2) of the enquiry, the English Court of Appeal had essentially created a rebuttable presumption that the express substantive law of the contract would be taken as the parties' implied choice of the proper law governing the arbitration agreement.

A subtle departure from the English-law position

The Assistant Registrar held that, contrary to the English Court of Appeal's rationalisation that commercial parties would ordinarily intend to have the whole of their relationship governed by the same system of law, it is more likely than not that when it comes to the quite separate (and often unhappy) relationship of resolving disputes subsequently when problems arise, there can be no natural inference that commercial parties would want the same system of law to govern these two distinct relationships.

Instead, the natural inference ought to be the opposite. When commercial relationships break down and parties descend into the realm of dispute resolution, the parties' *desire for neutrality* would come to the fore, and primacy is accorded to the neutral law selected by the parties to govern the dispute resolution proceedings (insofar as the law governing the arbitration agreement is concerned). The substantive law would take a backseat in this context (and would only take a main role subsequently when the time comes to determine the merits of the dispute).

It was emphasised that in the province of international arbitration, the arbitral seat is the juridical centre of gravity which gives life and effect to an arbitration agreement. Therefore, it would be "*rare*" for the proper law of the arbitration agreement to differ from the law of the seat, given that an arbitration agreement has a closer and a more real connection with the place where the parties have chosen to arbitrate rather than with the place of the law of the main contract.

The Singapore High Court noted that Article V(1)(a) of the New York Convention renders an arbitration award unenforceable if the arbitration is invalid under the law of the country where the award was made in the absence of an express choice of proper law, and an award may be set aside if the arbitration agreement is invalid under the law of the seat pursuant to Article 34(2)(a)(i) of the Model Law.

Given that rational businessmen must commonly intend their arbitration awards to be binding and enforceable, their attention with regard to the validity of their arbitration agreements would primarily be focused on the law of the seat, as opposed to the substantive law. This must necessarily be so because commercial parties would not intend to have an arbitration agreement valid under other laws (including the substantive law), only for it to be declared invalid under the law of the seat.

Moreover, given that the parties' choice of the neutral seat amounts to a selection of the law of the seat to govern procedural aspects of their arbitration (including the supervisory court's powers to determine a jurisdictional dispute in relation to the validity of an arbitration agreement), it

would make sense that the parties intended the same system of law to govern the validity of the arbitration agreement in order to *ensure consistency between the law and the procedure* of determining the validity of the arbitration agreement.

In the circumstances, in the absence of indications to the contrary, the above reasons would ordinarily compel a finding that the parties have implicitly chosen the law of the seat as the proper law to govern the arbitration agreement. The Singapore High Court, however, cautioned that the determination of the implied proper law ultimately remains a question of construction and each case will have to turn on its own facts.

Conclusion

This very recent decision of the Singapore High Court makes a forceful case for the primacy of the law of the seat (as opposed to the substantive law) as the law governing disputes over the validity of the arbitration agreement.

Given that the parties' chief concern once any dispute has arisen is to ensure the neutrality and integrity of the dispute resolution process itself, it follows that applying the law of seat (which parties would have been chosen for precisely those reasons) to govern any dispute over the validity of the arbitration agreement, rather than the substantive law of the main contract, is more likely to accord with the commercial intentions of the parties.

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