The law governing the arbitration agreement in LCIA Arbitrations: Where you stand depends on where you sit

17 NOVEMBER 2014

CATEGORY:
ARTICLE

New 2014 LCIA Rules introduce default rule that the law applicable to an arbitration agreement is the law of the seat

The autonomy and separability of an arbitration clause from its underlying contract is a formative principle of international arbitration. A corollary of this principle is that the law governing an arbitration agreement can differ from the law governing the substantive issues in dispute between parties (i.e., the law of the contract). Parties therefore can – and increasingly do – expressly designate the law applicable to their arbitration agreement, as distinct from (and often different to) the law governing the contract. However, in the absence of an express stipulation, there remains uncertainty as to the law applicable to the arbitration agreement. While the possibilities are generally limited to the law of the contract or the law of the seat of the arbitration, that uncertainty can throw up disruptive satellite disputes. The new 2014 LCIA Rules, effective on 1 October 2014, helpfully introduce a default rule (Article 16.4) that the law applicable to the arbitration agreement will be the law of the seat of the arbitration (unless the parties have lawfully agreed otherwise).

In England, some cases such as *Union of India v McDonnell Douglas Corp*[1] have held that the law of the arbitration agreement was the same as the law governing the parties' contractual obligations. In other cases such as *C v D*[2] and *XL Insurance v Owens*[3], the English Courts held that respective arbitration agreements were governed by English law as the arbitrations were seated in London, notwithstanding the fact that different governing laws applied to the contracts. The same conclusion was also reached in *Sulamérica v Enesa*.[4] In that case, the Court of Appeal set out guidelines providing that the law of an arbitration agreement is to be determined by undertaking a sequential three-stage enquiry into express choice, implied choice and the closest and most real connection. Despite this laudable attempt by the Court of Appeal to enhance certainty by identifying the appropriate methodology for determining the law governing the arbitration agreement, there remains residual uncertainty regarding the application of this test (and, in particular, determining "implied choice"). Such uncertainty is exemplified in the case of *Arsanovia v Cruz City*[5] where Smith J held in the High Court that the parties had impliedly chosen as the law governing the arbitration agreement Indian law (which was the law governing the parties' contractual obligations), notwithstanding the fact that the arbitration was seated in London.

Against this backdrop of continuing uncertainty, as reflected in the jurisprudence in the English courts, the presumption in the new LCIA Rules that the law governing an arbitration agreement is the law of the seat of the arbitration (absent contrary agreement) is to be welcomed. For LCIA arbitrations, this new default rule can be expected to reduce the number of disputes about which law governs the arbitration agreement.

[1] [1993] 2 Lloyd's Rep 48

[2] [2007] EWCA Civ 1282

[3] 2001] 1 All E. R. (Comm) 530

[4] *Sulamerica Cia Nacional De Seguros SA & Others v Enesa Engenharia SA & Others* [2012] EWCA Civ 638

[5] *Arsanovia Limited & others v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm)