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The separated arbitrator

Ben Giaretta and **Michael Weatherley** discuss two recent cases in England and Singapore about what law governs an arbitration clause, and explain what this means for commercial parties.

A paradoxical barber

The philosopher Bertrand Russell[1] gave the following example of a logical paradox: if a barber shaves all those, and only those, men in town who do not shave themselves, who shaves the barber? If he shaves himself, he does not **only** shave men who do not shave themselves; and if he does not shave himself, he does not shave **all** men in town who do not shave themselves.

A similar paradox arises if an arbitrator's jurisdiction derives directly from the contract that he must adjudicate on. If a party has an incontrovertible argument that the contract is void, the arbitrator must conclude that his jurisdiction is also void (and therefore he cannot make a ruling). If the arbitrator ignores the argument, he would not be complying with his duties, thus denying his own jurisdiction.

To avoid this paradox, the notion has been created that an arbitration clause stands as a separate contract, embedded within a main contract. The UNCITRAL Model Law, for example, states at Article 16(1) that: "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause".

Unintended consequences

However, when negotiating contracts, parties do not think of an arbitration clause as a separate contract. When looking at an arbitration clause, therefore, one does not find the features that one would normally see in contracts. In particular, there is no indication of what law governs that separate contract. This becomes relevant when there is an argument over whether an arbitration clause is valid: what standard should the arbitration clause be measured by?

The English answer

There have been various English cases about this issue, and the current leading authority is the judgment of the Court of Appeal in *Sulamérica*[2]. That concerned an insurance policy governed by Brazilian law, with an arbitration seated in London. The insurers had started an arbitration. The insured parties said that the arbitration clause was governed by Brazilian law, which meant (they said) that the arbitration was invalid because, under Brazilian law, the arbitration could only be started with their express consent at the time the arbitration commenced. On the other hand, the insurers said that the arbitration clause was governed by English law – therefore no such consent was needed, and the arbitration had been validly started.

The Court of Appeal set out the normal common law approach to identifying a governing law in England, which is to: (i) look for an express choice by the parties; (ii) look for an implied choice by the parties; then (iii) identify the place with which the contract has the closest and most real connection. The court said that parties will ordinarily be taken to have impliedly chosen the same governing law for their arbitration clause, as they have expressly chosen for the main contract. However, specific factors can lead to the conclusion that that cannot have been their intention.

In this case, the consequence of applying Brazilian law (namely that the insured parties' consent was required) did not sit with the express wording of the arbitration clause (which did not require any such consent), and therefore the parties could not be taken to have impliedly chosen Brazilian law to govern the arbitration agreement. On the other hand, the arbitration agreement had the closest connection to England, since that is where the arbitration would take place. Consequently, the Court of Appeal decided that English law applied to the arbitration agreement. The arbitration had therefore been validly started.

The Singapore solution

A similar situation came before the Singapore High Court in *FirstLink*[3]. This concerned a contract for online payment services. Disputes were to be referred to SCC

arbitration in Stockholm, and, unusually, the substantive governing law clause of the main contract stated that the "laws of the Arbitration Institute of the Stockholm Chamber of Commerce" applied.

One party started court proceedings in Singapore, arguing that the substantive governing law clause applied to the arbitration clause, and, since the arbitration clause could not be governed by the "laws" of an arbitration institution, it was invalid. The defendant said that the arbitration clause was governed by the law of the seat of the arbitration (Sweden), and, since the arbitration clause was valid under Swedish law, the Singapore court proceedings must be suspended to allow an arbitration to proceed.

The High Court considered *Sulamérica*. It agreed that the three-stage test should be applied, but it took the view that, in the absence of indications to the contrary, the choice of a country as the seat of arbitration would ordinarily imply that the parties had also chosen the law of that country to govern the arbitration agreement, rather than the substantive governing law of the main contract. As a result, Swedish law applied, and the arbitration agreement was valid. The court proceedings were suspended.

The High Court also recognised (following French authority[4]) that there was a third way between the substantive governing law and the law of the seat of the arbitration: namely, that arbitration clauses might be governed by principles of international law rather than the law of a particular country. However, the High Court did not rely on this point in reaching its decision.

Practical tips

- To avoid unnecessary litigation on this question, parties might consider specifying what law governs the arbitration clause. This could be achieved by identifying the governing law in the arbitration clause itself; or by stating that the governing law clause in the main contract applies to the arbitration clause.
- Alternatively, parties could use the law of the seat of the arbitration as the substantive governing law for the main contract: for example, English governing law when the arbitration takes place in England. This means that, by either course, the same answer is reached.
- Finally, parties should focus on making the language of the arbitration clause clear. It is notable that both the English court and the Singapore court reached the same result, of upholding the arbitration clause. In fact, they expressly directed their reasoning towards a point where the arbitration clause was valid. Provided the language of the arbitration clause clearly expresses an intention to arbitrate, therefore, a court which has a pro-arbitration policy is likely to adopt an approach that refers the parties to arbitration.

Notes

1 See *The Philosophy of Logical Atomism*, Routledge 1985 edition, p. 101.

2 *Sulamérica Cia Nacional de Seguros S.A. and others -v- Enesa Engeharia S.A. and others* [2012] EWCA Civ 638.

3 *FirstLink Investments Corp Ltd -v- GT Payment Pte Ltd and others* [2014] SGHCR 12. We understand that the High Court judgment is currently being appealed.

4 *Municipalité de Khoms El Mergeb -v- Société Dalico*, Judgment of 20 December 1994 Rev. arb. 166 (French Court de Cassation civ. 13).

Further information

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