NATIONAL LAW SCHOOL -TRILEGAL INTERNATIONAL ARBITRATION CONFERENCE 2023

PANEL-I: PROPER LAW OF ARBITRATION AGREEMENT

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INTRODUCTION

In the realm of international arbitration, one crucial and often complex issue that arises is the determination of the proper law of arbitration. The proper law of arbitration refers to the legal framework that governs the arbitration proceedings, including the rules, procedures, and substantive law applicable to the dispute. When parties fail to explicitly designate the proper law of arbitration, or when conflicts arise between the chosen law and the circumstances of the case, the determination of the proper law becomes a matter of great importance and complexity.

The proper law of arbitration impacts various aspects of the arbitration process, such as the appointment and powers of the arbitral tribunal, the conduct of proceedings, the admissibility and assessment of evidence, the interpretation and enforcement of awards, and the overall legitimacy and fairness of the arbitration process. In recent years, the international arbitration community has witnessed an increasing number of disputes and challenges surrounding the determination of the proper law.

Dr. Harisankar moderated the panel, whose broad themes focussed on discussing the trends for the applicability of proper law in different jurisdictions and the solutions for clarifying proper law in modern day arbitration agreements. By examining different perspectives and experiences, the panel shed light on this complex topic and contribute to the ongoing discourse in the field of international arbitration.

The panel comprised of the most eminent minds in arbitration law:

1. Mr Pallav Shukla (Partner, Trilegal)
2. Mr Steven Finizio (Partner, WilmerHale*)*
3. Ms Shruti Sabharwal (Partner, Shardul Amarchand Mangaldas)
4. Ms Shwetha Bidhuri (Director & Head-South Asia, Singapore International Arbitration Centre)
5. Dr. Harisankar K Sathyapalan (Associate Professor of Law, NLSIU).

This report will first provide an Executive Summary of the discussion, followed by providing a structured report of each speaker's main ideas.

I. OPENING REMARKS

Prof Sharada Shinde delivered the welcome address and introduced the themes of the conference.

Mr. Pallav Shukla introduced the panellists for the session.

Dr. Harisankar K Sathyapalan introduced the theme of Panel-I, 'the proper law of arbitration' as one of the most contentious issues in India and across jurisdictions, especially due to the differing positions taken by various courts. He affirmed its importance including in routine arbitration proceedings and conflict of law analysis. He posed three leading questions to the panellists that kicked off the discussion –

(i) what is the proper law of arbitration;

(ii) why do we need it;

(iii) what are the different aspects of arbitration that the proper law governs?

II. ENGLISH POSITION ON THE PROPER LAW OF ARBITRATION

Mr. Finizio began by describing the proper law of arbitration as contentious in Western jurisprudence, with specific reference to UK law. It is contentious in the sense that it is confused due to a host of different arguments and varying outcomes. There are wide differences between common law and civil law jurisdictions, not only in the outcome, but also in the reasoning for these outcomes.

Mr. Finizio expressed that the question of how to remedy this confusion is easily answered - that parties and counsel need to include just one sentence in the arbitration agreement expressly specifying which law applies to the arbitration agreement. However, it is rarely done either due to a culture of cut-and-paste from old clauses or because there is confusion about its consequences.

The English position is consolidated in the *Enka v Chubb* decision which continues to underscore the uncertainty and lack of consistency. The test in *Enka* is multilayered, each prong produces an outcome to the exclusion of others. If there is an express choice regarding the proper law, it is accepted. If no express choice is made, then the implied choice, if there is one, is accepted. If there is neither an express nor an implied choice, it creates a presumption in favour of the governing law of the underlying contract.

This brings to fore the issue of separability, the English view of which is narrower. The English view only considers the arbitration agreement separable to the extent of validity and enforcement purposes, otherwise it is considered as part of the underlying (matrix) contract. Thus, the *Enka* position is that parties intend for the same law to apply to the whole contract hence primacy is presumptively given to the law of the underlying contract. The presumption can be displaced by two competing considerations –

i) if the law of the seat stipulates that the same law applies to the arbitration agreement or,

ii) if the validation principle applies, i.e.; if there is a serious risk that the arbitration agreement would be rendered invalid under the law of the seat if the *lex contractus* (law governing the main contract) is applied. Lastly, if the presumption also stands displaced, the closest connection test is applied.

Mr. Finizio notes that in *Enka* the issue pertained to the enforceability of the arbitration agreement and arose at the beginning of the dispute; while in the *Kabab-Ji Sal* case, it arose at the stage of enforcement of the arbitral award. In *Kabab-Ji*, the award was rendered against a non-signatory, the choices for the proper law were French or English law - the former contained grounds to bind non-signatories whereas the latter didn't allow it. The UK Supreme Court applied *Enka*, with the added caveat that when considering if the party consented to bind a non-signatory, the validation principle (law presuming the validity of the agreement) cannot be used since that would be an arbitrary, circular logic. This brings the discussion back to the parties' intent - the court assumes that parties don't understand separability and that they choose a seat for neutrality purposes alone because of which the court must engage in an in-depth analysis of applicable law.

Interestingly, in their first consultation paper on the Review of the English Arbitration Act 1996, the UK Law Commission did not include proper law in the list of topics that the Act needed to address. It drew criticism for the same and so subsequently, in the second

consultation paper, the Law Commission recommended that the Act should reform the *Enka* position by way of a new rule stating that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself. This secures clarity, assumes that parties know what they are doing and avoids the problem of determining which parts of the English Arbitration Act are substantive or procedural, and hence applicable in a dispute.

III. INDIAN POSITION ON THE PROPER LAW OF ARBITRATION

Dr. Harisankar asked if there is any insistence on a separate clause laying down the governing law of the arbitration agreement in Indian contracts, what are its aspects, and what choices (if any) are stressed upon.

Ms Sabharwal stated that in her experience, she hasn't come across an arbitration agreement specifying an express choice for the law governing the contract and arbitration agreement. Dispute lawyers are not involved in the drafting stage of the contract, hence very few clauses refer to the governing law of the arbitration agreement. However, its determination is extremely relevant to the dispute.

Earlier, in the *NTCP v SMPL* judgement, the Indian Supreme Court had held that the arbitration agreement is separate only to the extent that it is ancillary, but it still draws its life from the main contract. This was clarified by the decision in *NN Global* which confirmed that the arbitration agreement is fully separable. The proper law of the arbitration agreement is relevant to save the parties time and money. Indian courts can take anywhere between 3-8 months to resolve the issue of the proper law. This determination of the applicable law in turn determines a crucial question - of arbitrability. Thus, the proper law is very important to determine validity, that is, whether the arbitration agreement was entered into correctly. There is a need to escalate the importance of this in practice and strongly recommends the inclusion of a clause expressly stating the law governing the arbitration agreement.

Mr. Finizio added here that although arbitral institutions are trying to include such a clause in their model arbitration agreements, it includes a caveat of ‘unless agreed to otherwise’ by parties which again takes us back to square one - deciding on implicit choice etc.

Dr. Harisankar recalled being on a panel 10 years ago discussing Sulamérica and noted how we are still discussing proper law in 2023. He asked Mr. Pallav Shukla to shed light on the position in Singapore which explains the issue's contemporary relevance.

IV. SINGAPOREAN POSITION IN *ANUPAM MITTAL* & THE WAY FORWARD FOR DETERMINING PROPER LAW

Mr. Shukla referred to the 2023 judgement of the Singapore Supreme Court in *Anupam Mittal v. Westbridge*, where the court addresses the validation principle. Here, the law of contract was Indian law, the place was Singapore and the arbitration was subject to ICC Rules. The dispute centred around the issue of oppression and mismanagement; however under Indian law, this issue is purportedly non-arbitrable as noted by the Court in its decision. The Court decided to give effect to the parties' intent which was apparently to arbitrate this issue. Thus, the Court gave primacy to party intent notwithstanding the position in Indian law, reasoning that resources cannot be wasted on its account.

Mr. Finizio observed that Singapore law subscribes to a narrower version of the validation principle compared to English law. The former places emphasis on parties' *awareness* of their positions and the applicable laws on validity. It creates a fiction that parties contemplated difficulty in proving validity under Indian law and deliberately chose Singapore as the seat. This rests on a strong assumption that parties are sophisticated enough to understand the intricacies of arbitration and foreign laws. For instance, many Indian lawyers were of the opinion that the Singapore Court was incorrect in holding that the matter was non-arbitrable in India, thus there is a risk of courts assuming, possibly incorrectly, what the law in other jurisdictions is.

Ms Sabharwal agreed that this approach is definitely uneasy, because the Court is effectively deciding what the parties should and should not have thought or known.

Dr. Harisankar asked Ms Shwetha Bidhuri whether institutional rules can provide clarity on these concerns.

Ms Bidhuri said that post-*Anupam Mittal* the guidance now would be to specify the law of the arbitration agreement. The SIAC has been educating parties on the importance of the same, and stressed on the need to have enough conversations underscoring this issue. However, she doesn't believe that the SIAC should amend its own rules and specify an applicable test to determine proper law. The making of such a default rule by arbitral institutions might complicate matters further, instead the aim now is to simplify the present position, by unifying the various approaches across jurisdictions. One way arbitral institutions can contribute would be to include 'governing law of the arbitration agreement' in the language of their model clause while leaving the answer to it blank, so that parties actually take cognisance of it.

With regards to the *Anupam Mittal* decision, she differs from Mr. Finizio. She opines that it's the court's duty to infer party intent and give effect to the arbitration agreement to prevent it from being nullified. The Indian position on arbitrability is unclear, for example, one school of thought argues that oppression is non-arbitrable but a purely mismanagement issue should be arbitrable. The court anticipated that it would bring up enforceability issues and took a composite approach in considering both the law of the seat in addition to the law of the arbitration agreement as a reference to determine arbitrability. This adds another layer to the analysis, and makes things a little more complicated. If the law of the contract is different from the seat, the decision on the law of the arbitration agreement would become complex.

She believes that from the institutional perspective, the guidance to parties would be to not choose a law of the arbitration agreement contrary to the law of the seat, because if a dispute is considered arbitrable under the former but not the latter, the arbitral proceedings might not even occur.

Mr. Finizio believes that the court in *Anupam Mittal* did not wish to employ a blanket application of the validation principle. The approach is not a fiction in the sense of assuming that parties intended for the arbitration agreement to be enforced; it is a fiction that credits parties' intention in this specific situation but not generally for any question of validity that may arise.

He referred to Prof. Maxi Scherer's comparative research of global jurisdictions noting how widespread the variance in positions is. He spoke about the two main differing positions - one that gives importance to the validation principle and the other that gives primacy to the law of

the seat because the former purportedly answers only yes or no questions, without going into the substantial ones. While he recognises the merits of both sides, he leans towards the latter, since it speaks more to the intent of the parties than the validation principle.

Ms Sabharwal is inclined towards the same approach, since the seat is where parties go for enforcement.

Mr. Finizio thinks arbitral institutions should specify the default rule and believes it would be wrong if a fiction assumes that parties pick a seat for neutrality. In fact, parties often remain silent on it for the opposite reason, to benefit from it. But as discussed so far, there are limitations of the validation principle as well. Hence, it is important to specify the seat.

Ms Sabharwal doesn't see how arbitral institutions can give a default rule, the law of the seat usually ends up winning as the closest connection to the dispute.

Mr Shukla and Ms Bidhuri also agreed that the seat would be given primacy, while **Ms Bidhuri** added a caveat that she would look more into the facts of the case (of where the assets were situated etc.) before giving primacy to the seat - as the lawyer drafting the clause, one must consider where parties are likely to enforce the award.

In response to Ms Sabharwal's concern that such an exercise would be very expensive, Ms Bidhuri said that in cases like *Anupam Mittal* it was difficult for the court to assess where parties' could possibly enforce the award, only the parties could have beforehand but if the parties can't either, she agrees that the law of the seat is safest.

Mr Finizio briefly spoke about the position in the U.S. not being clearly discernible. U.S. courts have held the law of the seat to be the proper law in some cases, whereas in others courts have jumped past the issue of determining the law of the arbitration agreement and looked to the law of the place of incorporation of the underlying contract to resolve the question of capacity. The trend now is to go with the seat but this goes to show that not all problems can be solved even if we have a default rule to determine proper law.

Dr. Harisankar asked the panellists why the need for this complex situation of conflict of laws? If the issue is of international arbitration, why tie it back to local jurisdictions? And opened the floor for questions.

V. QUESTION & ANSWER SESSION

Q1: Is it necessary to make an express choice of law for the arbitration agreement or whether there is a benefit to not specify the same? Whether there are any circumstances under which it helps to leave it unspecified?

Ms Sabharwal: It is absolutely beneficial sometimes so that one gets another ground to challenge their opponent at a later stage. It depends on the kind of contract a party is entering into. If they are providing the service, they owe more obligations and are more likely to be in breach, in that case it definitely helps to be vague.

Mr. Finizio: Parties do not specify the proper law for multiple reasons. First, before *Enka* and the recent attention on this issue, parties paid little attention to it and assumed a certain outcome. Second, when entering into a contract, contemplating the implications of choosing the law of another jurisdiction - possible differences and possible consequences in a future dispute that one can't even anticipate yet - is a scary exercise. So to wait-and-watch seems to be a good approach. Third, there weren't a lot of arbitrability issues in popular seats, but now with more jurisdictions gaining popularity for becoming pro-arbitration, it is more of a concern.

Ms Bidhuri: Lawyers can benefit from leaving the clause vague because they don't know which side they are going to be on. However, for the sake of certainty - to avoid satellite litigation, to avoid wastage of time and costs - it would be better if parties can narrow it down.

Q2: What caveats do lawyers have to take into account while drafting the contract?

Ms Bidhuri: There are fundamental differences between the seat and the enforcement jurisdiction, while it is not easy to know where a party is likely to enforce the award but considering where the majority of assets are is a good starting point. That is the jurisdiction

where questions of validity can hit enforceability, hence need to be mindful of the general position of law there.

Q3: When the issue does come up, do parties expect the tribunal/court to apply the closest connection test?

Ms Sabharwal: Parties don't really think about these issues, but practitioners will expect that if there is a doubt the tribunal will apply the closest connection test.

Q4: The NY Convention defines arbitrability and substantive validity differently, is it then fair for the Singapore court to have relied on international comity and conflate the two in its decision? What is the role of comity likely to be in the future?

Ms Sabharwal: The Singapore court took the correct approach. For the NY convention, the emphasis is on enforcement, and giving effect to the agreement to the extent possible. Awards should be enforceable and upheld. With regards comity, there has to be a respect for other countries' laws and on the parties' intentions, because policies apply differently in different jurisdictions. The act of relinquishing their national jurisdiction is an act of party autonomy that should be given legitimacy.

Mr. Finizio: Comity doesn't make much sense in international arbitration on this scale, tribunals are not applying international law, but chosen law. Must respect other countries' law when looking at public policy but that's where the release valve is of recognising sovereignty. If we also start considering it when deciding which law applies, it blows up the system which is built on party autonomy.

Mr. Shukla: The Singapore court's decision must be understood as an attempt to evolve a first principle to clarify the position on proper law in their jurisdiction, and not so much on the issue of arbitrability.

Q5: The assumption is that parties want everything to be governed by one law, but since issues of procedure would be resolved by the *lex arbitri* (law of the seat) why not have a default rule that *lex arbitri* applies?

Mr. Finizio: UK courts do overemphasise the weightage of the law of underlying contract, and there is a need to look at the seat. However, it is also important to not stretch this argument too much. It's important to investigate notions of separability and the question of intent since these determine whether reliance is placed on closest connection.

Q6: To what extent do online proceedings muddy the water when it comes to determining the seat?

Mr. Finizio: Recently, a Canadian court recently incorrectly said that the concept of seat has no role in online proceedings. Can't do away with seat because arbitration must have a public aspect, there is a need for a supervisory court. The seat is not a physical concept, but a legal one.

Ms. Sabharwal: Agree with this position because the seat is the one appointing arbitrators and overlooking the process. Need an anchor or parties will go to two different courts.

Mr. Finizio: ICSID doesn't designate a seat but it is a self contained system, with an annulment committee and appointment function, would need all the pieces to do away with the seat.

Q7: The four jurisdictions with major seats (England, France, Switzerland, US) do not use the approach recommended by the Panel, that is, law of the seat. Doesn't it then fall on arbitral institutions to bring about uniformity?

Ms Bidhuri: The problem is that arbitral rules cannot provide a fool-proof answer due to these very conflicting approaches across multiple jurisdictions. Moreover, it is not the prerogative of the institutions to decide for the parties.

Q8: Between the law of the arbitration agreement and the underlying contract, which one prevails? What are the trends?

Ms. Sabharwal: There can't really be a trend, it comes down to a case-by-case basis

Q9: If we concede that these clauses will continue to be copy-pasted and that it is beneficial for lawyers to leave the clause vague, are we back to square one?

Ms. Sabharwal: It is not easy to advise on what the proper law should be. One would have to confidently ascertain the jurisdiction's complete position on contract formation, arbitrability and enforcement at the drafting stage which is very expensive for clients.

Mr. Finizio: The difference is that lawyers are copy-pasting better clauses now. Copy-pasting is not necessarily on account of laziness, but rather indicative of bias or lack of thought. The law of the seat is the least dangerous as a prescriptive, since it provides clarity on which parts apply because they are mandatory and which don't.

Ms Bidhuri: agrees that it may be a tedious exercise but it's better to be prescriptive.

Mr Finizio: One would not make major mistakes in prescribing a law if it pertains to major jurisdictions where you've worked extensively. It becomes complicated as more and more jurisdictions get involved.

Dr. Harisankar concluded by saying that for the above reasons, the jury is still out on whether or not proper law of the arbitration agreement must be prescribed.