

Dispute Resolution Hotline

August 08, 2014

DOES YOUR ARBITRATION AGREEMENT PROVIDE FOR ITS GOVERNING LAW?

- Law governing the arbitration agreement added in HKIAC model clause
- The inclusion is aimed at avoiding confusion and costs at the dispute stage
- Other leading institutions likely to follow suit

Hong Kong International Arbitration Centre (“**HKIAC**”) has updated its model arbitration clause¹ to include specific words “*The law of this arbitration clause shall be ... (Hong Kong law)*”. Further, in the notes to the model clause, the HKIAC states that (a) the provision should be particularly included where the law of the substantive contract and the law of the seat are different; and (b) the law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause. It does not replace the law governing the substantive contract.

It is for the first time that a leading arbitral institution has introduced such a provision in its model arbitration clause. This has been done with a view to reduce the uncertainty and potential litigation which arises when parties did not expressly chose the law governing arbitration agreement.

BRIEF BACKGROUND OF THE LAW INVOLVED

International commercial arbitration involves potentially three types of laws being: (i) law governing the contract (substantive law); (ii) law governing the seat of the arbitration; and (iii) law governing the arbitration agreement.

The general methodology to determine the law governing the arbitration agreement, in case the parties have not chosen the same expressly, was laid down in *SulAmérica*², as a three stage enquiry into: (i) express choice; (ii) implied choice; and (iii) the system of law with which the arbitration agreement has the closest and most real connection. The Commercial Court in *Habas Sinai* (analyzed [here](#)) reconfirmed the principles in *SulAmérica* and provided that in order to determine the law governing the arbitration agreement, the choice of the seat and also the terms of the arbitration agreement play a huge significance as they give a strong indication about the proper law of the arbitration agreement.

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Having said that, *Klöckner*³, *Enercon*⁴ (analysed [here](#)), *FirstLink*⁵ and *Arsanovia*⁶ (analysed [here](#)) demonstrate the importance of expressly including a governing law clause in the arbitration agreement in international contracts. Significant time and cost is involved in litigation if these clauses are not expressly provided in the arbitration agreement.

ANALYSIS

In the recent past the courts have taken different stance. As against the weightage being given to choice of seat in *Habas Sinai*, in *Arsanovia* the substantive law of the agreement was considered as a strong indicator to say that the parties had made an implied choice of the same to be the law governing the arbitration agreement also. This was despite the fact that the seat of arbitration was also provided in the arbitration agreement.

This addition is a welcome change and other arbitral institutions will, more likely than not, follow HKIAC and make amendments to their respective model clauses.

In jurisdictions such as India (where the Courts have held that in absence of any clause to the contrary, the law governing the arbitration agreement would be the law of the seat) in circumstances where the parties would wish for a law other than the law of the seat to be the law governing the arbitration agreement, expressly providing such a clause in arbitration agreement gains all the more importance.

An express clause setting out the governing law as applicable to the arbitration agreement avoids confusion at a later date. Choosing HKIAC’s new model clause and by providing for the law governing the arbitration agreement, future uncertainty, litigation cost and the risk of unintended court interference can be avoided by the parties.

– Mukul Aggarwal, Moazzam Khan & Sahil Kanuga
You can direct your queries or comments to the authors

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¹ Text of the updated clause is provided [here](#)
² *SulAmérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A.* [2012] 1 Lloyd's Rep 671
³ *Klöckner Pentaplast GrbH & Co Kg v Advance Technology (H.K.) Company Limited*, 14/07/2011, HCA1526/2010
⁴ *Enercon India v. Enercon GMBH*, Civ. App. 2086/7, 2014
⁵ *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd and others* [2014] SGHCR 12, 19 June 2014
⁶ *Arsanovia Ltd v Cruz City Mauritius Holdings*, [2013] 2 All ER 1

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