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Session 2: Enforcement of Arbitration Agreements

Arbitration agreements and EU law

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Introduction

Looking back to the evolution of the Arbitration Act itself, the reason Part 2 dealing with domestic arbitration was never implemented is a perfect example of early involvement of the EU in the system of arbitration in this country. The Court of Appeal decision in 1996, *Phillip Alexander Securities v Bamberger*,[2] in which (then) Lord Justice Waller held that the distinction between international and domestic arbitration was incompatible with EC law because it amounted to a restriction on the freedom to provide services and/or unlawful discrimination. As a result of this case, Sections 86 to 87 were not brought into force by the Commencement Order.

Over the course of the last few years (since the advent of the Brussels Regulation)[3] and particularly over the last year, however, the influence of the EU in the sphere of arbitration seems to have grown enormously. I would like to focus on the 2009 cases of *National Navigation Co v Endesa Generacion SA*[4] and *Accentuate Ltd v Asigra Inc.*[5], two hugely significant cases for us as arbitration practitioners and enthusiasts and see what links can be drawn between them and what lessons can be drawn from them as regards the impact of EU law on arbitration agreements.

1. *National Navigation Co v Endesa Generacion SA*

In December last year, the Court of Appeal unanimously overturned the Commercial Court's judgment in *National Navigation Co v Endesa Generacion SA ("Endesa")*. Whilst the first instance decision had given arbitration practitioners some hope that the effect of the West Tankers decision could be limited, the appeal judgment extends West Tankers and affects both arbitration agreements and the principle of *kompetenz-kompetenz.*

Facts

The facts of the case were as follows. National Navigation agreed to deliver coal to Endesa by a bill of lading which expressly incorporated the terms of the charterparty. The charter contained provision for disputes to be referred to arbitration in London and was subject to English law. National Navigation's ship sustained damage which resulted in its alleged failure to fulfil its obligation to deliver the coal. Endesa commenced proceedings against National Navigation in Almeria, Spain, in order to recover the cost of obtaining an alternative supply of coal and National Navigation commenced a claim in the English Commercial Court for a declaration of non-liability to Endesa. (National Navigation was not at that time in possession of a copy of the voyage charter and was uncertain of its terms as regards dispute resolution.)

Each party challenged the jurisdiction of the court chosen by the other. The courts in Almeria determined that Spanish law applied to the dispute. Prior to any decision as to jurisdiction in the

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[2] *Phillip Alexander Securities and Futures Limited v Bamberger and others,* 12 July 1996, Court of Appeal (Civil Division), [1996] C.L.C. 1757; [1997] Eu. L.R. 63; [1997] I.L.Pr. 73; Times, July 22, 1996.

[3] Brussels Regulation (EU Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters).

[4] *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 (Comm); overturning *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm).

[5] *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 QB.

Commercial Court claim, National Navigation commenced arbitration proceedings in London seeking disclosure of the voyage charter, a declaration that the arbitration clause was incorporated in the bill of lading and an injunction to restrain Endesa from proceeding with its claims other than by arbitration. A number of applications were thus heard by Mrs Justice Gloster in the Commercial Court in autumn 2008.

Decision at first instance

At first instance the anti-suit injunction was refused in the wake of the West Tankers decision -- anti-suit injunctions remain out of the scope of an English court's tool-kit to protect arbitration agreements in cases where proceedings are brought in other Member State courts. However, National Navigation prevailed in its application for a declaration as to the applicability of the arbitration agreement. In Mrs Justice Gloster's judgment, although the determinations of the Almeria courts were Brussels Regulation judgments the declaratory proceedings fell within the arbitration exception in the Brussels Regulation[6] and therefore the English court did not have defer to the Member State court first seised. This decision was welcome as it gave some meaning to the arbitration exception which was left so uncertain following West Tankers. In the alternative, Mrs Justice Gloster was of the view that following the Spanish decision was contrary to public policy as it did not give effect to an arbitration agreement that was valid by its proper law.

Appeal

The appeal, which was heard in early November 2009, made three key findings:

1. The Almeria Court judgments were Brussels Regulation judgments. Although it acknowledged that the result may be unsatisfactory, the Court of Appeal considered that the effect of West Tankers was that a judgment on a preliminary issue (including in respect of incorporation of an arbitration clause) will be a Regulation judgment if it forms part of proceedings the main scope of which falls within the Regulation. The effect of this is that the English court must defer to the Spanish court's decision that no arbitration agreement was incorporated into the charterparty and that no arbitration can proceed (as the decision of the Spanish court creates an issue estoppel for other Member State courts.)

2. The Almeria judgments were binding in relation to the arbitration proceedings even though the latter fell outside the Regulation. It held that a "*[R]egulation judgment can...give rise to an issue estoppel as much in Arbitration proceedings excluded from the [R]egulation as in any other proceedings in an English court*".[7]

3. There was no public policy rationale for refusing to recognise the Almeria judgments. Given, following West Tankers: (a) Endesa was entitled to challenge the incorporation of the arbitration clause in the Almeria courts; and (b) the English courts were bound to recognise the decisions of that court; there was no room for an argument that public policy was infringed and no entitlement for the English courts to examine the question of incorporation themselves.

The difficulties thrown up by this decision are twofold:

1. The widening of the scope of the arbitration exception means that it may be harder to give effect to an agreement to arbitrate within the EU; and

2. Arbitration agreements are interpreted differently, and have different tests applied to their validity, under different laws. The testing of the validity of an arbitration clause by a jurisdiction other than that chosen by the parties to apply to their agreement could prove fatal to the existence of the agreement.

[6] EU Regulation 44/2001, Article 1(2)(d).
[7] *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397 (Comm), at 59.

1. The arbitration exception

As regards the arbitration exception, the principle that emerged from Lord Justice Moore-Bick's examination is that, for the purposes of determining the applicability of the Regulation, proceedings are to be characterised by reference to their subject matter. Where a dispute as to the existence of an arbitration agreement arises, that will fall outside or within the Regulation depending on whether it forms the main subject matter of the proceedings or it is merely ancillary to a substantive dispute which itself falls within the Regulation.

Current thinking at EU level as regards the scope of the arbitration exception

The review of the Brussels Regulation is still ongoing. I will limit my observations here to its impact on arbitration agreements.

In April 2009, the Commission published its Report and Green Paper[8] for reform of the Regulation, seeking views of interested parties upon the proposed narrowing or deletion of the arbitration exception. Adopting the proposals set out in the "Heidelberg report",[9] it made four recommendations in connection with arbitration. Looking at 1 and 2 in particular: (3 and 4 deal with enforcement and are less relevant here).[10]

1. A (partial) deletion of the arbitration exception such that court proceedings in support of arbitration would come within the scope of the Regulation.

To the extent that the exception is deleted this means ceding external competence on arbitration matters to the EU and, as many commentators have argued, will exacerbate the problem set out above. A useful suggestion by the European Parliament's Committee on Legal Affairs would be to clarify the arbitration exception such that judgments holding that arbitration clauses are invalid fall outside the scope of the Regulation and would therefore not be enforceable in other member states under the Regulation.

2. The introduction of a uniform conflict rule connecting the validity of arbitration agreements to the law of the place of arbitration. This would require a court seised of proceedings brought in breach of an arbitration agreement to stay those proceedings pending a decision on the issue at the place of the arbitration.

This would assist enormously with the *Endesa* scenario and the question of the validity of pre-emptive strategic 'torpedo' action.

2. Interpretation of the arbitration agreement

This leads me to the second of the difficulties to have emerged from the *Endesa* decision: that of differing interpretations of arbitration agreements.

In this case, the arbitration clause in the head charter stipulated that "*Present Clause (was) to be deemed fully incorporated into Bill(s) of Lading*."[11]

The court of Almeria followed Spanish law in determining that no arbitration agreement existed. (Spanish law was, in its view, the correct law to apply to the procedural question of whether judicial proceedings should be stayed. Moreover, English law had not been sufficiently asserted as the

[8] 21 April 2009.

[9] Or "Schlosser Report" after one of its authors – the others being Professors Pfeiffer and Hess of the Heidelberg University.

[10] 3. The insertion of a rule which would allow refusal of enforcement of a judgment which is irreconcilable with the arbitral award. 4. Granting the Member State where the award is given, exclusive competence to certify the enforceability of the award.

[11] *National Navigation Co v Endesa Generacion SA*, EWHC, above at footnote 4, at 6.

governing law of the dispute in the manner in which it should have been if it was to be considered by the court.) In its judgment dated 31 July 2008, the Almería Court concluded that:

"*the requirements for … agreement/incorporation under Spanish law had not been satisfied; in particular, Spanish law required the arbitration agreement and the choice of law agreement to be either expressly stated in the contract between the parties, or referenced in that contract and set out in "other documents that directly bound the parties"*. [12]

Therefore, the fact that National Navigation and Endesa were not direct counterparties to a charterparty containing a London arbitration clause meant that the requirements for conclusion of a binding arbitration agreement between Endesa and National Navigation were not satisfied. Furthermore,

"*by commencing the Commercial Court action NNC had waived the right to arbitrate the dispute under the alleged arbitration agreement and to challenge the jurisdiction of the Spanish court on the grounds that the dispute was referable to arbitration".* [13]

According to English law, at first instance, Mrs Justice Gloster's view was that English law applied and that the arbitration agreement was incorporated in the bill of lading (ie. that the words used in the charter party were specific enough to have that effect). On appeal, Lord Justice Moore-Bick's view was that the New York Convention did not impose a duty on English courts to examine the existence of an arbitration agreement for themselves. That was a question which could be determined by any court of competent jurisdiction. In this context, therefore, EU law impacts upon the interpretation of an English law arbitration agreement, producing the unsatisfactory result whereby the court first seised determines whether or not an arbitration agreement exists according to its own laws. Arguably this may be acceptable in the situation where no seat is chosen by the parties. However the principle that a court other than that of the jurisdiction selected by the parties should test the validity of an arbitration agreement and, in so doing, bind the courts of the chosen seat is highly undesirable. Standards and criteria vary from jurisdiction to jurisdiction and courts of a Member State should be able to decide for themselves, under their own national law, where it has been chosen to govern an arbitration, whether an arbitration agreement is valid. To suggest otherwise potentially conflicts with Member States' obligations to recognise valid arbitration agreements under the New York Convention

The benefit of the situation as it stands in relation to the Brussels Regulation and arbitration agreements is that there is no risk of conflicting decisions as regards the validity of an arbitration agreement in different Member State courts. However, the problem remains that a court first seised in another Member State can take a different view of the validity or existence of an arbitration agreement to the court or tribunal applying the law of that arbitration agreement. Whilst in this case the situation is perhaps not so pronounced given that the Almeria took a different view of incorporation to the English court on the facts, one could envisage cases where the different laws pertaining to arbitration agreements could be in issue. For example, a clash between the French and English provisions relating to the writing requirement – French arbitration law is of course unusual in having no requirements as to form and recognising oral agreements[14] whereas in England, while common law recognises an oral agreement, it cannot be enforced under the Arbitration Act.[15]

2. *Accentuate Ltd v Asigra Inc*

[12] As regards the Spanish law of incorporation, it is worth noting that the Head Charter had not actually been produced at that stage, so it was particularly difficult for the court to decide that it had been incorporated.
[13] This was confirmed in its subsequent appeal judgment of 3 December 2008 on NNC's appeal by way of reposición against that court's refusal to decline jurisdiction because of the arbitration agreement.
[14] See Fouchard, Gaillard & Goldman, *International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) paras 608 et seq.
[15] See Merkin, *Arbitration Act* (London: Informa Publishing, 2008), p. 27.

The High Court case of *Accentuate Ltd v Asigra Inc ("Accentuate")* deals with another Regulation -- the application of the Commercial Agents (Council Directive) Regulations 1993[16] (the "Regulations"), and their effect on the relevant arbitration agreement. This was not a question of which was the court first seised, but rather an issue of when EU law needs to be applied and where.

Mr Justice Tugendhat decided to allow litigation to proceed in relation to a dispute arising out of the Regulations, despite the existence of an arbitration clause referring to arbitration in Toronto and an award, made pursuant to that clause, to the effect that claims under the Regulations fell within its scope. In so doing, he affirmed that even where parties choose a non-EU law to govern their agreement, mandatory EU law must be followed.

Facts

In this case, an English distributor and Canadian licensor had entered into a software distribution agreement with an arbitration agreement and a Canadian governing law clause. When a breach of that agreement occurred, the distributor threatened to bring a claim in England under the Regulations. (In giving effect to an EU Directive, the Regulations entitle a self-employed commercial agent to an indemnity or compensation upon termination of an agency contract.) In response, the licensor commenced arbitration in Toronto for a declaration that the distributor had no claims against it. In their resulting awards, the tribunal clearly stated that the laws of Ontario (and federal laws of Canada) applied to the dispute and that the Regulations were not relevant.

Rather than challenge the award, the distributor applied to an English District Court for permission to serve the licensor out of the jurisdiction in order to obtain compensation under the Regulations. The licensor applied to the Court to stay proceedings pursuant to section 9 of the Act, on the grounds that the parties had agreed to refer disputes to arbitration in Toronto under Canadian law. The district judge declared that it had no jurisdiction but granted permission to the distributor to appeal. The distributor duly appealed to the High Court, arguing that the choice of law amounted to an evasion of EU law, rendering the arbitration agreement invalid and therefore that the stay of proceedings should be lifted and permission to serve proceedings out of the jurisdiction should be granted in order to obtain compensation under the Regulations.[17]

Decision – the interplay between EU law and arbitration

Justice Tugendhat agreed with the distributor. He held that the requirements of the Regulations were mandatory such that an arbitration clause in favour of Canadian law was "*null and void*" and "*inoperative*" to the extent that it required the submission to arbitration of questions pertaining to mandatory provisions of EU law.[18] Furthermore, recognition of any resulting awards would be refused on public policy grounds. As a result, the stay of the High Court litigation was lifted and permission to serve the licensor out of the jurisdiction was confirmed.

The mandatory nature of EU law notwithstanding a choice of law (including a non-EU choice of law) is set out in the 2000 European Court of Justice ("ECJ") case of *Ingmar GB Ltd v Eaton Leonard Technologies Ltd.*[19] However, the Court in *Accentuate* held not only that the parties' choice of governing law, but also their choice of arbitration should be disregarded, at least as far as claims under the Regulations were concerned. So we see that the very agreement to arbitrate (and by extension, the choice of seat) has been undermined here as it was in *Endesa*, by EU law.

Let us try to look separately at the impact of mandatory EU law on these two elements of the agreement to arbitrate which are, in fact, very closely linked:

1) the choice of governing law; and

[16] SI 1993/3053.
[17] The appeal also revolved around a question as to whether the agent had a real prospect of success on its claim under the Regulations for the purposes of permission to serve proceedings out of the jurisdiction. The Judge found in favour of the agent in that regard.
[18] *Accentuate Ltd v Asigra Inc*, above at footnote 5, per Tugendhat J at 89.
[19] [2000] EUECJ C-381/98.

2) the choice of forum.

1. Choice of governing law

It is not surprising that Justice Tugendhat should decide that mandatory EU law should apply. It is now accepted that in some situations, mandatory rules of a legal system not chosen by the parties can displace or restrict the application of the law chosen by the parties to govern the merits of their dispute.[20]

However, this decision is surprising as, in line with previous case law and practice, one would expect a tribunal, wherever it may be sitting, to apply mandatory EU law alongside the chosen law. Over the past thirty years or so, national courts in other arbitration-friendly jurisdictions have generally taken an increasingly open approach to questions of arbitrability and on the powers of arbitrators to consider claims or issues arising from mandatory statutory rights.[21] For example, it is now accepted that, under European law, enforcement of private competition law remedies by means of arbitration is permissible.

Moreover, there is precedent, albeit from the US (1985 US Supreme Court decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*.), to say that arbitrators in Japan had authority to deal with US anti-trust claims, despite a Swiss choice of law clause.[22] Notwithstanding the fact that the dispute involved US antitrust claims, the US Supreme Court upheld a clause providing for arbitration in Japan. The Mitsubishi case is generally accepted as representative of the modern approach to the issue of applying mandatory rules arising under a law other than the law of the contract and to the arbitrability of disputes governed by such rules[23]. In this sense, therefore, the High Court analysis seems to place England & Wales relatively speaking as a jurisdiction less willing to uphold an arbitration agreement.

2. Choice of forum – EU law displaces choice of parties to arbitrate

Whilst it is clear that an agreement as to choice of law should be displaced to the extent that there are mandatory EU law rights, the Act does not envisage that these rights should completely trump the parties' arbitration agreement in favour of the national court. Rather English law takes the view that a tribunal can give effect to the chosen law alongside any mandatory law.

The facts of this case are extreme in the sense that most of the subject matter of the proceedings (entitlement of an agent to compensation) was governed by EU law, leaving very little for Canadian law. Nonetheless, the decision has potentially harmful consequences. It could give any recalcitrant respondent the possibility of arguing that, as a matter of English law, a dispute is not arbitrable if it requires the application of mandatory EU law, where the chosen law of the contract is not the law of an EU Member State and where the seat of the arbitration is outside the EU. Such a narrowing of the concept of arbitrability would not be a positive development.

Whether the Canadian tribunal could, in fact, have applied EU law was not decided here as the distributor chose to bring its case in the English Court rather than challenge the awards in Canada

[20] *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (U.S. S.Ct. 1960); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (U.S. S.Ct. 1974); see also Dr. Marc Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration", *Journal of International Arbitration* (1997) Vol. 14(4), pp. 23-40.

[21] See for example *Rodriguez de Quijas v. Shearson/Am. Express, Inc*., 490 U.S. 477 (U.S. S.Ct. 1989); Federal Court of Canada, *Pilotes du Saint-Laurent Central Inc v. Laurentian Pilotage Authority*, August, 8, 2002, 246 FTR 161 (FCTD); Youssef, "The Death of Inarbitrability", in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International & Comparative Perspectives* (The Hague: Kluwer Law International, 2009), pp. 47 – 68; Kirry, "Arbitrability: Current Trends in Europe", *Arbitration International* (1996) Vol. 12(4) pp. 374-379.

[22] 473 U.S. 614, 637 n.19 (U.S. S.Ct. 1985).

[23] See Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009) p. 2180.

on that basis. However, the Court held that England was the most appropriate forum to hear the claim and that it was obliged to *"give effect to the mandatory provisions of EU law, notwithstanding any expression to the contrary on the part of the contracting parties".*[24] In so doing, the Court chose not to uphold the parties' arbitration agreement. In theory it could have held that an arbitration agreement did exist and that the Canadian tribunal should have given effect to mandatory EU law alongside the law of Ontario.

Therefore, the Court found that the Regulations had the effect not only of invalidating the parties' choice of law, but also their choice of forum. Whilst the former finding might be considered arguable, notwithstanding recent authority to the contrary, the latter is highly questionable. The impact of mandatory rules of law on the parties' choice of substantive law should have no bearing on the validity of their arbitration agreement.

Moreover, the approach taken by the Court to its limited discretion to refuse to stay proceedings under section 9 of the Arbitration Act is at odds with previous English case law: it has been held that if an applicant can raise an arguable case in favour of the validity of an arbitration agreement, a stay of proceedings should be granted and the matter left to the arbitrators.[25] To that extent the Court also failed to give effect to the principle of *kompetenz-kompetenz*, as it is recognised under English Law.

What links can be drawn between these two cases?

So what do we learn from these cases about EU law and arbitration agreements? One case looks at the relationship between jurisdictions within the EU whilst the other looks at the application of EU law outside the EU. In both cases, however, the application of EU law is not compromised – whether it is the Brussels Regulation or other Regulations that constitute mandatory EU law.

1. The result in both cases, as we have seen, is that EU law has the effect of invalidating the parties' agreement to arbitrate their dispute. In *Accentuate*, a purportedly invalid choice of substantive law also has the effect of invalidating the parties' choice of arbitration. To that extent, the Court has failed to take into account the doctrine of separability.

2. As regards the Brussels Regulation, the current interpretation of its effect on arbitration agreements by the judiciary in this jurisdiction is overly deferential towards EU law, to the expense of the arbitration agreement. However, this is not settled and there is hope that 2010 may bring change. The introduction of a uniform conflict rule connecting the validity of arbitration agreements to the law of the place of arbitration by the Commission as proposed would assist in the *Endesa* scenario. However, it would not affect the outcome of *Accentuate* as the seat of arbitration was not another Member State.

3. Within the EU however, it would be interesting to explore the principle, of the part that mandatory EU law would play in this context. One assumes that once an arbitration agreement is interpreted under any uniform conflict rule, that a tribunal anywhere within the EU should be able to apply mandatory EU law. However, the tribunal in *Accentuate* was silent on the issue of the application of EU law by a tribunal with its seat in the EU.

4. In any event, the concept that the designated forum should decide on its own jurisdiction i.e. *kompetenz-kompetenz*, is central to both cases. To what extent does mandatory EU law trump *kompetenz-kompetenz*? This is the crucial underlying issue that will, in my view, need to be monitored in the coming year.

Conclusion

The effect of EU law on arbitration is fundamental. As the *Endesa* case demonstrates, EU procedural law trumps the forum – the case winds up in the Spanish court. The choice of the seat

[24] *Accentuate Ltd v Asigra Inc*, above at footnote 5, per Tugendhat J at 88.
[25] *Albon v Naza Motor Trading SDN BHD (No. 3)* [2007] EWHC 665.

is also trumped in that its law plays no part in determining the validity of the arbitration agreement. As the *Accentuate* case demonstrates, mandatory EU law can trump the choice of governing law of the arbitration as well as the forum in which the parties chose to arbitrate their dispute under that law – the case winds up in the English court.

One can go further and look at recent developments as regards the Lisbon Treaty.[26] In that context, EU law is even set to trump the ability of Member States to enter into treaties. By assuming competence for Foreign Direct Investment, it is expected that Member States will no longer be able to enter into new bilateral investment treaties, either with other Member States (intra EU BITs) or with 3rd States (extra-EU BITs) and BIT provisions currently in force will be superseded by provisions in new EU treaties. This is still an open book with many questions yet to be resolved by the EC trade and investment department in Brussels. It does not impact directly on interpretation of the Arbitration Act. However, it indicates a desire on the part of the EU to assume increasing competence as regards trade and investment and to become involved in the resolution of investment disputes on behalf of Member States.

The cases we have looked at suggest that this desire exists at the level of EU policy makers in the sphere of recognition of foreign judgments and that it extends to impact on the autonomy of arbitration and *kompetenz-kompetenz*. Furthermore, the cases indicate that it not only is a question of direction from above, but the interpretation by the English judiciary of the role that EU law should play in the resolution of disputes in this forum.

[26] Lisbon Treaty on the Functioning of the European Union (TFEU), 1 December 2009, Article 207.