

Proper law of the arbitration agreement – how does it fit with the rest of the contract?

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What is the Issue?

- **SulAmérica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors [2012] EWHC 42 (Comm)**
 - “The Insureds contend that, as the proper law of the Policy is expressly Brazilian law and “exclusively” so (reinforced by the exclusive jurisdiction provision in favour of the courts of Brazil), combined with the fact that the parties, the location of the risk and the events are all Brazilian, the law of the arbitration agreement must also be the law of Brazil.”
 - “The Insurers, on the other hand, say that the law with which the arbitration agreement has its closest and most real connection is that of England because the arbitration clause provides that the seat of the arbitration is to be London, England.”

Relevant Provisions

- **Arbitration Clause – Condition 12**
 - “In case the Insured and the Insurer(s) shall fail to agree as to the amount to be paid under this Policy through mediation as above, such dispute shall then be referred to arbitration under ARIAS Arbitration Rules.”

- **Governing Law & Jurisdiction – Condition 7**
 - “It is agreed that this Policy will be governed exclusively by the laws of Brazil.”

- **Mediation Clause – Condition 11**
 - “If any dispute or difference of whatsoever nature arises out of or in connection with this Policy...the parties undertake that, prior to a reference to arbitration, they seek to have the Dispute resolved amicably by mediation.”

What is the Proper Law of the Agreement to Arbitration - 1

- **“The proper law of the Policy is expressly that of Brazil, the Insureds and Insurers are all Brazilian, the subject matter of the insurance is located in Brazil and the events in question took place in Brazil” (Judgment, para. 2)**
- **Condition 7:**
 - “It is agreed that this Policy will be governed exclusively by the laws of Brazil.
 - Any disputes arising under, out of or in connection with this Policy shall be subject to the exclusive jurisdiction of the courts of Brazil.”
- **Condition 12:**
 - **“In case the Insured and the Insurer(s) shall fail to agree as to the amount to be paid under this Policy through mediation as above, such dispute shall then be referred to arbitration under ARIAS Arbitration Rules.** The Arbitration Tribunal shall consist of three arbitrators, one to be appointed by the Insured, one to be appointed by the Insurer(s) and the third to be appointed by the two appointed arbitrators. The Tribunal shall be constituted upon the appointment of the third arbitrator.

What is the Proper Law of the Agreement to Arbitration - 2

- **Condition 12 (contd):**
 - The arbitrators, shall be persons (including those who have retired) with not less than ten years' experience of insurance or reinsurance within the industry or as lawyers or other professional advisers serving the industry.
 - When a party fails to appoint an arbitrator within 14 days of being called upon to do so where the two party-appointed arbitrators fail to appoint a third within 28 days of their appointment, then upon application ARIAS (UK) will appoint an arbitrator to fill the vacancy. At any time prior to the appointment by ARIAS (UK) the party or arbitrators in default may make such appointment.
 - The Tribunal may at its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute. The tribunal shall have the widest discretion permitted under the law governing the arbitral procedure when making such orders or directions.
 - **The seat of the arbitration shall be London, England."**

The Mediation Clause - 1

- **What is the proper law of Condition 11?**
 - "If any dispute or difference of whatsoever nature arises out of or in connection with this Policy including any question regarding its existence, validity or termination, hereafter termed as Dispute, the parties undertake that, prior to a reference to arbitration, **they will seek to have the Dispute resolved amicably by mediation.**
 - All rights of the parties in respect of the Dispute are and shall remain fully reserved and the entire mediation including all documents produced or to which reference is made, discussion and oral presentation shall be strictly confidential to the parties and shall be conducted on the same basis as without prejudice negotiations, privileged, inadmissible, not subject to disclosure in any other proceedings whatsoever and shall not constitute any waiver of privilege whether between the parties or between either of them and a third party."

The Mediation Clause - 2

- **What is the proper law of Condition 11? (contd)**
 - “The mediation may be terminated should any party so wish by written notice to the appointed mediator and to the other party to that effect. Notice to terminate may be served at any time after the first meeting or discussion has taken place in mediation.
 - It the Dispute has not been resolved to the satisfaction of either party within 90 days of service of the notice initiating mediation, or if either party fails or refuses to participate in the mediation, of if either party serves written notice terminating the mediation under this clause, **then either party may refer to the Dispute to arbitration.**
 - Unless the parties otherwise agree, the fees and expenses of the mediator and all other costs of the mediation shall be borne equally by the parties and each party shall bear their own respective costs incurred in the mediation regardless of the outcome of the mediation”.

Case Law I

- **Qatar Petroleum v Shell International Petroleum [1983] 2 Lloyd's Rep 35**
- **Sonatrach Petroleum Corp v Ferrell International Ltd [2002] 1 All ER (Comm) 627**
- **Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No.2) [2006] 1 All ER (Comm) 731**
- **Dicey, Morris & Collins**
 - “If there is an express choice of law to govern the contract as a whole, the arbitration agreement will also normally be governed by that law: this is so whether or not the seat of the arbitration is stipulated, and irrespective of the place of the seat.”

Doctrine of Separability

- **Fiona Trust v Privalov [2008] 1LLR 254**
- **Section 7, Arbitration Act 1996:**
 - “Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.”
 - “As the House of Lords pointed out in *Fiona Trust v Privalov* [2008] 1LLR 254, by reference to section 7 of the Arbitration Act 1996 (see paragraphs 12 and 17), an arbitration agreement is to be treated as distinct from the substantive agreement in which it is enshrined for the purpose of assessment of its validity, existence, and effectiveness.” (Judgment, para. 7)

Case Law II

- **XL Insurance Ltd v Owens Corning [2001] 1 All ER (Comm) 530**
- **C v D [2007] EWCA Civ 1282**
 - “The question then arises whether, if there is no express law of the arbitration agreement, the law with which that agreement has its closest and most real connection is the law of the underlying contract or the law of the seat of arbitration. It seems to me that if (contrary to what I have said above) this is a relevant question, the answer is more likely to be the law of the seat of arbitration than the law of the underlying contract.”
- **Dicey, Morris & Collins**
 - “If there is an express choice of law to govern the contract as a whole, the arbitration agreement will also normally be governed by that law: this is so whether or not the seat of the arbitration is stipulated, and irrespective of the place of the seat.”

The High Court Decision in *SulAmérica*

- **Cooke J’s conclusion (para. 15):**
 - “In these circumstances, it is clear to me that the law with which the agreement to arbitrate has its closest and most real connection is the law of the seat of arbitration, namely the law of England.”
 - “I see no difficulty in that by virtue of the mediation clause and its references to arbitration because, insofar as Condition 11 is part of the agreement to arbitrate, it must be governed by the self-same law.”

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