

Dispute Resolution Hotline

February 21, 2014

UK COURT REAFFIRMS THE SIGNIFICANCE OF SEAT IN AN INTERNATIONAL ARBITRATION

- Even when an agent is acting in excess of its authority, agrees to the choice of seat, the applicable law which will determine whether the arbitration agreement is valid will generally still be that of the putative seat of arbitration.
- The Court has held that the terms of the arbitration clause on its own may suggest an implied choice of law.

The Commercial Court (“**Court**”) in *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd*¹ reaffirmed the principle laid down in *Sul America Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A.*² (“**Sul America**”) and *Arsanovia Ltd v Cruz City Mauritius Holdings*³ (“**Arsanovia**”). In particular, the Court held that in order to determine the law governing the arbitration agreement, the choice of the seat and also the terms of the arbitration agreement plays a huge significance as they give a strong indication about the proper law of the arbitration agreement.

FACTS

The Applicant, Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS, a Turkish company (“**Habas**”), and the Respondent, VSC Steel Company Ltd, a Hong Kong company (“**VSC**”), entered into a contract for the sale and purchase of 15,000 mts of steel (“**Contract**”). The Contract had been negotiated by VSC, Habas and two companies acting on behalf of Habas, Steel Park Limited (“**Steel Park**”) and Charter Alpha Limited (“**Charter Alpha**”).

The negotiation continued for approximately two months and the governing law and arbitration clause of the Contract were subject to a number of amendments. According to the last draft of the Contract, which was signed by Habas, the agreement was to be governed by the Turkish law and the disputes were to be referred to “*Turkish arbitration*”. However, Steel Park and Charter Alpha continued to negotiate with VSC, and Steel Park eventually signed and sent a version of the Contract to VSC by email, which although did not specify a governing law but provided for disputes to be referred to ICC arbitration in Paris. After further negotiations between Charter Alpha and VSC, it was agreed that the seat of the arbitration would be changed to London.

Subsequently, a dispute arose when no delivery of steel was made and VSC commenced arbitration proceedings claiming damages pursuant to the London arbitration agreement. The Tribunal concluded that it had substantive jurisdiction and that Habas’ agents had ostensible authority to conclude the contract and the arbitration agreement; there was a binding contract made containing a binding arbitration agreement.

Habas challenged the jurisdiction of the Tribunal and its Award pursuant to section 67 of the English Arbitration Act 1996 (“**Act**”) on the grounds that the Tribunal erred in finding that there was a binding arbitration agreement because: *(i)* there was no binding consensus on the terms of the London arbitration agreement; and *(ii)* Habas’ agents had known that it would only accept a Turkish law contract which provided for arbitration in Turkey and they did not have actual or ostensible authority to conclude the London arbitration agreement on behalf of Habas.

ISSUE

Whether the Tribunal was correct in arriving at the decision that English law is the applicable law of the arbitration agreement.

CONTENTION BY APPELLANT

Habas submitted that the Court ought to disregard the seat of the arbitration agreement while identifying the law with which it has the closest connection. It stressed that Charter Alpha/ Steel Park exceeded their actual authority when agreeing to the London arbitration agreement and it was only because they did so that it was possible to say that the arbitration agreement had its closest connection with English law.

Habas argued that the choice of seat in the arbitration agreement should not be taken as determinative of the law applicable to the arbitration agreement on the facts of the case, since this had been agreed by VSC in excess of authority. It was also submitted that English private international law rules ought to determine the law governing the validity of the arbitration agreement as the London arbitration agreement was agreed in excess of authority. Therefore, the correct applicable law governing the arbitration agreement should be the Turkish law, being the law with the closest connection to the matrix contract.

Habas submitted that even if there was ostensible authority to enter into the arbitration agreement, by reasons of the Regulations, the Turkish law requirement for the formal validity of the arbitrations had to be met, and they were not met in this case.

CONTENTION BY RESPONDENT

VSC maintained that by agreeing to London arbitration, the parties had chosen English law as law applicable to arbitration agreement.

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DECISION

While arriving at his decision, Hamblen J applied the guidance provided in *Sul America* and *Arsanovia*, which suggest that if an underlying contract does not contain a governing law clause, the significance of the choice of seat of the arbitration agreement contained therein is likely to be “*overwhelming*” in determining the applicable law of the arbitration agreement. Further, Hamblen J added to the discussion by opining that the terms of the arbitration agreement may themselves connote an implied choice of law. Hamblen J concluded that as the Contract contained no express choice of law clause and the seat of the arbitration was London, the applicable law of the arbitration agreement was English law.

The Court summarized the principles laid down in *Sul America* and *Arsanovia*, including the three stage test that the proper law is to be determined by undertaking 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 Court added that the terms of the arbitration agreement may also indicate an implied choice of law of the arbitration agreement. It referred to *Cie. Tunisienne v Cie d'Armement*⁴ and *Egon Oldendorff v Liberia Corp*⁵, wherein it was recognized that the terms of an arbitration agreement may operate as an implied choice of law for the substantive contract. Further, the Court observed that in a situation where the terms of an arbitration agreement eventually operates as an implied choice of the law of the substantive contract, then in such instances, they must equally operate as an implied choice of law for the arbitration agreement as well.

Hamblen J held that even assuming that the underlying contract was governed by Turkish law and accepting that there was no actual authority to agree to the London arbitration clause, the applicable law to the arbitration would still remain English law based on the choice of seat in the arbitration agreement. The Court held that there is no logical or principled link between the issue of authority and the issue of the law with which a contract has its closest connection. The Court was of the opinion that determining the latter question involves a consideration of the terms of the contract as made, rather than the authority with which it was made and held that it would potentially make major and uncertain inroads into the well-established common law doctrine that validity of a contract is determined by the putative proper law of the contract. It would mean according special treatment to actual authority for conflicts of law purposes, but as a matter of English law, actual authority is not a stronger or more effectual form of authority than ostensible authority.

The Court found that Habas' agents had ostensible authority to agree to the London arbitration agreement and that Habas had not shown that the agents had no actual authority to enter into the arbitration agreement; even if it was the case that there was no actual authority to agree the London arbitration clause, the applicable law of the arbitration agreement would be English law.

The Court held that even assuming that the requirements under the Turkish law had to be met (i.e. the arbitration agreement had to be in writing and signed), the requirements had been met because the agreement was in writing and was contained in a signed contract. The amendment to refer to London was either inserted by the signatory, Mr. Kurtoglu, or expressly approved by him and this would satisfy the signature requirements under the Turkish law.

ANALYSIS

The case adds to the principles cited in cases such as *Sulamerica* and *Arsanovia* on how to determine the applicable law of an arbitration agreement, in the absence of any express choice. It highlights, in particular, that the terms of the arbitration clause themselves may suggest an implied choice of law.

The practical takeaway from this case is the importance of expressly including a governing law clause in the arbitration agreement in international commercial contracts. It is safe to expressly state the governing law as applicable to the arbitration agreement to avoid any confusion at a later date.

— Alipak Banerjee, Prateek Bagaria & Vyapak Desai

You can direct your queries or comments to the authors

¹ [2013] EWHC 4071 (Comm)

² [2012] 1 Lloyd's Rep 671

³ [2013] 2 All ER 1

⁴ [1971] A.C. 572

⁵ [1996] 1 Lloyd's Rep 380

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