1. Since our last international arbitration newsletter, there have been two particularly interesting decisions from the English Court of Appeal concerning international arbitration. This edition (written by Robert Scrivener) provides a roundup and some commentary.

Law applicable to an arbitration clause: Kabab-Ji S.A.L. v Kout Food Group [2020] EWCA Civ 6[1]

2. The Court of Appeal started 2020 by considering the sometimes thorny issue of how to identify the governing law of an arbitration agreement.

3. The leading case on this is Sulamerica v Enesa Engelharia [2012] EWCA Civ 638. There, the insurance contracts in question contained both express choice of law clauses in favour of Brazilian law and also London arbitration clauses. Under Brazilian law, the agreement to arbitration was only enforceable with the insured's consent (likely rendering the agreement ineffective). The debate was whether the arbitration agreement was governed by the law applicable to the main contract (i.e. Brazilian law) or, instead, the law of the seat (i.e. English law). The Court of Appeal decided that:

   3.1. It was first necessary to consider whether there had been an express choice of the law applicable to the arbitration agreement.

   3.2. In the absence of an express choice, it was necessary to ask whether there had been an implied choice. Lord Justice Moore-Bick said that "*an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the arbitration agreement*". This meant it was likely an implied choice would be in favour of the law which the parties had agreed to apply to their main contract. However, one factor which might suggest otherwise would be the choice of a seat with a different governing law (as had happened on the facts of Sulamerica).

[1] A copy of the judgment can be found at https://www.bailii.org/ew/cases/EWCA/Civ/2020/6.html

3.3. Finally, in the absence of an express or implied choice, the law which had the most real and closest connection to the arbitration agreement would be applied. On the facts of Sulamerica, Moore-Bick L.J. concluded that there had been neither an express nor implied choice of law. The law with the closest connection to the arbitration agreement was English law, that being the law of the seat.

4. Sulamerica has also been applied in Singapore: see BCY v BCZ [2016] 2 Lloyd's Rep. 582 *per* Steven Chong J.

5. Kabab-Ji concerned a "Franchise Development Agreement" (or "**FDA**"). The arbitration clause required disputes to be referred to ICC arbitration in Paris. But the FDA also contained a choice of law clause in favour of English law.

6. The appellant before the Court of Appeal was Kabab-Ji. It had been successful in the underlying arbitration and commenced proceedings to enforce the award in its favour in the English Commercial Court under s.101 of the Arbitration Act 1996. The respondent (Kout Food Group, or "**KFG**") applied for an order setting aside enforcement under ss.103(2)(a) and (b) of the Arbitration Act 1996, which provide that:

"*Recognition or enforcement of the award may be refused if the person against whom it is invoked proves –*

(a) That a party to the arbitration agreement was (under the law applicable to him) under some incapacity;

(b) *That the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made…*"

7. In simple terms, there was a dispute about whether KFG ever became a party to the FDA and the arbitration clause it contained. Two of the issues that fell to be decided in answering that question were (a) whether the law governing the validity of the arbitration clause also governed the question of whether KFG became a party to the arbitration clause, and (b) if so, what that law was.

8. The first instance judgment in the High Court was given by Sir Michael Burton. By the time of the hearing before him, the parties agreed that the law governing the validity of the arbitration clause also governed the question of whether KFG became a party. That left over the question of what that law was.

9. Applying the approach in Sulamerica, the judge determined that there had been an express choice of English law. The choice of law clause in the FDA was broad ("*This Agreement shall be governed by and*

construed in accordance with the laws of England"). When read together with the arbitration clause and the clues that offered, he thought that there had been a choice of English law.

10. The question of whether English law applied was important because the FDA also contained a "no oral modification clause", preventing variations from taking effect unless (amongst other things) they were in writing. Kabab-Ji's argument was that KFG became a party to the FDA by oral agreement and conduct. However, having concluded that English law applied, Sir Michael Burton followed the decision of the UK Supreme Court in MWB Business Exchange Centres Ltd. v Rock Advertising Ltd. [2018] UKSC 24 and found that the "no oral modification clause" prevented such a variation.

11. On appeal, and as it had argued at first instance, Kabab-Ji contended that, on a true construction of the choice of law clause, there was no express (or implied) choice of law. That meant the arbitration agreement was governed by the law with which it had the closest connection, being the law of the seat (i.e. French law).

12. But the Court of Appeal rejected Kabab-Ji's arguments. For various reasons, the judges concluded that the choice of law clause was broad enough to cover the arbitration agreement. As such, because there was an express choice of law, the fact the arbitration was seated in Paris was neither here nor there. The Court of Appeal also affirmed the Sir Michael Burton's decision that (as a matter of English law) the "no oral modification clause" precluded KFG from becoming a party to the contract. The Court of Appeal thought the award was, therefore, unenforceable.

13. A few points are of note:

    13.1. First, Flaux L.J. recognised that a choice of law clause in a contract would not necessarily amount to an express choice of the law applicable to the arbitration agreement (see paragraph [62]). It was always necessary to construe the choice of law clause and ask what parts of the contract it was intended to cover.

    13.2. Secondly, Kabab-Ji also relied on the concept of the separability of an arbitration agreement. Section 7 of the Arbitration Act 1996 provides (in summary) that an arbitration agreement which forms part of the main contract is not invalid / ineffective just because the main contract is itself invalid / ineffective. For that purpose, the arbitration provisions are "*treated as a distinct agreement*". The Court of Appeal found that this was of no assistance. The purpose of s.7 was to protect the arbitration clause from becoming invalid because of a defect in the main agreement. It did not preclude the arbitration clause being construed with the rest of the

contract. Nor did it preclude the possibility of an arbitration clause being subject to a choice of law made in the main agreement.

13.3. Thirdly, the Court of Appeal briefly raised the question of what test should be applied when considering whether there was an implied term choosing the law applicable to the arbitration agreement. There was some debate about whether Sulamerica required a different test to that put forward in Marks & Spencer PLC v BNP Paribas [2015] UKSC 72 (i.e. that an implied term must be necessary to give the contract business efficacy). Flaux L.J. appeared tentatively to suggest (at [53]) that he thought the test should be the same as any other implied term; Sulamerica did not require something different. This discussion was obiter, however, and Flaux L.J. added that it was not necessary to reach a final conclusion on this point: paragraph [70].

13.4. Finally, this case is a very rare example of an English court declining to enforce an arbitration award. The court reached a different conclusion to the arbitration tribunal. This is unusual, but is nothing more than a faithful application of Article V of the New York Convention.

Orders against third parties: A & B v C, D & E [2020] EWCA Civ 409[2]

14. One of main roles which the courts of an arbitration's seat have is to make orders in support of arbitration. In the Arbitration Act 1996, an English court's main powers are contained in s.44. Section 44(2) gives the court the same powers as it has in connection with legal proceedings before it in respect of:

"*(a) the taking of the evidence of witnesses;*

(b) the preservation of evidence;

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—

(i) for the inspection, photographing, preservation, custody or detention of the property, or

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;

and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d) the sale of any goods the subject of the proceedings;

(e) the granting of an interim injunction or the appointment of a receiver."

[2] A copy of the judgment can be found at https://www.bailii.org/ew/cases/EWCA/Civ/2020/409.html

15. The most important decisions in recent years on the scope of s.44 are Cruz City 1 Mauritius Holdings v Unitech Ltd. [2014] EWHC 3704 (Comm) and DTEK Trading SA v Morozov [2017] EWHC 1704 (Comm).

16. In the former, Males J. (as he then was) said obiter that s.44 did not give the English courts powers to make orders against a non-party to an arbitration. But, as Males J. also noted in his judgment, this was a conclusion on which earlier decisions had expressed different views. The view of one leading commentator is that Cruz City is incorrect on this point (see *Gee on Commercial Injunctions* 6th ed. at paragraph 6.37).

17. In DTEK, Sara Cockerill QC (now Cockerill J.) considered an application against a non-party seeking an order under s.44(2)(b) to preserve evidence. The conclusion she reached was that, whilst there was an argument about the issue, Males J. was correct and his decision should be followed.

18. That case law provides the background to A & B v C, D & E, where an order was sought under s.44(2)(a) to take the evidence of a witness located in England in support of an arbitration in New York. The witness was not a party to that arbitration.

19. At first instance, Foxton J. said that, had it not been for the earlier authorities of Cruz City and DTEK, there was "*considerable force*" in the suggestion that s.44 allowed orders to be made against non-parties in appropriate cases. Mr. Justice Foxton also referred to a decision of Mimmie Chan J. sitting in the Hong Kong Court of First Instance where, under s.45 of the Arbitration Ordinance, she concluded that she could make an order against a non-party: see Company A v Company D [2018] HKCFI 2240.

20. But, all that notwithstanding, Foxton J. concluded the reasoning in Cruz City and DTEK was "*persuasive*" and felt he should follow it. He could not make the order sought, because s.44(2)(a) did not allow an order to be made against a non-party to the arbitration.

21. On appeal, the Court of Appeal declined finally to answer the question of whether Cruz City and DTEK were rightly decided insofar as they suggested that none of the powers under s.44(2) could be exercised against non-parties. Instead, the court chose only to consider whether s.44(2)(a) (i.e. the provision dealing with the taking of evidence of witnesses) permitted orders to be made against a non-party.

22. The Court of Appeal concluded that, whatever the position under the rest of s.44(2), s.44(2)(a) did give the court the power to make an order against a non-party (paragraph [36]). When reaching that conclusion, the judges were influenced in part by an English court's ability to grant orders in support of arbitrations that were not seated in England and Wales (as was the case on the facts before the court):

see paragraph [43]. If s.44(2)(a) did not allow an order to be made against a non-party, it would have little to no content in the context of such arbitrations.

23. An interesting twist to all this is that one of the Court of Appeal judges was Males L.J. (who of course had given the decision in Cruz City when he was a High Court judge). He delivered his own judgment and, like the other judges, also declined to offer a view on whether Cruz City was correct about the other parts of s.44(2), saying "*I would reserve my opinion on whether [the]…reasoning on this point is correct as regards the other paragraphs of s.44(2). There are, in my view, strong arguments either way and it may be that the position varies as between the various paragraphs of subsection (2)*" (paragraph [57]). But, despite that, Males L.J. agreed that s.44(2)(a) could be used to grant an order against a non-party.

24. The Court of Appeal's decision is a welcome clarification of s.44(2)(a). But it leaves open the important practical question of how far the other powers in s.44(2) can be exercised against non-parties.

Pump Court

Senior Clerks Carl Wall and Stewart Gibbs
4 Pump Court, Temple, London EC4Y 7AN
Tel +44 (0)20 7842 5555 Fax +44 (0)20 7583 2036 DX 303 LDE www.4pumpcourt.com