ENFORCEMENT OF ARBITRATION AGREEMENTS AGAINST NON-SIGNATORIES: WHICH LAW (THE CHICKEN AND THE EGG)?

By Albert Monichino QC

Assume a court proceeding is brought by a plaintiff against a defendant who seeks to stay the proceeding on the grounds that the dispute before the Court has been agreed between the parties to be referred to arbitration. The defendant is not named as a party to the arbitration agreement. However, it is related to the counter-party that the plaintiff has contracted with. The putative arbitration agreement provides for arbitration in a foreign seat with the merits to be determined by the law of that seat. In considering whether there is a binding arbitration agreement between the plaintiff and the defendant, for the purposes of the stay application, should the court apply its own law or the law of the putative arbitration agreement (ie the law of the foreign seat)? Does it matter that an arbitration between the parties has been commenced by the defendant, an arbitrator has ruled that he has jurisdiction, and the court of the seat of the arbitration has upheld that ruling?

Introduction

Under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('**New York Convention**'), the question of whether a non-signatory to a main contract containing an arbitration clause is bound by the arbitration agreement constituted by that arbitration clause, is a question that may be faced by a national court at different stages of the arbitral process. First, when called upon to enforce an arbitration agreement and stay its court process (under Article II).[1] Secondly, when requested to enforce an arbitral award (under Article V).[2] In both situations, the preliminary question arises: what system of law should be applied in determining whether the parties before the court are bound by the alleged arbitration agreement? While Article V contains an express choice of law (in particular, the law of the putative arbitration agreement, alternatively the law of the seat),[3] Article II is silent as to the choice of law to be applied. Where a proceeding is brought against a defendant who alleges that there is an arbitration agreement between it and the plaintiff, the existence of which is denied by the plaintiff, should a national court entertaining an application by the defendant to stay the proceeding apply its own conflict of law rules to determine the relevant law to be applied to determine the question of whether the plaintiff is bound by the arbitration agreement? Alternatively, should the court apply the choice of law rule expressed in Article V (ie the law of the putative arbitration agreement) on the basis that Article II impliedly selects the same choice of law rule?

The issue has recently come before the Australian courts in *Jasmin*[4]. At first instance, Edelman J (before his elevation to the High Court of Australia) opined that on an application for a stay under s 7, if the plaintiff resisting the stay contends that it is a stranger to a contract containing an arbitration agreement, the question of whether the plaintiff is bound by the arbitration agreement (ie the question of partyhood) is to be determined by the choice of law rules of the forum (which in Australia, at common law, results in application of the *lex fori*) and not the law of the putative arbitration agreement (as mandated by Article V of the New York Convention). This (*obiter*) view was affirmed on appeal by two judges of the Federal Court (Beach J, with whom Dowsett J generally concurred). Beach J (like Edelman J)[5] considered it counter-intuitive to suggest that the law to assess whether a contract had been formed should be the law set out in the contract that the plaintiff denied being a party to: [130].[6] On the other hand, Greenwood J dissented on this point, taking the view that "the structured integrated coherence" of the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') required the same choice of law rule mandated by s 8(5)(b) of the IAA (to the enforcement of an award) to be applied under section 7(2) (to the enforcement of an arbitration agreement), notwithstanding that section 7(2) did not expressly select a choice of law rule: [82].

The issue is reminiscent of the impenetrable brain teaser: "which came first, the chicken or the egg?".[7] With respect, Greenwood J's views are to be preferred to the views of the majority of the Full Court of the Federal Court of Australia and of the trial judge.

Facts

Trina, a US company, entered into a Supply Agreement with JRC, another US company. It provided for arbitration in New York according to New York Law. Under the Supply Agreement, Trina was to supply solar panels to Jasmin, an Australian company. To avoid GST, JRC (a related party to Jasmin) was named as the purchaser under the Supply Agreement. Instead, Jasmin was named as the guarantor. The arbitration clause in the Supply Agreement did not bind the guarantor. The solar panels were delivered late, were of the wrong model, and did not comply with Australian conditions. JRC and Jasmin refused to pay the invoices rendered by Trina. Trina commenced an arbitration against Jasmin and JRC in New York seeking recovery of unpaid invoices of about USD 1.3 million. Jasmin objected to the jurisdiction of the Arbitrator, contending that it was not a party to any arbitration agreement with Trina. In a preliminary ruling on jurisdiction, the Arbitrator found, applying New York law, that Jasmin was bound by the arbitration agreement. Jasmin took no further part in the arbitration.

Shortly afterwards, Jasmin commenced legal proceedings in Australia against Trina seeking damages, for misleading or deceptive conduct in contravention of the *Australian Consumer Law*, in the order of $A30 million. Jasmin sought leave to serve the proceedings out of the jurisdiction upon Trina in the US.

First Instance Decision

Edelman J, sitting as a judge of the Federal Court, granted leave to serve the proceedings out of the jurisdiction upon Trina.[8] At the time, he was aware that there was an arbitration on foot in New York and that the Arbitrator had found that she had jurisdiction over Jasmin. Applying the *lex fori* (ie Australian law) to determine the question of the existence of the putative arbitration agreement, Edelman J found that Jasmin was not a party, and

accordingly it could not be confidently expected that any later stay application brought by Trina pursuant to s7 of the IAA would be successful. Accordingly, his Honour considered that there was no good reason to exercise his residual discretion not to grant leave to Jasmin to serve Trina with court proceedings out of the jurisdiction.

Trina appealed. Following Edelman J's decision, and prior to the hearing of the appeal before the Full Court of the Federal Court, the Arbitrator rendered a final award on the merits against Jasmin and JRC, and Jasmin made application before the New York courts (ie the courts at the seat) to set aside the final award.

Appeal Decision

The Full Court of the Federal Court of Australia dismissed the appeal. All three members of the Court were of the view that the trial judge's discretion did not miscarry. However, they were divided on the question of the proper law to apply to determine whether there was an arbitration agreement in existence between Trina and Jasmin.

Greenwood J was of the view that to give effect to the "structured integrated coherence" of the international arbitration system, the question whether a party to a stay application under s 7 of the IAA is a party to an arbitration agreement should be determined by the same choice of law rules selected in s 8(5)(b) of the IAA (reflecting Article V(1)(a) of the New York Convention) – namely, the proper law of the putative arbitration agreement, or failing any indication thereon, the law of the seat: [82]-[83]. Notwithstanding that the trial judge applied (erroneously) the lexi fori instead of the putative proper law of the arbitration agreement, Greenwood J considered that the trial judge could not be satisfied (on a leave to serve-out application on the incomplete material before him) that a stay application would in due course be successful: [87] and [94]. Accordingly, in Greenwood J's view, the trial judge's discretion did not miscarry.

On the other hand, Beach J (with whom Dowsett J generally concurred), endorsed the view of the trial judge that a distinction applies between the law to be applied to determine the existence (ie contract formation) and validity of an arbitration agreement. While validity is to be tested according to the putative proper law of the contract, Beach J considered that the choice of law rules in Australia dictated that the *lex fori* be applied to determine questions of contract formation (following Brennan and Gaudron JJ in *Oceanic Sun Line Special Shipping Co Inc v. Fay*).[9] I note that this is not a universal approach. Some jurisdictions (including the United Kingdom) apply the law of the putative contract to determine the question.[10]

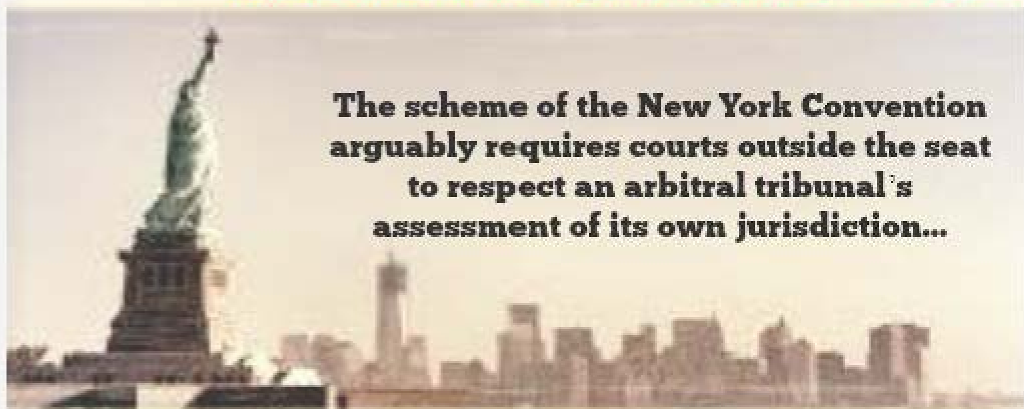
Beach J was not persuaded that the specified choice of law rules in s 8(5)(b) [on an enforcement application] should be implied into s 7 [on a stay application]. It is widely accepted that s 8(5)(b) [and its counterparts in other jurisdictions], while speaking in terms of "validity", extends to the ground that the award debtor is not a party to the arbitration agreement: [164].[11]

Beach J observed (at [182]):

> "The fact that s 8(5)(b) provides for a choice of law different to the law of the forum in relation to whether an "arbitration agreement" exists to which a party is bound, does not entail that the same choice of law needs to be made for s 7(2)... s 7(2) contains no provision requiring the creation of a legal fiction purportedly justified by some perceived consistency with s 8(5)(b). Notably, Trina US has not cited any compelling international authority that supports its position..."

Beach J further noted (at [184]):

> "...if there are anomalies that now arise because the Final Award has been handed down, they should properly be assessed and dealt with in any stay application under s 7(2). But the idiosyncratic circumstances of the present case arising because the Final Award has now been handed down, cannot drive the proper analysis concerning s 7(2) and the choice of law question."



New York Proceeding

After the hearing in the Full Court and shortly before it handed down its decision, a New York Court dismissed Jasmin's application to set aside the Arbitrator's final award.[12] The New York Court undertook a *de novo* review of the question of jurisdiction. Applying New York law, it found that Jasmin was bound by the arbitration agreement. First, because JRC was acting as Jasmin's agent when it entered into the Supply Agreement. Alternatively, because an equitable estoppel (as understood in New York law) applied to preclude Jasmin from denying that it was bound by the arbitration agreement, having regard to the direct benefits that it received under the Supply Agreement and its involvement in both in its negotiation and implementation. There is no mention of the New York Court proceedings in the Full Court's decision.

Comment

Gary Born notes that there have been a wide range of divergent views expressed on this issue, and resulting uncertainty, but that in order to produce a consistent and effective legal regime for the recognition and enforcement of international arbitration agreements, and to avoid the possibility of inconsistent results, the same choice of law rules should apply under both Articles II and V at the different stages of the arbitration process.[13] The author respectfully agrees.

If, as can be expected, Trina seeks to enforce the award in Australia against Jasmin, any contention by Jasmin, in resisting enforcement, that it was not a party to the alleged arbitration agreement falls to be determined by New York law. It is highly unlikely that on an enforcement application the Federal Court would find (contrary to the finding of the New York Court) that under New York law Jasmin is not bound by the arbitration agreement contained in the Supply Agreement.[14]

This leaves open the unsavoury spectre that the Federal Court will enforce the Arbitrator's award and at the same time allow the Federal Court proceeding to be litigated before it. It seems incongruous that a stay application would not be granted in circumstances where the New York courts have confirmed the Arbitrator's ruling that Jasmin is bound by the arbitration agreement (unless it could be said that some of the matters alleged in the Federal Court proceeding fall outside the scope of the arbitration agreement).

The scheme of the New York Convention arguably requires courts outside the seat to respect an arbitral tribunal's assessment of its own jurisdiction, subject to review by courts of the arbitral seat. Here, an Arbitral Tribunal had already found it had jurisdiction, and the supervising court at the seat had confirmed that decision. It is not known why the Full Court did not wait to see how the New York courts decided the setting aside application (if, indeed, the matter was brought to its attention at all). Neither the trial judge, nor the majority of the Full Court, placed any

weight on the fact that an Arbitral Tribunal had assumed jurisdiction under the putative arbitration agreement.

Separately, it seems incongruous that on a stay application, the question of existence of an arbitration agreement should be decided according to the *lex fori* while the question of validity should be decided according to the putative law of the arbitration agreement, when on an enforcement application both questions fall to be determined by the putative law of the arbitration agreement. Albert Jan Van den Berg observes in his seminal text (at p 126):1[6]

> "A systematic interpretation of the Convention, in principle, permits the application by analogy of the conflict rules of Article V(1)(a) to the enforcement of the agreement. It would appear inconsistent at the time of the enforcement of the award to apply the Convention's uniform conflict rules and at the time of the enforcement of the agreement to apply possibly different conflict rules of the forum. It could lead to the undesirable situation of the same arbitration agreement being held to be governed by two different laws: one law determined according to the conflict rules of the forum at the time of the enforcement of the agreement, and the other determined according to Article V(1)(a) at the time of enforcement of the award. The silence of the Convention on this point in connection with the enforcement of the agreement is not to be interpreted *a contrario*, as it is due to the last minute insertion of the provisions relating to the arbitration agreement in the Convention, which, as previously noted, has entailed several omissions. Rather, **the Convention's provisions must be interpreted on the basis of an integral interrelation between them**... Article II can be deemed to incorporated Article V(1)(a). (emphasis added)

The main argument against applying the proper law of the putative agreement is a "boot straps" argument (ie that it is unfair to test the question of whether there is a binding contract by application of the proper law of the contract that one of the parties disputes). That may be so, but international commercial arbitration has similar fictions (for example, the separability doctrine which allows an arbitrator to rule that the overarching contract, in which the arbitration agreement is contained, is void). Such fictions are entrenched for pragmatic reasons.[17] Applying the law of the putative arbitration agreement on a stay application is more consistent with the doctrine of kompetenz-kompetenz which underpins the Model Law, the negative effect of which is that courts should give the arbitral tribunal the first opportunity to rule on questions of jurisdiction. [18] Conversely, adopting a forum's idiosyncratic choice of law rules on a stay application may usurp the role of the arbitral tribunal, and give rise to potentially inconsistent decisions on the existence of an arbitration agreement by the court hearing the stay application, the supervising court of the seat and the enforcement court. Indeed, Born stridently criticises this approach as "unsatisfactory and wrong". [19]

End Notes

1. Implemented by section 7 of the International Arbitration Act 1974 (Cth) ("IAA").
2. Implemented by section 8 of the IAA.
3. Articles 34(2)(a)(i) and 36(1)(a)(i) of the UNCITRAL Model Law on International Commercial Arbitration are to similar effect.
4. Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd [2015] FCA 1453; Trina Solar (US), Inc v Jasmin Solar Pty Ltd [2017] FCAFC 6.
5. Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd [2015] FCA 1453, [166].

5. Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd [2015] FCA 1453, [166].

6. A similar view was recently expressed by Hammerschlag J in Kennedy Miller Mitchell Films Pty Limited v Warner Bros. Feature Productions Pty Limited [2017] NSWSC 1526[63]. His Honour did not refer to Jasmin or consider any competing view based on the structured intergrated .coherence of the New York Convention and the Model Law.

7. Malini Ventura v. Knight Capital Pty Ltd [2015] SGHC 225, [1]

8. Trina Solar (US) Inc v Jasmin Solar Pty Ltd [2017] FCA 1453.

9. (1988) 165 CLR 197), 133-134.

10. See Dicey, Morris and Collins on The Conflict of Laws (15th Edition), [32-108]: The effect of the Rome 1 Regulation on the law applicable to contractual obligations (in force in the United Kingdom) is to refer questions relating to the existence of a contract to the putative governing law.

11. Referring to IMC Aviation Solutions Pty Ltd v Altain Khuder LLC (2011) VR 202 [171] and Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan [2011] 1 AC 763, 77.

12. Trina Solar US, Inc. v JRC-Services LLC and Jasmin Solar Pty Ltd (D NY, 16-CV-2869 VEC).

13. Gary Born, International Commercial Arbitration, vol 1 (Kluwer Law International, 2nd ed, 2014), 493-497.

14. Thus, see Astro Nusantra International BV v PT Ayunda Mitra [2016] CACV 272/2015 where the Hong Kong Court of Appeal followed the Singapore Court of Appeal's view of jurisdiction in PT First Media TBK v Astro Nusantra International BV [2013] SACA 57, where an international arbitration award made in Singapore was sought to be enforced in Hong Kong.

15. Gary Born, International Commercial Arbitration vol 2 (Kluwer Law International, 2nd ed, 2014), 1052-3.

16. Albert Jan Van den Berg, The New York Arbitration Convention of 1958 (Kluwer Law International, 1981).

17. Hancock Prospecting Pty Ltd v Rinehart [2017] FCAFC 170

[344]: "The separability principle is a rule, reached and laid down pragmatically, rather than logically, by courts in common law and civil law jurisdictions over decades and found in arbitral rules and conventions, that the agreement to arbitrate in the arbitration clause and the substantive agreement in which one finds the clause should be viewed as separate and distinct agreements."(emphasis added)

18. UNCITRAL, Report of the UNCITRAL on the Work of its Eighteenth Session: Discussion on

Individual Articles of the Draft Text (UN Doc A/40/17) (3–21 June 1985) pp 31–32, at [157]–[161].

19. Born, op cit, p. 495.

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