Choice of law for arbitration agreements

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Commercial parties are under Norwegian law generally free to agree that disputes between them related to a certain contract shall be finally decided through arbitration, rather than through the ordinary court system. The parties are also generally free to agree under which country's substantial set of laws the contract shall be interpreted and applied, and commercial contracts will normally contain a choice of law clause.

The Norwegian Arbitration Act Section 31 states that the arbitral tribunal shall apply the set of rules that the parties have chosen for the substance of the dispute between them, and that if the parties made a choice of law, the arbitral tribunal shall apply the set of rules that would apply according to Norwegian choice of law principles.

Since the arbitration agreement, under the doctrine of separability, is considered a separate agreement from the commercial contract, even though the clause is included in the same contractual document, the choice of law for the substance of the dispute does not necessarily also apply to the interpretation and application of the arbitration agreement.

This particularly applies if the parties have agreed a substantive law to govern the contract that is not the substantive laws of the place where the arbitration proceedings shall take place (the seat of the arbitration). The

procedural laws in the country of the seat of the arbitration will then govern the arbitration proceedings, and the other country's laws will govern the interpretation and application of the contract.

The arbitration agreement will then, in a sense, both be a part of the contract that is governed by the other country's laws, but also a part of the procedural rules of the arbitration, since the procedural rules to a large extent can be agreed between the parties as part of the arbitration agreement. It is therefore not obvious what country's laws the parties must have intended to govern the interpretation and application of the arbitration agreement.

To reduce the risk of different courts applying different set of rules to the arbitration agreement, the parties should therefore make an explicit choice of law also for the arbitration agreement.

The problems that can arise if such a choice is not made, is illustrated by the case between the Lebanese company Kabab Ji SAL against the Kuwaiti company Kout Food Group ("KFG"). The background for the case can be summed up as follows:

- Kabab Ji had entered into franchise agreements with Al Homaizi Foodstuff Company ("AHFC"), where AHFC was granted license to run restaurants in Kuwait under the Kabab Ji concepts. The parties had agreed that the franchise agreements were governed by English substantive law, and disputes were to be handled by arbitration under the rules of the ICC.
- AHFC later became the subsidiary of KFG, then a newly established holding company, after a corporate restructuring.
- A dispute arose related to the franchise agreements and Kabab Ji referred the dispute to arbitration before the ICC. The defendant in the proceedings was KFG (not AHFC). KFG participated under protest, claiming that it was not a party to neither the franchise agreements nor the arbitrations agreements within them.
- The arbitration tribunal found that the question of whether or not KFG was a party to the arbitration agreement had to be decided pursuant to French law, as the law of the seat of the arbitration, and that English law would govern any obligations KFG might have under the franchise agreements.
- The tribunal found that KFG had become a party to the arbitration agreement under French law. The majority of the tribunal also found that KFG had obligations under the franchise agreements pursuant to English law and made an award in favor of Kabab Ji of about USD 6.7 million. One arbitrator believed that KFG did not have any obligations under the franchise agreements under English law.

Thereafter two parallel proceedings were issued by the parties. Kabab Ji sought to enforce the award in the UK, and KFG issued proceedings before the ordinary courts of France to annul the arbitration award on the basis that the arbitral tribunal did not have jurisdiction.

The enforcement proceedings in the UK went all the way up to the Supreme Court, who decided the case in a judgment of 21 October 2021 (https://globalarbitrationreview.com/uk-supreme-court-rules-again-governing-law):

- The UK Supreme Court found that the choice of law provision in the franchise agreements also applied to the arbitration agreement, and that the question of whether or not KFG was a party to the arbitration should be decided under the English law. In paragraph 39 of the judgment the Supreme Court states:

"*In our view, the effect of these clauses is absolutely clear. Clause 15 [the choice of law clause, our comment] of the FDA is a typical governing law clause, which provides that 'this Agreement' shall be governed by the laws of England. Even without any express definition, that phrase is ordinarily and reasonably understood (for the reasons given at paras 43 and 53 of our judgment in Enka) to denote all the clauses incorporated in the contractual document, including therefore clause 14 [the arbitration clause, our comment].*"

- The UK Supreme Court further found that, under English law, there was no real prospect of finding that KFG had become a party to the arbitration agreement.
- The enforcement of the arbitration award in the UK was therefore denied, since the arbitral tribunal did not have jurisdiction to make the award against KFG.

The French annulment proceedings also went all the way up to the Court of Cassation, which is the court of last instance, who decided the case in a decision of 29 September 2022 (https://globalarbitrationreview.com/article/kabab-ji-ruling-cements-cross-channel-clash):

- The Court of Cassation found that the arbitration agreement was a separate agreement from the franchise agreements, and therefore that the choice of law provision did not apply.
- The arbitral tribunal had, according to the Court of Cassation, correctly applied French law to the question of whether KFG was bound by the arbitration agreement.
- The arbitration award was therefore upheld.

This implies that Kabab Ji still has an arbitration award that is enforceable in principle, but that it is not enforceable in the UK. It will probably not be enforceable in any other countries that would consider the arbitration agreement governed by English law neither. Kabab Ji will therefore have to enforce the arbitration award in France or other countries that will apply French law to this question.

So how would a Norwegian court handle the choice of law issue in an enforcement proceeding?

- Under the Norwegian Arbitration Act Section 45 arbitration awards can be enforced in Norway no matter the country the award is from.
- One reason to decline enforcement is, according to the Norwegian Arbitration Act Section 46, that the arbitration agreement is not valid pursuant to the laws the parties have agreed shall apply to the arbitration agreement, or if no such choice has been made, pursuant to the laws of the country in which the arbitration award was made.
- The question is then if Norwegian courts will consider the choice of law in the agreement to also apply to the arbitration clause/agreement. In principle this could be the case, if the agreement properly interpreted implies that the parties have made such a choice, but normally Norwegian courts should consider the arbitration agreement to not be included in the choice of law for the substance of the rest of the agreement.

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