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Consequences of the Separability Presumption for the Choice of Law Applicable to Arbitration Agreements

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Abstract

The paper intends to show what consequences the separability presumption can have for the choice of law that applies to arbitration agreements, namely the consequences that involve the application of different choices of law and its accepted standards. When discussing the separability and its consequences it is hard to keep the line and at the same time not to shake the assumption that already exist in International commercial arbitration. The purpose of this paper is to show the inconsistencies that exist nowadays.

Keywords: arbitration agreements, choice of law, international commercial arbitration, Rome I, separability

Introduction

One of the direct consequences that separability doctrine can have is the possibility of laws applicable to the parties' main contract be different from the one that is applicable to the arbitration agreement. That is, despite the fact that the parties' main contract may be represented explicitly, or impliedly, by the laws of one state, the related arbitration agreement or clause may be governed by the laws of other states, or even by the standards of worldwide law. The result, no doubt comes from the separability doctrine, as its main assumption is that there are two different, separate contracts and the invalidity or nullity of one of them is not the burden for any of it to be declared as invalid or null. In addition, it may in principle be governed by two different legal regimes. As it was pointed out in one of the arbitral awards, "an arbitration clause in an international contract may perfectly well be governed by a law different from that applicable to the underlying contract" (ICC Case No. 1507, p. 216). However, it should be stressed that, the doctrine of separability does not mean that the law that governs the arbitration agreement or clause should always be separate. It simply states that it is a possibility for another law to be applicable to the arbitration agreement or to main contract[1] (ICC case No. 4131, 1984, pp. 131, 132). Often in practice the law applicable to both arbitration agreement and the main contract are the same[2] (ICC Case No. 5294, p. 140-42, ICC Case No. 3572, p. 111).

Subsequently, challenges to the validity of the main contract do not deprive the tribunal from the jurisdiction to resolve the dispute concerning to the contested contract. Likely, challenges to the main contract does not deprive an arbitral award from validity. The conclusion taken by the court or the tribunal that the main contract is invalid do not necessarily weaken an award rendered by the tribunal.

The substantive legal rules, governing the main contract may be different from the law that governs the arbitration agree-

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1 Interim Award in ICC Case No. 4131, IX Y.B. Comm. Arb. 131, 132 (1984) ("sources of applicable law for determining the scope and the effects of an arbitration clause, which is the basis of an international arbitration, are not necessarily the same as the law applicable to the merits of the dispute referred to this arbitration").

2 Final Award in ICC Case No. 5294, XIV Y.B. Comm. Arb. 137, 140-41 (1989) (applying Swiss law to both arbitration agreement and underlying contract); See also, Final Award in ICC Case No. 3572, XIV Y.B. Comm. Arb. 111 (1989) (applying law chosen by parties to govern underlying contract to arbitration agreement).

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ment. The arbitration agreement/clause may survive expiration or termination of the main contract, as long as the claims arise from or during the term of specific provisions that survived the agreement.

Choice of Law

The choice of the law that governs arbitration agreement is a complex matter. Based on theoretical point of view, it is possible for the arbitration agreement to be governed by the law that is different from the main contract. Various commentators, national courts and arbitral tribunals applied and developed different types of choice of law rules to the substantive validity of international arbitration agreements, starting from the law chosen by the parties, to the law of arbitral seat and to the law of the state with the most significant relationship or the closest connection. This variety of different choice of law rules can lead to unfortunate uncertainties, uncertainties that can aggravate different issues associated to arbitration agreements, such as diverse laws applicable to the issue of substantive or formal validity, interpretation, capacity or assignment and even to issues of non-arbitrability.

One of the existing approaches to determining the law applicable to arbitration agreement is the law that governs the main contract. So the law chosen by the parties, express choice of law. Some commentators recognize the fact that this express choice of law extends to arbitration agreements too (Born G., 2004, p. 515, 580). The reason for this view was justified by the fact that, when an ordinary person enters into the contractual relationship, they do not consider that two different laws shall govern their main contract and arbitration agreement, but the chosen law will imply both main and separate agreement. Practice affirms this approach too. Basically the same approach is taken regarding the absence of choice of law. In this case some authors state that, although separability do entail that law applicable to main contract is different, it does not necessarily mean that it will be so. They more lean to conclusion that one law governs both, main contract and the arbitration agreement.

Second approach is application of arbitral seat as a law governing the arbitration agreement in case there is no express choice of law made by the parties. This approach is widely accepted by a lot of national courts. One of the bright examples of this way is taken by the English courts.

Third approach is related to the "closest connection". Based on one of the English court's recent decision in *Sulamerica Cia National v Enesa Engenharia S.A.* despite the fact that there was an express choice of Brazilian Law (policy was governed by the Brazilian Law), the judge deciding this case held that the proper law based on the case circumstances and the applica-tion of the closest connection test was English law. He pointed out that choice of the arbitral seat determines the jurisdiction of the courts of the country, where the seat is located and the "curial" law. Though he failed to emphasize more on the Brazilian Law, as under the Brazilian law the arbitration agreement was invalid, separate consent was needed in order to bind parties to arbitration.

In my point of view, the critical analyses of these different law approach would be that they give unsatisfactory and uncertain results. Application of the arbitral seat is based on the exclusivity of the procedural matters and ignoring the contractual personality of the arbitration agreement (Gaillard, Savage, 1999, p.424) e.g. when it is difficult to resist the fact that the law of the contract governs the arbitration agreement or the clause incorporated in the contract, for instance, in articles of association or joint venture agreements.

As for the closest connection test, it includes the problem of applying different law factors, in order to get to that one applicable law. Often the choice has less meaningful connection to the case than the law of the contract. In my opinion, the defect of the closest connection test resulted in Sulamerica case, when the court adopted that the law applicable to the dispute was the English law as the closest connection to the arbitral seat; whereas there was an explicit choice of law clause for the Brazilian Law. In addition, this defect is shown by fast shift in relatively short period of time from the chosen law to the law of the arbitral seat in English law and not only in UK.

Choice of Law Approach Taken in Sulamerica Case

Case Background:

The dispute was related to the construction of the hydroelectric generating dam plant in Brazil, also known as JirauGreemfield Hydro Project. In March 2011 certain incident arose between the consortium of Brazilian construction companies and Brazilian insurers that led the insured to file a claim over coverage for substantial damage that was caused during a workers' protest. The policy contained an express provision regarding the choice of law in favor of Brazilian Law, in addition with the exclusive jurisdiction also by the Brazilian Courts. A part from this, it also contained mediation and arbitration clause under the ARIAS Arbitration Rules, with the arbitration seat in London, England.

On the one hand, insurers before the Judge argued that they had commenced valid arbitration proceedings. On the other hand, the insured claimed that under Brazilian law, in order for them to be validly bound by the arbitration, their consent was needed. Additionally, the right to refer dispute to arbitration is only possible if the requirements contained in condition 11 were met, meaning that first case should have been settled by the means of mediation.

However, as the insured stated under the Brazilian Law the arbitration agreement is not valid against them, if there is no consent from their side, this was the issue to be determined by the court in order to continue anti-suit injunctions. Despite the fact that the judge mentioned nothing regarding the position under the Brazilian Law, he held that the proper law to be considered is English Law, as the London was the seat of arbitration and therefore had the most real and closest connection to seat, nevertheless the fact, that there was express choice of Brazilian Law and the explicit connection of policy to Brazil.

On appeal, the council on behalf of consortium disputed that there was an implied choice of Brazilian law as the law that governed arbitration agreement. On the basis of several factors consortium argued that (1) policy was subject to Brazilian Law,

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(2) any disputes connecting to the policy was to be settled by the courts of Brazil, so called exclusive jurisdiction, (3) there was a close commercial relationship between Brazil and the Policy, (4) mediation as a pre-condition to the arbitration was governed by the law of Brazil. Thus, consortium agreed that there was no explicit choice of law that governed the arbitration agreement. On other side the insurers used the separability doctrine and choice of England Law as the seat of the arbitration.

Court Decision:

Despite the fact that there was an express choice of Brazilian Law (policy was governed by the Brazilian Law), the judge deciding this case held that the proper law based on the case circumstances was English law. He pointed out that choice of the arbitral seat determines the jurisdiction of the courts of the country, where the seat is located and the "curial" law.

As to Lord Justice Moore-Bick, he analyzed the historical background of the case beginning with the views of Lord Mustill in various early cases. In Black Clawson International Ltd v PapierwerkeWaldhof -Aschaffenburg AG[3] ,Mustill J. stated that

> *"Where the laws diverge at all, one will find in most instances that the law governing the continuous agreement [arbitration agreement] is the same as the substantive law of the contract in which it is embodied and that the law of the reference is the same as the lexfori." In addition, "In the ordinary way, [the proper law of the arbitration agreement] would be likely to follow the law of the substantive contract".*

Similar observations were held by Lord Mustell in Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd[4] :

> *"It is by now firmly established that more than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration. Less exceptionally it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration: the "curial law" of the arbitration as it is often called".*

A number of other cases were mentioned by Lord Justice Moore-Bick supporting the view that parties intend, when choosing governing law to the main contract that same contract shall govern the arbitration agreement too. However, Lord Justice Moore-Bick mentions that nowadays a shift occurred in English courts according to the "C v D, [2007] EWCA Civ 1282, [2008] 1 A11 E.R. (Comm) 1001"[5] and "XL Insurance Ltd v Owens Corning [2001] 1 A11 E.R. (Comm) 530[6] " cases. Particularly, Lord Justice discussed in his decision the speech of Lord Justice Longmore in CvD in which he referred to a different passage from Lord Mustill J in "Black Clawson International case" that read:

"It has I believe, been generally accepted that in an arbitration case with a foreign element, three systems of law are potentially relevant. Namely: (i) The law governing the substantive contract. (ii) The law governing the agreement to arbitrate. (iii) The Law of the place where the reference is to be conducted: the lexfori. In the great majority of the cases, these three laws will be the same. But this will not always be so. It is by no means uncommon for the proper law of the substantive contract to be different from the lexfori; and it does happen, although much more rarely, that the law governing the arbitration agreement is also different from the lexfori".

From this passage Lord Justice Longmore concluded that it was infrequent for the law governing the arbitration agreement to be different from the law that governed the main contract. It is so, because an arbitration agreement usually has the most real and closest connection to the law of the seat of the arbitration. Similar, approach was taken by Toulson J in XL Insurance case, where parties impliedly agreed that the law of the seat London governs the arbitration agreement, thus if parties had chosen the proper law of the contract, that was New York, it might have not been valid. By stating for the arbitration in London and referring to the provisions of the Arbitration Act 1996, the parties agreed on English law as a law that governs issues within the scope of the act, inclusive of the jurisdiction of the arbitrators and the formal validity of the arbitration agreement.

Lord Justice Moore-Bick observed that:

> *"the difference in emphasis the views expressed in the earlier authorities and those to be found in the more recent cases is, I think, mainly due to the different degrees of importance that has been attached to the parties expressed choice of law to govern the substantive contract, reinforced by a more acute awareness of the separable nature of the arbitration agreement".*

Even though in Sulamerica case there is a strong indication in favor of an implied choice of Brazilian Law as a law governing the arbitration agreement, Lord Justice Moore-Bick points out two important factors that weights against this.

First, as parties may knew that their choice of the seat of the arbitration – London will bring the English law applicable to the case, including its application to the process of arbitral proceedings, it can be understood that parties intended English law to be applicable to all aspects of arbitration agreement. Second,

3 Black Clawson International Ltd v PapierwerkeWaldhof -Aschaffenburg AG; HL 5 MAR 1975;

4 Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd HL 17 FEB 1993;

5 C v D [2007] EWCA Civ 1282 and XL Insurance v Owens Corning CLC 914 [2001];

6 XL Insurance Ltd v Owens Corning 1 A11 E.R. (Comm) 530 [2001]

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consortium's argument that the arbitration agreement was not enforceable against them without their consent is unlikely to be true as parties would not have entered into such a one-sided arrangement. Therefore, Lord Justice Moore-Bike determined that this argument lacked sufficient evidence for the fact that parties made an implicit choice in favor of Brazilian law as the law governing the arbitration agreement. Further, according to the analyses made by the judge, he reached the conclusion that the proper law was the law of England.

As for the Master of the Rolls, Lord Justice Neuberger, agreed with Lord Justice Moore-Bick, but additionally he pointed out that it was irrelevant to choose between CvD or other earlier cases, as the result under either approaches would have been the same. He strongly believed that English law was the proper law for this case, as unless the insured were willing to consent to arbitration, giving the effect to arbitration agreement would have been impossible.

Analysis

The approach illustrated by the "C v D" case has introduced a number of uncertainties in English Law, which leads to some difficulties for commercial parties, when the issue of separability is on stake. In describing the current problem between the approaches taken in C v D and earlier cases, the Master of the Rolls was right when he named it as an "unsatisfactory tension". *What should a court do? Should the analysis be stated with the presumption that the arbitration agreement is governed by the law of the seat – the approach that is taken in more new cases – or should he follow the old rule – the proper law of the contract?* It is a big question nowadays, thought those two approaches try to stretch the fairly bright line which law is arguably a better one.

Facing this problem nowadays, we can expect from the parties that they would expressly mention what law governs their arbitration agreement. Thus, this is not happening in practice. The reason for this could be the fact that parties do not think on the stage of drafting the agreement or the arbitration clause that the law that they have already provided the main contract can differ from the law that governs their dispute clause.

Historically, the law was that the court should have to look in order to determine whether parties made an express or implied choice of law before the conflict of law rules were used to see the law applicable. The courts moved far from this methodology for two reasons, both of which may authentically be addressed: (a) the law of the seat is the closest and the most real connection to arbitration agreement, (b) separability of the arbitration agreement means that it is an autonomous and distinct from the main contract.

The question that arises from the Sulamérica decision is whether it sufficiently clears the uncertainties that exist in the law. I should agree with the sequence of analysis made by the Lord Justice Moore-Bick: (1) express choice; (2) implied choice; then (3) the law with the closest and most real connection with the arbitration agreement. He clarified correctly in paragraph 26: "A search for an implied choice of proper law to govern the arbitration agreement is therefore likely (as the dicta in the earlier cases indicate) to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion."

The arguments pointed out in the Sulamérica decision, have added some valuable clarity to the disarray that has crawled into the subject of which law governs the arbitration agreement in a contract,where the law chosen for the contract and the seat for the arbitration allude to distinctive jurisdictions. Master Justice Moore-Bick effectively set out the best possible examination to be embraced and the Master of the Rolls legitimately distinguished the unsuitable strain between the approach concentrated on the proper law of the agreement and on the law of the seat. As Lord Justice Moore-Bick stated, the starting point for the investigation ought to have been an assumption that the parties intended that the arbitration agreement should be governed by the law that governed the contract as a whole.

However, the approach the court took in the end was that there was no implied choice of law for the arbitration agreement and therefore it should be governed by the law of the seat undid the clarity. The components that the court depended upon to override the assumption for the best possible law were not by any means convincing and could even be said to build a contending assumption for the law under which the arbitration agreement is destined to be commonly enforceable to the exclusion of other factors.

Given the uncertainty that remains in this area of law, if the consortium seeks leave to appeal, the Supreme Court should review the case so that it can make a more unequivocal endorsement of the traditional approach to this issue and re-establish the effective presumption in favor of the proper law of the contract. This will provide the maximum level of certainty to commercial parties when negotiating their contracts.

It can be said that this decision somehow tried to clarify the issue related to the confusion that exists in international commercial arbitration, thus it also may be argued that some clarifications still are needed.

Correspondingly, conflict of laws issues and its relationship with the international commercial arbitration has always been a difficult and delicate issue. From the very beginning, in case there is no explicit choice of law by the parties, arbitrators struggle with the question which regime of private international law or what law applies to the case at stake. While national courts have strict rules to apply their national conflict of laws rules.

In various aspects, such as law applicable to arbitration agreements, arbitral proceedings, substance of dispute, recognition and enforcement of the arbitral awards, arbitral tribunal will have to decide which conflict of laws rules it should apply, rules of arbitral seat or other. In this respect, arbitrators enjoy a big power to decide which laws to apply. This is based on the text of different legislation, as an example, Article 28(2) of UNCI-TRAL Model Law states: "*Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable*". Based on this provision, we can clearly see that Model Law gives opportunity to the tribunal to apply, not limited set of the rules but any conflict of laws rules he deems appropriate. In this regard, in contrast to domestic courts, tribunal enjoys bigger power when choosing law and is not bound by Private International law rules. For example, among the different potentially applicable laws is the

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closest connection test – Rome I Regulation; the law of the arbitral seat or the law of the place, where the arbitration agreement is concluded. However, these various conflict of laws rules may lead to different results, uncertainty, confusion, which conflict with the main aim of arbitration to provide efficiency. Because of this efficiency and flexibility for the parties to adopt to the dispute, the rules that they deep proper or choose the law that they know and are familiar with, are the reason why International Commercial Arbitration is so popular nowadays and a lot of businessman or businesswoman choose this way of settlement of their dispute in contrast to courts. Eventually, this automatic shift of conflict of laws rules will lead to injustice towards those who failed to come up with their minds and think for the laws that govern both contract and arbitration agreement.

Although this happens very rarely, especially in practice, a lot of questions still need to be answered: are the separate application of choice of law rules and the applicable law indeed based on the separability presumption? What are the consequences for the arbitration clause, when the main contract is terminated? Does it entail that arbitration agreement is terminated as well? Fortunately, all these questions can be answered by the separability presumption. In my opinion, separability presumption is related to the application of the conflict of laws rules and the applicable law. It gives opportunity to the arbitration agreement to still continue its existence and be decided. Without this principle, declaring the main contract invalid also will have consequences for the validity of arbitration agreement and therefore, tribunal will be prevented to hear the dispute.

Despite the fact that parties may not take into consideration that different law can be applicable to their main contract and arbitration agreement, separability presumption gives chance to the arbitration agreement to live. Therefore, even if the main contract is recognized null, void or terminated based on the competence-competence doctrine tribunal shall still decide on the validity of the arbitration agreement. Of course there are some conflict of laws rules, which will limit the choice of applicable law, simply because the arbitration is excluded from its scope, for example Brussels I regulation or Rome I Regulation.

Rome I Regulation as conflict of laws rules, has some impact on international commercial arbitration. According to the Article 1(1) the material scope of the Rome I Regulation deals only with the contractual relationship in civil and commercial matters. Article 1(2) of Rome I limit the regulations application to certain matters, meaning that it does not apply to customs, revenue or administrative matters. Also it extends exclusion of arbitration and choice of court agreements.

Let us have a brief look on the road taken by the regulation and explain why Rome I does not cover the arbitration agreements? And whether arbitrators have the duty to apply Rome I?

During the negotiation on the issue on stake – exclude or not the arbitration agreements from the scope of Rome I – on the one hand, delegation from the United Kingdom defended the inclusion of the arbitration agreements based on two points: i) arbitration agreements as a contractual nature was not different from other agreements, and ii) the existed international conventions on the arbitration were inadequate in the manner that they did not have the proper provision on the law applicable to the arbitration agreements and that those international conventions having no universal scope, in contrast to the Rome I, were not ratified by all the Member states. On the other hand, form the German and French delegations perspective the inclusion of the arbitration agreements would increase the number of the conventions in this area. The justified reason of this view was the separability presumption that was included in the draft and therefore, made the arbitration clause autonomous from the underlining contract. In addition, they argued that concept of closest connection was heard to apply to arbitration agreements, because the separation of contractual and procedural aspect of the arbitration agreements were difficult.

In my opinion, two main uncertainties exist regarding the application of Rome I to the arbitration agreements: First, Rome I excludes the arbitration agreements, but it can be used in order to determine the application of the law to the substance of the disputes. As the arbitrators, in case of absence of the choice of law by the parties, it applies the conflict of laws rules, in order to determine the law applicable to the merits. Though, weather the arbitration agreements should have been excluded from the Rome I application is rather debatable. However, I believe that the Article 1(2)(e) has rather vague provision, meaning that it is hard to see what this exclusion really covers, as there are varieties of laws applicable to international Commercial Arbitration:

- Law that applies to arbitration agreement - governs the scope, validity and interpretation of the arbitration agreements;

- Law that applies to arbitration proceedings – governs the constitution of the tribunal, powers of the arbitrators, including the grounds for challenge;
- And the law that governs the substance of the dispute – that covers the validity and interpretation of the contract, consequences of breach of contract, rights and obligations of the parties.

Second, besides the fact that more than one law exists in International Arbitration different wording of Rome I Regulation and Brussels I Regulation underline the ambiguity as well. Rome I does not explicitly exclude the arbitration from its scope entirely, as for example, Brussels I regulation under Article 1(2)(d), which not only excludes arbitration agreements, but the whole arbitration.

The issues on uncertainty were addressed by Mario Giuliano and Paul Legarde in their Report on the Convention on the law applicable to contractual obligations, where they stated that "*The exclusion of arbitration agreements does not relate solely to the procedural aspects, but also to the formation, validity and effects of such agreements. Where the arbitration clause forms an integral part of a contract, the exclusion relates only to the clause itself and not to the contract as a whole. This exclusion does not prevent such clauses being taken into consideration for the purposes of Article 3(1)*." (Giuliano, Legarde, 1980, pp.11,12).

From the reports perspective, we can clearly see that the Rome I not only excludes the procedural part but also the effects, validity and formation of the arbitration agreement. In addition, though report doesnot address the issue of law governing the substance of the dispute, by virtue of separability presumption it separates the arbitration clause from the underling/main contract and therefore states that Rome I applies only to the rest of the contract and not to the arbitration agreements. Here we can strongly point out that the separability presumption plays a

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great role. It makes possible for the arbitration agreement and the main contract to be governed by the different laws.

Another explanation regarding the limited exclusion of the arbitration agreements from the Rome I addressed by the Report was the Recital 12[7] of the Regulation that accepts the arbitration agreement as one of the pillars to determine the law applicable to the merits of the dispute based on the Article 3(1) of Rome I Regulation.

Despite the controversies that do exist nowadays whether Rome I Regulation should be applicable to the arbitration agreements or not, the practice shows that some tribunals do apply to it. The reason may be the fact that UNCITRAL Model Law or the UNCITRAL Arbitration Rules require the arbitrators to apply the conflict of law rules that they deem appropriate, while determining the law that parties failed to choose. Rome I Regulation was used regardless of the fact whether it was in force in the countries of which the parties were nationals (Poudret, Bensson, 2007, pp. 687, 584-5). For example, a tribunal seated in Milan, while deciding on the law applicable to the contract, used the conflict of laws rules in the Rome I Regulation as a part of the Italian law (ICC court bulletin, 1999, p. 83-87). Same approach was taken by the Sole arbitrator seated in the Brussels in the dispute between the Belgium and Dutch company, when determining the consistence of the valid choice of law clause with the position stated by the parties.

From the Arbitration outlook, in contrast to the courts, arbitrators do not have forum and therefore, they are not bound by the conflict of laws rules of the seat of the arbitration (Redfern, Hunter 2009, pp. 3.216-18). As a result, when parties fail to determine the law, arbitrators' have flexibility and freedom to choose law applicable to the merits of the dispute they deep appropriate. On these bases, it is said that the arbitrators, in order to choose the law applicable to the substance of the dispute, will refer to the conflict of laws rules of the arbitral seat or use the closest connection test. Also, cumulative approach – choosing from variety of conflicts of laws rules - can be taken as well. Not to forget the *amiables compositeurs* that allows arbitrators to decide on their common sense, fairness and a good faith the outcome of the dispute without consulting the rules.

As to the European Law perspective, if the dispute is concerned to the contractual obligations the arbitrators determining the law applicable to the dispute have to apply the provisions of Rome I Regulation, whereas in case the parties agreed to settle their dispute based on the institutional rules in the arbitration than those rules would prevail over the Rome I Regulation. But if arbitrators are not required to apply the Rome I, in the world of EU failure to apply the rules of European Union that have mandatory or public policy nature will result in breach or error of EU law. The consequence to this breach can be the fact that arbitral award can be challenged under the Member states courts National Law, although it wound not affect the validity of the award as the arbitrators' awards on the choice of law are not subject to review by the EU courts.

Therefore, it can be noted that Rome I convention is only applicable to the International Commercial Arbitration while divining the law applicable to the merits of the dispute. However, the question whether the arbitrator is bound to apply the rules of Rome I Regulation still remains. Thus, during the research I found out that the answer on this question very much depends on the arbitrators' powers to give effect to their rights to decide the law applicable to the case on their own motion. This motion is granted by the procedural law of the arbitration that can require them to turn to the EU law – Rome I regulation for instance.

Conclusion

To sum up all above said, it can be said that the separability presumption is usually being applied in order to be sure that, even if the main contract is invalid, the arbitration agreement or the arbitration clause can still survive. The rational for the separability presumption is to help parties to save their rights and to be able to dispute in the forum they prefer. It can also be said that the separability presumption is a kind of practical necessity, without which each party will be unable to avoid arbitration just only by contesting the contract in which the arbitration agreement is incorporated.

However, it should also be noted that the well established fact that arbitration agreement may be governed by different law than the main contract derives from the approaches taken in International Commercial Arbitration. One should not forget that though the fact is established, separabaility presumption is a presumption and not more. As a result of the application of the variety of rules, developed by the commentators and the arbitral tribunal parties are taken the opportunity to resolve their dispute in the court they want. The advantage of the arbitration is that parties have the chance, in contrast to the court system, to settle their drama in the regime they have chosen beforehand. When discussing the separability and its consequences, it is hard to keep the line, to keep both, ups and downs and at the same time not to shake the assumption that already exist in International commercial Arbitration.

Nowadays there are a lot of contradictory views which do not lead to the solutions. Even for instance, the approach taken by the English courts that started determining the law applicable to the arbitration agreements from the choice of law ending to the law of the seat, got the arbitration world to much more controversy than it was before. The clash that exists even between the different courts in different countries taking different decision does not lead to the uniformity and the balance of the system.

However, one is surely clear that in order to avoid any misunderstandings in future, parties need to learn to expressly provide their arbitration agreement or the arbitration clause that is incorporated in the main contract, which law is applicable to their dispute.

7 "An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated."

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