Case No: A3/2012/0249

Neutral Citation Number: [2012] EWCA Civ 638
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(COMMERCIAL COURT)
Mr. Justice Cooke
2011 Folio 1519

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 May 2012

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE MOORE-BICK
and
LADY JUSTICE HALLETT

- -

Between :

SULAMÉRICA CIA NACIONAL DE SEGUROS S.A. and others	**Claimants/ Respondents**
- and -	
ENESA ENGENHARIA S.A. and others	**Defendants/ Appellants**

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- -

Mr. David Wolfson Q.C. and **Miss Nehali Shah** (instructed by **White & Case LLP**) for the **appellants**
Mr. Michael Crane Q.C., **Mr. Stephen Houseman** and **Mr. Damien Walker** (instructed by **Clyde & Co. LLP**) for the **respondents**

Hearing date : 20th March 2012

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Judgment

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Lord Justice Moore-Bick :

1. This is an appeal against the order of Cooke J. continuing an anti-suit injunction restraining the appellants, Enesa Engenharia S.A. and other insured ("the insured"), from pursuing proceedings against the respondents, Sulamérica Cia Nacional de Seguros S.A. and other insurers ("the insurers"), in the courts of Brazil.

2. The dispute between the parties has its origin in two policies of insurance against various risks arising in connection with the construction of a hydroelectric generating plant in Brazil known as the Jirau Greenfield Hydro Project. In March 2011 certain incidents occurred which led the insured to make claims under the policies, but the insurers declined liability on the grounds that the losses were uninsured or excluded by express terms of the policies and that there had been a material alteration in the circumstances disclosed to them at inception of which they had not been notified as required by condition 3 of each of the policies. Since the policies are in substantially the same terms, it is convenient to refer to them simply as "the policy", as did the judge below.

3. The policy contains a London arbitration clause, to which I shall refer in more detail later, but it also contains an express choice of Brazilian law as the law governing the contract and an exclusive jurisdiction clause in favour of the courts of Brazil. On 29th November 2011 the insured gave notice of arbitration. In response the insured started proceedings in Brazil seeking to establish that the insurers were not entitled to refer the dispute to arbitration and obtained from the court in São Paulo an injunction restraining the insurers from resorting to arbitration in order to pursue a claim for a declaration that they were not liable under the policy. In response the insurers made an application without notice to the Commercial Court seeking an injunction to restrain the insured from pursuing the proceedings in Brazil. Stadlen J. granted an order in those terms which Cooke J. subsequently continued after hearing argument from both parties.

4. The judge made the following findings about the circumstances in which the policy had been entered into:

> "2. . . . The insurance was, however, reinsurance-led, in the sense that the insureds, through brokers JLT, sought to arrange the terms of the reinsurance cover before local insurers were put in place to "front" the covers. The reinsurances are led by Swiss Re, Allianz and Zurich Re. The programme was tailor-made for the Jirau project and was the subject of lengthy and detailed negotiation between the insureds, who are substantial enterprises, and the reinsurers. The reinsurances are expressed in the English language and the policy, although in the Portuguese language, contained essentially the same terms as the reinsurances, translated from the English. In determining the issues which arise, both parties proceeded on the basis of the policy, translated into English, as reflecting the reinsurance terms and conditions."

5. The General Conditions forming part of the policy included the following:

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"**7. Law and Jurisdiction**

It is agreed that this Policy will be governed exclusively by the laws of Brazil.

Any disputes arising under, out of or in connection with this Policy shall be subject to the exclusive jurisdiction of the courts of Brazil.

11. Mediation

If any dispute or difference of whatsoever nature arises out of or in connection with this Policy including any question regarding its existence, validity or termination, hereafter termed as Dispute, the parties undertake that, prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation.

All rights of the parties in respect of the Dispute are and shall remain fully reserved and the entire mediation including all documents produced or to which reference is made, discussion and oral presentation shall be strictly confidential to the parties and shall be conducted on the same basis as without prejudice negotiations, privileged, inadmissible, not subject to disclosure in any other proceedings whatsoever and shall not constitute any waiver of privilege whether between the parties or between either of them and a third party.

The mediation may be terminated should any party so wish by written notice to the appointed mediator and to the other party to that effect. Notice to terminate may be served at any time after the first meeting or discussion has taken place in mediation.

If the Dispute has not been resolved to the satisfaction of either party within 90 days of service of the notice initiating mediation, or if either party fails or refuses to participate in the mediation, of if either party serves written notice terminating the mediation under this clause, then either party may refer to the Dispute to arbitration.

Unless the parties otherwise agree, the fees and expenses of the mediator and all other costs of the mediation shall be borne equally by the parties and each party shall bear their own respective costs incurred in the mediation regardless of the outcome of the mediation.

12. Arbitration

In case the Insured and the Insurer(s) shall fail to agree as to the amount to be paid under this Policy through mediation as

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above, such dispute shall then be referred to arbitration under ARIAS Arbitration Rules. The Arbitration Tribunal shall consist of three arbitrators, one to be appointed by the Insured, one to be appointed by the Insurer(s) and the third to be appointed by the two appointed arbitrators. The Tribunal shall be constituted upon the appointment of the third arbitrator.

The arbitrators shall be persons (including those who have retired) with not less than ten years' experience of insurance or reinsurance within the industry or as lawyers or other professional advisers serving the industry.

Where a party fails to appoint an arbitrator within 14 days of being called upon to do so where the two party-appointed arbitrators fail to appoint a third within 28 days of their appointment, then upon application ARIAS (UK) will appoint an arbitrator to fill the vacancy. At any time prior to the appointment by ARIAS (UK) the party or arbitrators in default may make such appointment.

The Tribunal may at its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute. The tribunal shall have the widest discretion permitted under the law governing the arbitral procedure when making such orders or directions.

The seat of the arbitration shall be London, England."

6. Before the judge the insurers argued that they had commenced valid arbitration proceedings in accordance with condition 12, the insured having failed or refused to join in a mediation as contemplated by condition 11. They also argued, however, that condition 11 was ineffective to create a binding obligation or to impose a condition on the commencement of arbitration. The insured argued that they were not bound to arbitrate because the arbitration agreement was governed by the law of Brazil, under which it could be invoked only with their consent. They also argued that the right to refer disputes to arbitration arose only after the requirements of condition 11 had been satisfied. Those requirements were not satisfied in this case and in any event the scope of the arbitration clause was limited to disputes about the quantum of the insurers' liability and did not encompass disputes about substantive rights and obligations of the kind which the insurers had sought to refer.

The proper law of the arbitration agreement

7. It was not suggested that the approach which the court is required to take to resolving the issues of construction which arise in relation to conditions 11 and 12 of the policy is affected by the choice of proper law. However, since the insured say that under the law of Brazil the arbitration agreement is not enforceable against them without their consent, it is an issue that has to be determined, since it is an essential factor for the court to take into account in deciding whether to continue the injunction. Although the judge made no finding about the position under Brazilian law (because he did not

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need to), if the insured's argument were correct, the reference to arbitration would be ineffective and the injunction would have to be discharged.

8.The judge held that the proper law of the arbitration agreement in this case was English law, notwithstanding the express choice of Brazilian law as the law governing the policies and the obvious connection of the policy to Brazil. He considered (paragraph [10]) that the key question was the weight to be given to the choice of London as the seat of the arbitration. He pointed out that the choice of the seat of the arbitration determines the curial law and the supervising jurisdiction of the courts of the country where the seat is located, in this case England. That led him to the clear conclusion (paragraph [15]) that the law with which the agreement to arbitrate had its closest and most real connection was the law of England.

9.It was common ground before us, as it had been before the judge, that the proper law of the arbitration agreement is to be determined in accordance with the established common law rules for ascertaining the proper law of any contract. These require the court to recognise and give effect to the parties' choice of proper law, express or implied, failing which it is necessary to identify the system of law with which the contract has the closest and most real connection: see *Dicey, Morris & Collins, The Conflict of Laws*, 14th ed., paragraph 16R-001. It was also common ground that an arbitration agreement forming part of a substantive contract is separable, in the sense that it has an existence separate from that of the contract in which it is found. That principle, which reflects the presumption that the parties intended that even disputes about matters which, if established, would undermine the intrinsic validity of the substantive contract (such as fraudulent misrepresentation) should be determined by their chosen procedure, has been given statutory recognition by section 7 of the Arbitration Act 1996. In *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep. 254 the House of Lords re-emphasised both the presumption that parties to a contract who have included an arbitration clause intend that all questions arising out of their relationship should be determined in accordance with their chosen procedure and the separability of arbitration agreements which enables their intention to be effective.

10.The insured's case is that the parties have impliedly chosen the law of Brazil as the law governing the arbitration agreement. In support of that they rely on three principal factors: the express choice of the law of Brazil as the law governing the policy, coupled with the agreement that the courts of Brazil should have exclusive jurisdiction in respect of any disputes arising under, out of, or in connection with the policy; the close commercial connection between the policy and the state of Brazil (the parties, the subject matter of the insurance and the currency of the policy all being Brazilian and the language in which it is written being Portuguese); and the inclusion of a provision, which is itself governed by the law of Brazil, requiring the parties to attempt mediation as a pre-condition to any reference to arbitration. Of these, most emphasis was placed on the express choice of the law of Brazil to govern the policy, but the insured also relied on the wider commercial and legal context in which the arbitration agreement is set. Although they recognised that the parties had not made an express choice of proper law to govern the arbitration agreement, they submitted that the judge had failed to consider whether they had made an implied choice of proper law. Had he done so, he would have concluded that the parties intended the arbitration agreement, in common with all other aspects of the policy, to

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be governed by the law of Brazil. The insurers, on the other hand, relied heavily on the separability of the arbitration agreement and the choice of London as the seat of the arbitration as justifying the judge's decision that the proper law of the arbitration agreement was English law.

11. It has long been recognised that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole, but it is probably fair to start from the assumption that, in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law. It is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice of the law to govern any arbitration agreement contained within it; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate. In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334 Lord Mustill said (at pages 357-8):

> "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." (Emphasis added.)

12. That is consistent with his observations in the earlier case of *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1982] 2 Lloyd's Rep. 446 when discussing the possibility that different systems of law may govern the substantive contract, the arbitration agreement, the individual reference and the arbitral proceedings. At page 455, col. 2 he said:

> "Where the laws diverge at all, one will find in most instances that the law governing the continuous agreement [sc. the 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 lex fori." (page 455);

and at page 456, col. 1:

> "In the ordinary way, this [sc. the proper law of the arbitration agreement] would be likely to follow the law of the substantive contract."

However, it should be noted that in that very case Mustill J. (as he then was) was inclined to treat the parties' choice of Zurich as the place of arbitration as indicating

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an intention that the law governing the arbitration agreement should be the law of Zurich.

13. Similar statements of principle may be found in other cases. Thus, in *Sonatrach Petroleum Corp v Ferrell International Ltd* [2002] 1 All E.R. (Comm) 627 Colman J. said in paragraph [32]:

> "Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract."

14. In *Sumitomo Heavy Industries Ltd v Oil & Natural Gas Commission* [1994] 1 Lloyd's Rep. 45 Potter J. (as he then was) expressed the view that the choice of law to govern the substantive contract will usually be decisive in determining the proper law of the arbitration agreement (page 57, col. 1) and in *Leibinger v Stryker Trauma GmbH* [2005] EWHC 690 (Comm) Cooke J. held that the proper law of an agreement to arbitrate in London was German law because the parties had expressly chosen German law as the proper law of the substantive contract, to which the arbitration agreement, although contained in a separate document, was an adjunct.

15. The choice of curial law is normally made by identifying the seat of the arbitration. In the passage in his speech in *Channel Tunnel Group v Balfour Beatty* cited earlier Lord Mustill recognised that it is more common for the curial law of the arbitration to differ from the proper law of the substantive contract, as a result of the parties' agreeing to arbitrate in a country other than that whose law they have chosen to govern their agreement, than it is for the proper law of the arbitration agreement to differ from the proper law of the substantive contract. He did not explain why that should be the case, but in my view two reasons suggest themselves. One is that it is not at all uncommon in certain kinds of international arbitration, especially those involving government contracts, for the seat of the arbitration to be chosen on grounds (often a desire for a neutral forum) which differ from those which underlie the choice of law to govern the substantive contract. Another is that parties entering into a contract, whether containing an arbitration agreement or not, are likely to intend that the whole of their relationship, including the agreement to arbitrate, is to be governed by the same system of law.

16. Support for that view can be found in a number of highly-respected commentaries. *Dicey, Morris & Collins, The Conflict of Laws*, 14th ed. contains the following paragraphs:

> "16-016 It is submitted that in most cases the correct solution will be found in the construction of the agreement as to the parties' choice of law. This respects the fact that what is in issue is a contractual question, on which the parties enjoy autonomy of choice of law, whether under the common law or under the Rome Convention. If no such choice, express or implied, can be discerned, then it will often be the case that the arbitration agreement will be found to be most closely connected with the law of the place where the

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> arbitration has its seat, which is also the place where the award is to be treated as "made" for the purpose of the New York Convention.
>
> 16-017 *The law chosen by the parties*. If there is an express choice of law to govern the arbitration agreement, that choice will be effective, irrespective of the law applicable to the contract as a whole. If there is an express choice of law to govern the contract as a whole, the arbitration agreement will also normally be governed by that law: this is so whether or not the seat of the arbitration is stipulated, and irrespective of the place of the seat."

17. The learned authors of *Mustill & Boyd, Commercial Arbitration*, 2nd ed., having set out the three steps that are to be taken in determining the proper law of the arbitration agreement say at page 63:

> "The starting point is to determine the proper law of the contract in which the arbitration is embedded. As a general rule the arbitration agreement will be governed by the same law, since it is part of the substance of the underlying contract. But this is not an absolute rule, since other factors may point clearly to some other system of law. Thus if the arbitration is to be held in the territory of a state which is party to the New York Convention on the Recognition and Enforcement of Awards, section 5(2)(b) of the Arbitration Act 1975 [now section 103(2)(b) of the Arbitration Act 1996] appears to give rise to a rebuttable presumption that the law governing the validity of the arbitration agreement is the law where the award is to be made. The presumption would we submit readily be rebutted in favour of the proper law of the underlying contract."

18. The insurers initially placed considerable emphasis on the fact that an arbitration agreement is separable from the substantive contract in order to argue that its closest and most real connection was with the law of the place of the seat, here English law. However, as the cases demonstrate, both the concept of separability and the principles for determining the proper law of the arbitration agreement are well established and have been for some time. It is not possible, therefore, to dismiss observations made before the decision in *Fiona Trust v Privalov* as being "old law" which has been superseded by that decision, as the insurers suggested. That being so, I do not think that separability provides an easy answer to the question that arises in this case, which turns primarily on the relative importance to be attached to the parties' express choice of proper law and their choice of London as the seat of the arbitration. In support of his submission that the proper law of the arbitration agreement in this case is English law Mr. Michael Crane Q.C. placed considerable emphasis on two relatively recent decisions, *XL Insurance Ltd v Owens Corning* [2001] 1 All E.R. (Comm) 530 and *C v D* [2007] EWCA Civ 1282, [2008] 1 All E.R. (Comm) 1001.

19. *XL Insurance Ltd v Owens Corning* concerned a claim under a policy of insurance which contained a clause providing for arbitration in London under the provisions of the

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Arbitration Act 1996 and also a choice of New York state law as the law governing the substantive contract. New York state law incorporated the provisions of the United States Federal Arbitration Act in relation to the requirement for the arbitration agreement to be in writing. The insured brought proceedings in Delaware for a declaration that the insurers were liable to indemnify it in respect of certain losses and the insurers brought proceedings in London seeking an injunction restraining the insured from pursuing those proceedings. The insured opposed the grant of an injunction on the grounds that under New York law the arbitration agreement was very arguably ineffective, because it was formally invalid. Toulson J. held that the choice of law clause did not necessarily invalidate the arbitration clause; the two had to be construed in conjunction with each other. By providing for arbitration in London under the provisions of the Arbitration Act 1996 the parties had chosen English law to govern matters falling within the scope of the Act, including the formal validity of the arbitration agreement and the jurisdiction of the arbitrators, and by doing so had by implication chosen English law as the proper law of the arbitration agreement.

20. *C v D* also concerned a claim on a policy of insurance expressly governed by New York law which contained a clause providing for arbitration in London "under the provisions of the Arbitration Act 1950 as amended." The insured commenced arbitration proceedings in London against the insurer and obtained an award in its favour. The insurer then applied to the tribunal to correct its award on the grounds that its findings constituted a manifest disregard of New York law and indicated that it would apply to a federal court to set aside the award on those grounds. The insured brought proceedings for an injunction restraining the insurer from starting proceedings in New York or from relying on the law of New York to oppose the enforcement of the award. Cooke J. held that the choice of London as the seat of arbitration involved an agreement that any proceedings seeking to challenge the award would be only those permitted by English law and granted the relief sought. On appeal this court upheld his decision on the grounds that the choice of the seat of arbitration involved also a choice of forum for remedies seeking to challenge any award.

21. Since it was the agreement of the parties to arbitrate in London under the provisions of the Arbitration Act 1996 that carried with it a choice of England as the forum in which to pursue challenges to the award, it was unnecessary for the court to reach a decision on the proper law of the arbitration agreement. Indeed, Longmore L.J., with whom Sir Anthony Clarke M.R. and Jacob L.J. agreed, expressly recognised that the result would have been the same, even if the proper law of the arbitration agreement had been the law of New York (paragraph [20]). Nonetheless, he went on to express his view on the question, which at the end of paragraph [23] he defined as being "to discover the law with which the agreement to arbitrate has the closest and most real connection." Having considered the passage in Lord Mustill's speech in *Channel Tunnel Group v Balfour Beatty*, to which I have referred, and having rejected the argument that Lord Mustill was expressing a view about the frequency with which the proper law of the arbitration agreement is likely to differ from the law of the seat, he said in paragraph [26]:

> "One is therefore just left with his dictum in the *Black Clawson International* case (with which I would respectfully agree) that it would be rare for the law of the (separable) arbitration

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> agreement to be different from the law of the seat of the arbitration. The reason is that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place."

22. In the light of the passages cited earlier from the judgment of Mustill J. in the *Black Clawson International* case it may be worth noting that the dictum to which Longmore L.J. was referring appears to be a summary of the following passage at page 453 Col. 1:

> " . . . 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, and the performance of that agreement. (iii) The law of the place where the reference is conducted: the lex fori.
>
> In the great majority of 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 lex fori; and it does happen, although much more rarely, that the law governing the arbitration agreement is also different from the lex fori. See *Miller v Whitworth Street Estates Ltd.*, [1970] 1 Lloyd's Rep. 269; [1970] A.C. 583."

23. For myself, I am not sure that Mustill J. was there intending to suggest that the proper law of the arbitration agreement can be taken to be the same as the law of the seat of the arbitration, at any rate in a case where the parties have made an express choice of law to govern the substantive contract, but in any event that passage has to be read and understood in conjunction with his later remarks.

24. Mr. Wolfson suggested that the observation of Longmore L.J. in *C v D* is being treated as establishing something approaching a rule of law that the proper law of the arbitration agreement is determined by the law of the place of the seat. Such a rule would no doubt be convenient and would prevent many disputes of the kind that has arisen in this case, but stated in such simple terms, I do not think that it can easily be reconciled with the earlier authorities or with the established principles for determining the proper law. Another work to which our attention was drawn, *Jurisdiction and Arbitration Agreements and their Enforcement*, 2nd ed. (David Joseph Q.C.), contains a useful discussion of the current state of the law in the light of the dicta in *C v D*. In paragraphs 6.33 – 6.41 the learned author suggests that the court did not have the benefit of full citation of authority and sets out a number of reasons for preferring the conclusion that where parties have made an express choice of law to govern the substantive contract, that choice ought to be construed as extending to the dispute resolution procedure. He argues that there is a real and close connection between the law governing the arbitration agreement and the law governing the substantive contract, that the connection between the arbitration and the law of the seat is most

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readily expressed through and understood in terms of the procedural law of the arbitration and that a divergence between the proper law of the substantive contract and the law of the arbitration agreement may give rise to problems in the context of complex dispute resolution procedures involving mediation and expert determination as well as arbitration. As will become apparent, I think that there is force in some, though not all, of those points and the discussion, which is too lengthy to admit of citation in full, certainly merits consideration.

25. Although there is a wealth of dicta touching on the problem, it is accepted that there is no decision binding on this court. However, the authorities establish two propositions that were not controversial but which provide the starting point for any enquiry into the proper law of an arbitration agreement. The first is that, even if the agreement forms part of a substantive contract (as is commonly the case), its proper law may not be the same as that of the substantive contract. The second is that the proper law is to be determined by undertaking a three-stage enquiry into (i) express choice, (ii) implied choice and (iii) closest and most real connection. As a matter of principle, those three stages ought to be embarked on separately and in that order, since any choice made by the parties ought to be respected, but it has been said on many occasions that in practice stage (ii) often merges into stage (iii), because identification of the system of law with which the agreement has its closest and most real connection is likely to be an important factor in deciding whether the parties have made an implied choice of proper law: see *Dicey, Morris & Collins*, op. cit. paragraph 32-006. Much attention has been paid in recent cases to the closest and most real connection, but, for the reasons given earlier, it is important not to overlook the question of implied choice of proper law, particularly when the parties have expressly chosen a system of law to govern the substantive contract of which the arbitration agreement forms part.

26. If the court were concerned with a free-standing agreement to arbitrate in London containing no express choice of proper law, it is unlikely that there would be a sufficient basis for finding an implied choice of proper law and it would simply be necessary to seek to identify the system of law with which the agreement had the closest and most real connection. In those circumstances the significance of the choice of London as the seat of the arbitration would be overwhelming. However, where the arbitration agreement forms part of a substantive contract an express choice of proper law to govern that contract is an important factor to be taken into account. The difference in emphasis between 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' express choice of proper law to govern the substantive contract, reinforced by a more acute awareness of the separable nature of the arbitration agreement. The concept of separability itself, however, simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes. In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate. 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

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governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion. These may include the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract: see *XL Insurance v Owens Corning*.

27. In the present case the parties expressly agreed that the policy was to be governed exclusively by the law of Brazil. Although the insured did not seek to argue that that amounted to an express choice of law governing the arbitration agreement, for the reasons given earlier I think it is a strong pointer towards an implied choice of the law of Brazil as the proper law of that agreement. However, the matter does not end there. As the judge recognised, condition 12 of the policy forms part of a dispute resolution procedure which includes a mediation agreement and the two have to be read in conjunction with each other. It is difficult to believe that the parties intended the provisions relating to mediation to be governed by any system of law other than the law of Brazil, but the fourth paragraph of condition 11 contains conditions which directly affect the right to refer disputes to arbitration. Mr. Wolfson submitted that if the arbitration agreement were governed by English law, different parts of condition 11 would be governed by different proper laws, which cannot have been the parties' intention.

28.I agree that it would be unusual (though not, I think, impossible) for different parts of a composite clause to be governed by different proper laws, but I do not think that is a necessary consequence of holding that English law is the proper law of the arbitration agreement. Condition 11 is concerned with mediation and the fourth paragraph simply explains what is to happen if the mediation process fails. It tells one that in those circumstances either party may refer the dispute to arbitration, but it does not contain the substantive agreement to arbitrate, which is to be found in condition 12. That would remain the case even if condition 11 were apt to give rise to an effective precondition to arbitration. There is no reason, therefore, why the whole of condition 11 should not be governed by the law of Brazil, even though condition 12 is governed by the law of England.

29.Although there are powerful factors in favour of an implied choice of Brazilian law as the governing law of the arbitration agreement, two important factors point the other way. The first is that identified by Toulson J. in *XL Insurance v Owens Corning*. As the parties must have been aware, the choice of another country as the seat of the arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. Accordingly, even though the arbitration agreement in this case does not specifically refer to the provisions of the Arbitration Act 1996, the parties must have foreseen and intended that its provisions should apply to any arbitration commenced pursuant to condition 12 (including all those provisions, such as sections 5, 7, 8, 12, and 13 which are more substantive than procedural in nature). This tends to suggest that the parties intended English law to govern all aspects of the arbitration agreement, including matters touching on the formal validity of the agreement and the jurisdiction of the arbitrators.

30.The second factor is the consequence that is said to follow from the choice of the law of Brazil as the law governing the arbitration agreement. Although the judge made no finding on this point, the insured say that it renders the agreement enforceable only with their consent. If correct, that is a powerful factor and one which the court must take into account when considering an implied choice of Brazilian law. Although

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most arbitration agreements permit either party to refer disputes to arbitration, some provide for arbitration only at the option of one or other party. If that is what the parties wanted to achieve, therefore, the means were readily to hand. In the present case, however, there is nothing to indicate that the parties intended to enter into a one-sided arrangement of that kind; indeed, condition 11, which provides the immediate context for condition 12, expressly provides that either party may refer to arbitration a dispute that has not been satisfactorily resolved by mediation. The possible existence of a rule of Brazilian law which would undermine that position tends to suggest that the parties did not intend the arbitration agreement to be governed by that system of law.

31. In the light of these conflicting indications it is necessary to return to the two critical questions raised earlier: have the parties impliedly chosen the law of Brazil to govern the arbitration agreement; and if not, with which system of law does that agreement have the closest and most real connection? Taking into account the various factors to which I have referred, I do not think that in this case the parties' express choice of Brazilian law to govern the substantive contract is sufficient evidence of an implied choice of Brazilian law to govern the arbitration agreement, because (if the insured are correct) there is at least a serious risk that a choice of Brazilian law would significantly undermine that agreement. Having regard to the terms of conditions 11 and 12, I do not think that the parties can have intended to choose a system of law that either would, or might well, have that effect. This, it seems to me, reflects the fact that, although one may start from the assumption that the parties intended the same law to govern the whole of the contract, including the arbitration agreement, specific factors may lead to the conclusion that that cannot in fact have been their intention. In the end, therefore, I am unable to accept that the parties made an implied choice of Brazilian law to govern the arbitration agreement.

32. One then has to consider with what system of law the agreement has the closest and most real connection. Although Mr. Wolfson submitted that the agreement has a close and real connection with the law of Brazil, being the law governing the substantive contract in which the arbitration agreement itself is embedded, I think his argument fails adequately to distinguish between the substantive contract and the system of law by which it is governed. No doubt the arbitration agreement has a close and real connection with the contract of which it forms part, but its nature and purpose are very different. In my view an agreement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, does not have a close juridical connection with the system of law governing the policy of insurance, whose purpose is unrelated to that of dispute resolution; rather, it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective. Its closest and most real connection is with English law. I therefore agree with the judge that the arbitration agreement is governed by English law.

Mediation as a condition precedent to arbitration

33. Before the judge the insured submitted that condition 11 of the policy contained an enforceable obligation to mediate and that compliance with its terms was an essential precondition to arbitration. In the present case that condition was not satisfied and the insurers had therefore not validly commenced an arbitration which called for

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protection by the grant of an injunction. The judge held, however, that condition 11 did not give rise to any binding obligation. He referred to, and was content to follow, the decisions of Colman J. in *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059, [2002] 2 All E.R. (Comm) 1041 and Ramsey J. in *Holloway v Chancery Mead* [2007] EWHC 2495 (TCC), [2008] 1 All E.R. (Comm) 653, in each of which the court expressed the view that an agreement to enter into a prescribed procedure for mediation is capable of giving rise to a binding obligation, provided that matters essential to the process do not remain to be agreed. He held, however, that condition 11 of the present policy did not meet those requirements, because it contained no unequivocal undertaking to enter into a mediation, no clear provisions for the appointment of a mediator and no clearly defined mediation process. Essential matters therefore remained for agreement between the parties. Accordingly, condition 11 did not give rise to a legal obligation of any kind, and in the absence of a binding obligation there could be no effective precondition to arbitration.

34. Mr. Wolfson submitted that, contrary to the conclusions of the judge, condition 11 does contain a clear definable minimum duty to participate in a mediation that is capable of having legal effect. The essential preconditions to arbitration, he submitted, are a notice initiating mediation followed by one of the three outcomes identified in the fourth paragraph of that condition.

35. I have little doubt that the parties intended condition 11 to be enforceable and thought they had achieved that objective. In those circumstances the court should be slow to hold they have failed to do so. However, in order for any agreement to be effective in law it must define the parties' rights and obligations with sufficient certainty to enable it to be enforced. The task of the court when questions of this kind arise, therefore, is to determine whether the clause under consideration fulfils that requirement. Although clauses providing for mediation and other forms of dispute resolution procedure are becoming increasingly common, I do not think it helpful to go beyond that in attempting to define the minimum ingredients necessary to enable such provisions to be given legal effect. Each case must be considered on its own terms.

36. In the present case, unlike *Cable & Wireless v IBM* and *Holloway v Chancery Mead*, condition 11 does not set out any defined mediation process, nor does it refer to the procedure of a specific mediation provider. The first paragraph contains merely an undertaking to seek to have the dispute resolved amicably by mediation. No provision is made for the process by which that is to be undertaken and none of the succeeding paragraphs touches on that question. I agree with the judge, therefore, that condition 11 is not apt to create an obligation to commence or participate in a mediation process. The most that might be said is that it imposes on any party who is contemplating referring a dispute to arbitration an obligation to invite the other to join in an ad hoc mediation, but the content of even such a limited obligation is so uncertain as to render it impossible of enforcement in the absence of some defined mediation process. I think that the judge was right, therefore, to hold that condition 11 is incapable of giving rise to a binding obligation of any kind.

37. Mr. Wolfson was content to accept that the judge was right on that point, but submitted, nonetheless, that condition 11 is capable of giving rise to conditions which had to be satisfied as a matter of fact before a valid reference to arbitration could be made. I have some difficulty with that submission for the simple reason that unless condition 11 establishes the conditions with sufficient certainty to be capable of enforcement,

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they will be ineffective. The conditions identified in the fourth paragraph of condition 11 all relate to the progress of a mediation for which the first paragraph provides, but if (as I think) that mediation is not defined with sufficient certainty, the conditions cannot constitute a legally effective precondition to arbitration.

The scope of the arbitration agreement

38. The first sentence of condition 12 provides that:

> "In case the Insured and the Insurer(s) shall fail to agree as to the amount to be paid under this Policy through mediation as above, such dispute shall then be referred to arbitration under ARIAS Arbitration Rules."

39. The insured submitted that the current dispute between the parties, which concerns the insurers' liability to indemnify them under the policy, falls outside the scope of the agreement, which is limited to disputes about the amount to be paid in respect of any individual loss. The judge rejected that argument and in my view he was right to do so. Although it is possible to compare the opening language of condition 12 with the broader language of conditions 7 ("any disputes arising under, out of or in connection with this Policy") and 11 ("any dispute or difference of whatsoever nature"), it is impossible to overlook the close connection between condition 11 and condition 12. One thing that emerges clearly from condition 11, effective or not, is that the parties intended that all disputes should be subjected to mediation, and that, if mediation failed, they should be capable of being referred to arbitration. That much appears clearly from the first and fourth paragraphs. Likewise, condition 12 contains in its first sentence a reference back to condition 11. I am unable to attach much significance to the fact that the word "dispute" does not bear an initial capital letter; to hold that that represented a deliberate attempt to distinguish the content of condition 12 from that of condition 11 is somewhat fanciful and in any event creates its own problems, since it is clear that the two are intended to work in conjunction with each other. The real question is whether by using the expression "fail to agree as to the amount to be paid under this Policy" the parties intended to limit the scope of the arbitration agreement in a manner inconsistent with the fourth paragraph of condition 11.

40. In my view it would be very surprising if the parties had intended to limit the scope of the arbitration agreement in that way. If, as Mr. Wolfson suggested, there were thought to be good reasons for resolving disputes about liability in the courts of Brazil, leaving only disputes about quantum to be determined by arbitration, that could easily have been provided for without creating a conflict between the two conditions. It would be unusual for parties to a contract of this kind to establish separate and distinct procedures for resolving what in many cases are likely to be different aspects of the same dispute, and there is no indication that they had that in mind. Reading conditions 11 and 12 together, I think it is clear that they were intended to form part of a composite dispute resolution process applicable to disputes of every kind and that the use of the word "dispute" is intended to refer to all disputes to which condition 11 refers. If necessary, I would be prepared to strain the language of condition 12 in order to reach a conclusion that accords with what I consider to be good commercial sense, but in fact it is not necessary to do so. There is no difficulty in construing the

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language of condition 12 in that way, because, as the judge observed in paragraph [44]:

> "As a matter of language, a failure to agree "as to the amount to be paid under this policy" includes a dispute about whether any sum is due under the policy at all, and thus includes matters of liability and coverage."

41. In my view condition 12 enables either party to refer to arbitration any dispute arising out of or in connection with the policy.

Reconciliation of condition 7 with conditions 11 and 12

42. In paragraphs [47] – [51] of his judgment Cooke J. considered how the exclusive jurisdiction provision in condition 7 could be reconciled with the mediation and arbitration provisions in conditions 11 and 12. As I read his judgment, he did so in order to deal with the insured's argument that, unless the arbitration were limited to disputes relating to quantum, the exclusive jurisdiction clause in condition 7 would be deprived of substantially all effect.

43. In paragraph [47] he said:

> "Whereas Condition 11 of the policy appears permissive in allowing a party to refer a dispute to arbitration in the circumstances referred to, Condition 12 provides that such disputes "shall" be referred to arbitration. Whilst the Insurers argued that the contract gives rise to a permissive right to refer to arbitration, and that the only mandatory element requires that, if that permissive right is exercised, the arbitration must take place under ARIAS rules, for the purposes of this argument, I treat the arbitration clause as being mandatory."

44. Having considered various authorities, including, in particular, *ACE Capital Ltd v CMS Energy Corporation* [2008] EWHC 1843, [2009] 1 Lloyd's Rep. I.R. 414, he expressed his conclusion as follows:

> "49. In the present case, on the construction that I have held, all disputes or differences can be and must be referred to arbitration under the terms of Condition 12, but if that is so, what is left of the exclusive jurisdiction of the courts of Brazil under Condition 7? The answer is very little in practice - much the same as found by Christopher Clarke J in paragraph 82 of the *ACE* decision. It enables the parties to found jurisdiction in a court in Brazil to declare the arbitrable nature of the dispute, to compel arbitration, to declare the validity of the award, to enforce the award, or to confirm the jurisdiction of the Brazilian courts on the merits in the event that the parties agree to dispense with arbitration. It specifically operates to prevent the parties proceeding in another court on the merits. Use of the Condition 7 rights for these purposes

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> does not detract from the arbitration clause but gives them meaning. Furthermore, enforcement in Brazil against Brazilian parties is self-evidently a realistic possibility."

45. On the hearing of the appeal the insured renewed their application for permission to appeal against what they said was a decision by the judge that the arbitration agreement in this case is mandatory, rather than merely permissive. Longmore L.J. refused permission on the grounds that this was not an independent ground of appeal that would enable the insured to succeed if they failed on all of the other grounds.

46. In my view permission to appeal should be refused. In the first place, as Mr. Wolfson accepted, the argument that the insured seek to pursue does not provide an independent ground for setting aside the judge's order and it is the order made by the court below, rather than the judge's reasoning which led to it, that is the proper subject of an appeal. Quite apart from that, however, I do not think that the judge was purporting to make a decision one way or the other about the nature of the arbitration agreement. Having recorded that the insurers had argued that condition 12 gave rise to a permissive right to refer disputes to arbitration, he chose nonetheless for the purposes of the argument to treat it as if the provision for arbitration were mandatory, but that is all. In those circumstances I think that ground 4 is misconceived.

Conclusion

47. For these reasons I would refuse permission to appeal on ground 4 and dismiss the appeal.

Lady Justice Hallett:

48. I agree.

The Master of the Rolls:

49. I agree with Moore-Bick LJ's conclusions and reasoning on the various issues raised on this appeal, but wish to add a few paragraphs on the issue of the proper law of the arbitration agreement.

50. It is not uncommon for a commercial contract to contain (i) a choice of law clause stating that it 'will be governed exclusively by the laws of' one country (as in condition 7 in this case, which provides for the law of Brazil), (ii) a jurisdiction clause providing that the courts of the same country will have exclusive jurisdiction in relation to disputes arising out of the contract (also in condition 7, which refers to the Brazilian courts), and (iii) an arbitration clause providing that all, or certain, disputes arising out of the contract are to be referred to arbitration the seat of which is in a quite different country (in clause 12, which states that the seat of any arbitration is to be England).

51. Given the desirability of certainty in the field of commercial contracts and the number of authorities on the point, it is, at least at first sight, surprising that it is by no means easy to decide in many such cases whether the proper law of the arbitration agreement is (i) that of the country whose law is to apply to the contract or (ii) that of the country which is specified as the seat of the arbitration. However, once it is accepted that that issue is a matter of contractual interpretation, it may be that it is inevitable that the

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answer must depend on all the terms of the particular contract, when read in the light of the surrounding circumstances and commercial common sense.

52.Even allowing for that, however, one might have expected the cases to have provided clear and consistent guidance. However, it seems to me that the attitude of the courts over the past twenty years or so has not been entirely consistent.

53.Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 357-8, appears to have regarded it as 'exceptional' for the law of the arbitration agreement to differ from that governing the interpretation of the agreement, a view which he also expressed when at first instance in *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1982] 2 Lloyd's Rep 446, 455, 456. Other first instance judges expressed the same view in the cases referred to in paras 13 and 14 above, as have the editors of *Dicey, Morris & Collins, The Conflict of Laws*, 14th edition, para 16-017. As explained by Cooke J in one of those cases, *Leibinger v Stryker Trauma GmbH* [2005] EWHC 690 (Comm) 690, this is justifiable on the basis that the arbitration agreement is an 'adjunct' to, or part of, the contract of which the proper law has been specifically agreed between the parties.

54.On the other hand, the most recent learning on the issue, which is to be found in the decision of this court, *C v D* [2007] EWCA Civ 1282, [2008] 1 All ER (Comm) 1001, suggests a somewhat different approach. In that case, Longmore LJ (with whom Sir Anthony Clarke MR and Jacob LJ agreed) said at para 25 that 'it would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration'. After referring to the observations of Lord Mustill, both in the House of Lords and at first instance, he explained this conclusion on the basis that 'an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract'.

55.It may be that the difference between the view propounded in cases such as *Leibinger* [2005] EWHC 690 (Comm) and that advanced in *C v D* [2008] 1 All ER (Comm) 1001 was the growing awareness of the importance of the principle that an arbitration agreement is separable from, in some ways almost juridically independent of, the underlying contract of which it physically is part. Although the principle was not a new one, and had been enshrined in section 7 of the Arbitration Act 1996, its importance was perhaps reinforced by the reasoning of the House of Lords in *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254. Another reason for the recent leaning towards the seat of the arbitration may have been a growing appreciation of the point that, at least where that seat is the UK, certain substantive provisions of the 1996 Act (sections 5, 7, 8, 12 and 13) would apply to the arbitration, which could be said to suggest that the parties intended the law of the arbitration to be that of the seat – a view adopted by Toulson J in *XL Insurance Ltd v Owens Corning* [2011] 1 All ER (Comm) 530.

56. Accordingly, (i) there are a number of cases which support the contention that it is rare for the law of the arbitration to be that of the seat of the arbitration rather than that of the chosen contractual law, as the arbitration clause is part of the contract, but (ii) the most recent authority is a decision of this court which contains clear dicta (albeit *obiter)* to the opposite effect, on the basis that the arbitration clause is severable from

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the rest of the contract and plainly has a very close connection with the law of the seat of the arbitration.

57. Faced with this rather unsatisfactory tension between the approach in the earlier cases and the approach in *C v D* [2008] 1 All ER (Comm) 1001, it seems to me that, at any rate in this court, we could take one of two courses. The first would be to follow the approach in the most recent case, given that it was a decision of this court, namely *C v D* [2008] 1 All ER (Comm) 1001. The alternative course would be to accept that there are sound reasons to support either conclusion as a matter of principle. Whichever course is adopted, it is necessary to consider whether there is anything in the other provisions of the contract or the surrounding circumstances which assist in resolving the conundrum.

58. I do not think that we ought to take a third course of treating what was said in *C v D* [2008] 1 All ER (Comm) 1001 as wrong, although a powerful case is made out to that effect in *Joseph on Jurisdiction and Arbitration Agreements and their Enforcement* 2nd edition, paras 6.33-6.41. It is not suggested by the appellants that the earlier cases bind us to allow this appeal. And it would be questionable in principle and risk confusion in practice if we were to go directly against recent judicial observations on this very issue, given that they were clearly expressed (if *obiter*) views in this court, which included two highly respected and experienced commercial law judges.

59. Having identified the two alternative approaches we could adopt, I consider that it is unnecessary to choose between them, as they each lead to the conclusion that we should dismiss this appeal. Assuming in the appellants' favour that it is an open question whether the law of the arbitration is the chosen law of the contract or the law of the arbitration seat, each party contends that there is at least one provision in the contract which assists its case. The appellants argue that the mediation contemplated by condition 11 is subject to Brazilian law, owing to the choice of law clause, which is a strong indicator that the same law should apply to the arbitration under condition 12, especially as failure of any mediation process is an express precondition to arbitration. The respondents rely on (i) the proposition that, if Brazilian law, rather than English law, is the law of the arbitration, that would be inconsistent with the express provision in condition 12 that any dispute which fails to mediate successfully 'shall then be referred to arbitration', as, under Brazilian law, the respondent insurers could not refer an issue to arbitration without the consent of the appellant insured, and (ii) the provisions of the 1996 Act as considered by Toulson J in *XL Insurance Ltd* [2011] 1 All ER (Comm) 530.

60. While it is not without some force, I am not very impressed with the appellants' argument based on the interrelationship between the mediation and arbitration clauses. The fact that the mediation agreement in condition 11, and any mediation pursuant thereto, are governed by Brazilian law does not necessarily mean that any subsequent arbitration must be similarly so governed. The questions whether and how condition 11 is enforceable, and the question whether there had been a 'failure to agree' in any mediation (the express precondition to arbitration in condition 12) would have to be determined by reference to Brazilian law. However, I do not see why that should mean that the law governing the agreement to arbitrate under condition 12 itself should be Brazilian law, as a matter of logic or even as a matter of commercial or legal convenience.

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61. On the other hand, the fact that, if Brazilian, rather than English, law applies to the arbitration agreement, it may very well not be possible to give effect to the apparently mandatory and plainly unqualified provision for arbitration in condition 12 unless the insured was prepared to have an issue referred to arbitration, is a pretty strong argument for English law applying. All the more so if one bears in mind that the question is to be determined by reference to the apparent intention of the parties as gathered from the terms of the contract. In addition, as Toulson J said in *XL Insurance Ltd* [2011] 1 All ER (Comm) 530, the fact that certain provisions of the 1996 Act will, on any view, govern the arbitration agreement tends to support the respondents' case that English law applies.

62. In the light of the reasons given in the judgment of Moore-Bick LJ, as expanded in this briefer judgment, I would dismiss this appeal.

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