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"Concerning the implied choice of law in contracts"

Introduction

Sometimes parties do not address the issue of the governing law of the contract leaving it up to the court or to the arbitral tribunal to determine the relevant legislation. When such situations arise, a decision by the Singapore Court of Appeal, issued on 10 February 2021, should prove to be of immense future value. (See, *Solomon Lew v Kaikhushru Shiavax Nargolwala and others and another appeal* [2021] SGCA(I) 1).

Facts of the case and *ratio decidendi*

The Singapore Court of Appeal dealt with two appeals in a real estate transaction dispute. A panel composed of Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, and Lord Jonathan Hugh Mance IJ (who delivered the judgment) rejected an appeal filed by the claimant but upholding another filed by two of the respondents.

From a juridical point of view, the dispute was "about the sale of shares in a company owning certain rights in relation to … [a] villa" (*Solomon Lew v Kaikhushru Shiavax Nargolwala and others and another appeal* [2021] SGCA(I) 1). The company was incorporated under British Virgin Islands law.

The oral contract involved had made no explicit choice of governing law, so the Singapore International Commercial Court applied Singaporean legislation. Simon Thorley IJ held that:

> [w]ith regard to the first stage, it may be unlikely that the Express Law will be stated in the case of a putative contract. However, the Implied Law stage is just as applicable to a putative contract as it is to a concluded contract. If the facts as found allow the court to reach a clear conclusion as to what would have been the parties' common intention as to the governing law of the contract if the same was concluded, then it would be unrealistic to disregard that and to determine that the proper law was in conflict with that common intention. Equally, the Objective Law stage may, in an appropriate case, lead the court to the clear conclusion that a particular law was the one that had the closest connection with the putative contract rather than the *lex fori*. In both cases however, I consider that the court should reach a clear conclusion that a particular law should be applied rather than the *lex fori*. In cases of doubt, the counsel of prudence would be to apply the *lex fori*. In the present case, I consider that the

> facts as found above do enable me to reach a clear conclusion by applying the second stage test, the Implied Law stage. This is because of the Nargolwalas' insistence, at the time that the alleged contract was made that Singapore lawyers should be instructed and, hence, that Singapore law should apply (*Solomon Lew v Kaikhushru Shiavax Nargolwala and others* [2020] SGHC(I) 02).

He added that – in case of ambiguity – the *lex fori* should apply.

However, in its decision, the Court of Appeal disregarded this conclusion.

The Court of Appeal held that there was no implied choice of law in the original contract. Hence, the closest and most relevant law would be the most applicable (*JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 at 79).

Since the dispute – in economic terms – was about a villa in Thailand, Thai law was held to be the proper law. The panel stated that "[a]ll that matters for present purposes, however, is that it was properly and eminently arguable that Thai law would govern any oral contract made on 11 October 2017" (*Solomon Lew v Kaikhushru Shiavax Nargolwala and others and another appeal* [2021] SGCA(I) 1, at 89).

Implied choices of law across other jurisdictions

How have other jurisdictions dealt with similar implied choices of law?

England and Wales

Before Brexit, the choice of law issue was governed by the Rome I Regulation (EU Regulation 593/2008). Even after 31 January 2020, with EU provisions integrated into UK law, this is likely to remain the status quo, at least in the short term.

Anyway, under UK common law, if the parties have expressly stipulated that a contract is to be governed by a particular law, that choice is valid if the selection is genuine and legal and does not contradict public policy (See, *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 [1939] 1 All ER 513, PC). UK mandatory rules shall apply, however.

An implied choice of law can arise if it is sufficiently clear from the terms of the contract itself or the circumstances of the case as in:

1) a contract on a standard form, such as a Lloyd's policy of marine insurance (see, *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [1999] 2 All ER (Comm) 54, [1999] Lloyd's Rep IR 472, CA);

(2) a contract where there is a previous course of dealing between the parties (*The Adriatic* [1931] P 241 at 247);

(3) the choice of a particular forum (*Hellenic Steel Co v Svolamar Shipping Co Ltd, The Komninos S* [1991] 1 Lloyd's Rep 370, CA).

Switzerland

Under article 116.1 of the Federal Act on Private International Law (PILA), parties are free to determine the governing law of the contract. Yet, the selected foreign law is limited by the Swiss public policy (art. 17, PILA) and is overridden by any relevant mandatory provision in Swiss law, under PILA article 18. No choice of law is allowed in consumers' contracts (art. 120.2, PILA). Therefore, an implicit choice of law may "result with certainty from the provisions of the contract or from the circumstances" (art. 116.2, PILA).

If there is no choice, the material law of the contract shall be the law of the state with which it has the closest connection (art. 117.1, PILA). PILA article 117.2, presumes a close connection "with the state of habitual residence of the party that has to perform the characteristic obligation", or, "if that party has concluded the contract in the exercise of a professional or business activity, with the state where such party has its establishment".

"Characteristic obligation" is taken to mean:

a. in contracts for the transfer of title: the transferor's obligation;

b. in contracts pertaining to the use of property or of a right: the obligation of the party conferring such use;

c. in agency contracts, contracts for work and other contracts to perform services: the service obligation;

d. in contracts of deposit: the obligation of the depositary;

e. in guarantee or suretyship contracts: the obligation of the guarantor or surety.

The People's Republic of China

In the PRC, the parties can choose the governing law of the contract, if there is a foreign element. This is an exception to the general principle that PRC law shall apply to every legal activity performed in Mainland China. Under article 12 of the 2020 Civil Code: "The laws of the People's Republic of China shall apply to the civil activities taking place within the territory of the People's Republic of China, except as otherwise provided by law".

What is a foreign element? Pursuant to article 522 of the Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China (Issued on 30 January 2015, 注释 (zhushi) [2015] No. 5), a case is foreign-related if:

> (1) One or both parties concerned are foreigners, stateless persons, or foreign enterprises or organizations; or (2) The habitual residences of one or both parties concerned are beyond the territory of the People's Republic of China; or (3) The subject matter is located beyond the territory of the People's Republic of China; or (4) The legal facts generating, altering or terminating civil relations occur beyond the territory of the People's Republic of China; or (5) Other situations based on which the case can be regarded as a foreign related case.

It is worth stressing that "an entity incorporated in China solely or partially by a foreign shareholder, including a wholly foreign owned enterprise (WFOE), Sino-foreign joint venture, or Sino-foreign cooperative enterprise, is considered a domestic entity under PRC law." Therefore, these entities do not count as foreign-related (Gao Feng, Teng Haidi, Wu Mingyan, 'Dispute resolution and choice of law in China related contracts', King & Wood Mallesons, 16 October 2015).

If there is a foreign element, the parties can choose their governing law freely, even though the selected law has no connection to the case. For instance, a charter contract between a Chinese and a Singaporean party, on a route from Dalian to Port Klang can be governed by English law. Exceptions apply under mandatory PRC provisions, if contracts fall "directly" under article 4 of the PRC Law on the Laws Applicable to Foreign-Related Civil Relations, since, according to article 5, "Where the application of a foreign law will be prejudicial to the social and public interest of the PRC, the PRC law shall be applied".

If there is no expressed choice of law "the law of the habitual residence of a party whose performance of obligation is most characteristic of the contract or the law that most closely connected with the contract shall be applied" (Art. 41 PRC Law on the Laws Applicable to Foreign-Related Civil Relations).

The Hague Principles on Choice of Law in International Contracts.

Approved by the Hague Conference on Private International Law on 19 March 2015, the Hague Principles on Choice of Law in International Contracts (HP) also address the issue of implied choice of law.

Under HP article 4:

"A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law".

This presents another argument against the *lex fori* as the governing law of the contract if there is no express choice of law. Furthermore, in this article, choices of law can "appear clearly" in, for instance, previous dealings between the parties (Commentary on HP, 4.13 and Illustration 4-8).

In the Commentary to HP article 4, there are two examples of the implied choice of law. Firstly:

> Party A and Party B conclude a marine insurance contract in the form of a Lloyd's policy of marine insurance. Because this contract form is based on English law, its use by the parties may indicate that the parties intend to subject the contract to English law.

Secondly, "Party A and Party B conclude a contract that uses the legal language characteristic of the law of State X. This may indicate that the parties intend their obligations to be determined according to the law of State X".

Concluding remarks

As we can understand from the Singaporian case, it is crucial to identify a contract's proper law. It is always advisable to insert an explicit and properly drafted choice of law clause in every contract.

The issue is harder to deal with, in case of a dispute about the existence of a contract, as in the case discussed here.

In this case, it can be wise and advisable to make some reference to the governing law in correspondence between the parties to give the court or arbitral tribunal evidence of the actual intention of the parties.