Litigation & Arbitration Group

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Arbitration case law update:

Supreme Court in Enka v Chubb Clarifies Test for Determining the Law Governing an Arbitration Agreement

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In its much anticipated judgment in the case of Enka v Chubb [2020] UKSC 38, the Supreme Court has now clarified the correct approach as a matter of English law for determining the governing law of an arbitration agreement.

The Supreme Court held that the governing law of an arbitration agreement is: (i) the law chosen (either expressly or impliedly) by the parties or (ii) where the parties did not make such a choice, the law with which the arbitration agreement is most closely connected. Importantly, where the parties have not expressly agreed the law of the arbitration agreement, the Supreme Court held that:

- their choice of law governing the main agreement will generally apply to the arbitration agreement; or
- where (as in Enka), the parties make no choice of law for the main agreement, the default rule is that the law of the seat of the arbitration should apply to the arbitration agreement as it is the law which is most closely connected with the arbitration agreement.

Despite the powerful dissenting judgments of Lord Burrows and Lord Sales, the Supreme Court's decision brings much needed certainty to this area of arbitral law.

Background and the issues before the Supreme Court

At least three systems of law may be relevant in a dispute under an international commercial contract that contains an arbitration clause. These are the laws governing the:

1. substance of the dispute (usually the governing law of the main contract);

2. arbitration process (usually the law of the seat of the arbitration); and

3. the agreement to arbitrate.

In Enka (as described in our previous article here), the English Court was asked to determine what the law of the arbitration agreement was, in order to rule on whether Russian court proceedings started by Chubb breached that agreement to arbitrate (and, therefore, whether the English Court should grant anti-suit relief).

The contract in question contained no express agreement as to either the law of the main agreement or the law of the arbitration agreement, but there was an express agreement that London would be the seat of arbitration and there was, in fact, no dispute between the parties that the law of the main agreement should be Russian law.

Reversing the decision of the High Court, the Court of Appeal had held that unless the parties incorporated, expressly, a choice of law governing the arbitration agreement, there was a strong presumption that they had impliedly chosen the law of the seat as the governing law of the arbitration agreement.

The decision of the Supreme Court

The Supreme Court disagreed with the Court of Appeal and held that there was no such presumption.

The Supreme Court's decision was based on principles of English common law.[1] The Supreme Court held, pursuant to those principles, that an arbitration agreement is governed by:

1. the law that is expressly or impliedly chosen by the parties; or
2. if the parties have not made such a choice, the law with which the arbitration agreement is most closely connected.

Express or implied choice

The Supreme Court held that whether the parties had chosen (either expressly or impliedly) a system of law to govern their arbitration agreement was a matter of interpretation of the arbitration agreement and the main contract as a whole.[2]

It stated that, where a main contract contains a governing law clause, "*it is natural to interpret such a governing law clause, in the absence of good reason to the contrary, as applying to the arbitration clause for the simple reason that the arbitration clause is part of the contract*".[3] This approach, in the Supreme Court's view, was supported by "*many commentators on international arbitration*"[4] and provides consistency and coherence for the parties, and avoids complexity, uncertainty and artificiality.[5]

However, the Supreme Court recognised that this general inference may be negated if there are additional factors indicating a different intention of the parties. The choice of seat alone is not a sufficient factor to displace this general inference, but the Supreme Court endorsed the judgment of Moore-Bick LJ in Sulamérica[6] by confirming that the governing law of the main contract may not apply where there is "*at least a serious risk*" that the arbitration agreement might be invalidated or substantially undermined by that law.[7]

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[1] As opposed to the rules under the Rome I Regulation, which does not apply to arbitration agreements.
[2] In that regard, it is notable that the Supreme Court expressed the view that that the Court of Appeal had placed too much emphasis on the principle of separability. The Supreme Court emphasized that this doctrine was limited to providing that an arbitration clause be treated as separate agreement for the purposes of determining its "*validity, existence and effectiveness*", rather than that the clause should generally be regarded as a separate contract from the main agreement. Enka v Chubb [2020] UKSC 38 at [61].
[3] Ibid at [43].
[4] Ibid at [55].
[5] Ibid at [53].
[6] Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638.
[7] Enka at [109].

The Supreme Court also disagreed with the Court of Appeal's finding that the potential overlap between substantive and procedural rules in the Arbitration Act 1996 justified a "*general inference*" that the choice of an English seat implied a choice of English law.[8]

As a matter of construction, the Supreme Court (by a 3:2 majority) found that the parties had not agreed (either expressly or impliedly) a choice of law governing the main agreement or the arbitration agreement. In such circumstances, the majority considered that it was necessary to apply the closest connection test.[9]

Closest connection test

The majority held that the law of the seat of arbitration will (as a general rule) be the law that is most closely connected to the arbitration agreement.[10] They found that this default rule was supported by considerations of principle and policy, including that:

1. The seat of the arbitration is the place where (legally) the arbitration agreement will be performed, and by agreeing to a seat, the parties submit to the jurisdiction and coercive powers of the courts in that country.[11]

2. This rule is in line with the New York Convention, and the national law giving effect to it.[12]

3. The default rule upholds the "*reasonable expectations of contracting parties*".[13]

4. Legal certainty is promoted by recognising a default rule, and this enables parties to "*predict easily and with little room for argument which law the court will apply by default.*"[14]

The arbitration agreement in Enka provided that the seat of the arbitration was London. Therefore, applying the default rule, the majority held that English law governed the arbitration agreement (and, therefore, that the Court of Appeal was right to grant the anti-suit injunction restraining the Russian proceedings).[15]

Clarity and Certainty

The Supreme Court's decision provides welcome clarity to an area of arbitration law that has long been uncertain. It may, however, remain prudent practice for parties to agree expressly what the law of the

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[8] Ibid at [82].

[9] The minority (Lord Burrows and Lord Sales) agreed with the majority in the Supreme Court that if the parties had expressly or impliedly chosen the law governing the main agreement, this law would generally also apply to the arbitration agreement. However, they found that the parties impliedly chose Russian law to govern the main contract, and that this law also applied to the arbitration agreement.

[10] Notably, the minority disagreed with the majority on this aspect too. The minority considered that the law of the main contract had the closest connection to the arbitration agreement, on the basis (as set out by Lord Sales) that the closest connection test should, as with the implied choice enquiry, "*reflect the likely expectations of the parties as businesspeople*". Ibid at [281]. Lord Sales considered that the boundary between an implied choice and needing to apply the closest connection test is not always clear, and that adopting a "*radically divergent default rule*" at the closest connection stage from the general inference at the implied choice stage (as the majority did), "*risk*[s] *the appearance of arbitrariness*". Ibid at [283].

[11] Ibid at [121].

[12] Ibid at [125].

[13] Ibid at [142].

[14] Ibid at [144].

[15] In any event, the Supreme Court went on to state that, had the arbitration agreement been governed by Russian law, the principles governing whether to grant an injunction would not have changed: "[i]*n both cases the enquiry is whether there has been a breach of the arbitration agreement and whether it is just and convenient to restrain that breach by the grant of an anti-suit injunction*." Ibid at [177]. Both the majority and minority agreed that the English Court would not have been required to defer to the Russian Court on the issue of whether there had been a breach.

arbitration agreement is to be (in addition to agreeing both the law of the main agreement and the seat of arbitration) in order to best ensure that their intentions are not undermined.

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