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ENKA v CHUBB: WHAT IS THE GOVERNING LAW OF AN ARBITRATION AGREEMENT?

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In its landmark judgment in Enka v Chubb, the Supreme Court has clarified the principles for determining which law governs an arbitration agreement where the parties have not made an express choice. The Supreme Court held that the general rule is that where parties have chosen a governing law for the main contract that law will apply to the arbitration agreement. A majority found that where the parties have not chosen a governing law for the main contract, the governing law of the arbitration agreement will generally be the law of the seat of arbitration chosen by the parties. The decision is significant for businesses who use arbitration agreements in their cross-border contracts as it clears up years of uncertainty in this area.

The Background

A Russian power plant was severely damaged in a fire. After paying out on an insurance claim for the damage, Chubb, the Russian insurer of the plant's owner, brought proceedings in the Russian courts against 11 companies, including Enka, a Turkish subcontractor involved in construction work at the plant, arguing they were liable for the damage caused. Enka brought a claim in the English courts for an anti-suit injunction restraining Chubb from continuing the Russian proceedings. Enka argued that the Russian proceedings had been brought in breach of an arbitration agreement, which provided for arbitration in London under ICC Rules. Neither the main contract nor the arbitration agreement within the contract included an explicit governing law clause.

At trial, the Commercial Court dismissed Enka's claim on the basis that the English court was not the appropriate forum to decide it. Following an expedited appeal, the Court of Appeal allowed Enka's claim, holding that questions as to whether the English courts were the appropriate forum were irrelevant, the arbitration agreement was governed by English law and that an anti-suit injunction should be awarded to restrain the Russian proceedings. Chubb appealed to the Supreme Court.

Although both parties agreed that the main contract was governed by Russian law, the parties disagreed

Which laws apply in international arbitration?

The cross-border nature of international arbitration means that different systems of law may govern different aspects of the same arbitration. For example, the principle of separability, which treats an arbitration clause as a separate contract from the main contract for the purposes of issues over validity or enforceability, means that different parts of a contract may be governed by different laws. Under English law:

- **The proper law of the contract** governs the substantive issues referred to arbitration. Parties may choose the proper law of a contract by including a choice of law clause in their contract.
- **The law of the seat of the arbitration** is generally accepted to be the law that governs the arbitration, arbitration procedure and whether any resulting award can be challenged or set aside.
- **The proper law of the arbitration agreement** governs issues relating to the validity and scope of the arbitration agreement.

The central issue in this case was identifying the proper law of the arbitration agreement where the proper law of the main contract containing it differed from the law of the seat of arbitration.

on the law governing the arbitration agreement. Chubb argued that, because the main contract was governed by Russian law, the arbitration agreement was also governed by Russian law. Enka argued that the law of the arbitration agreement was that of the seat of the arbitration, namely English law.

> *"It is a striking feature of the English proceedings that the trial, the appeal to the Court of Appeal and the appeal to the Supreme Court have all been heard in just over seven months. This is a vivid demonstration of the speed with which the English courts can act when the urgency of a matter requires it." (Lord Hamblen and Lord Mance)*

What's the debate about? – "seat" versus "main contract" approaches

As the Supreme Court acknowledged, the issue of which system of law should govern an arbitration agreement when the law of the main contract differs from the law of the seat of arbitration has "long divided courts and commentators, both in this country and internationally". On one side, some have argued that the law that governs a contract should generally also govern the arbitration agreement which, though separable, forms part of that contract. On the other side, others have argued that the law of the seat of the arbitration, not the law of the main contract, should generally govern the arbitration agreement. The debate is an important one because it affects which laws govern issues around the validity and scope of arbitration agreements. This has proven a thorny issue for some time, with Court of Appeal decisions falling on either side of the fence.

> *"The time has come to seek to impose some order and clarity on this area of the law." (Lord Justice Popplewell, Court of Appeal)*

On which side of the fence did the Supreme Court land? – the "seat" approach

By a 3:2 majority (delivered by Lords Hamblen and Leggatt and with which Lord Kerr agreed), the Supreme Court dismissed Chubb's appeal.

As the EU regime of Rome I does not apply to arbitration agreements, the English court must apply English common law rules to determine which law governs an arbitration agreement. The law applicable to an arbitration agreement is:

1. The law expressly or impliedly chosen by the parties to govern the arbitration agreement; or
2. In the event no choice has been made, the law which is "most closely connected" to the arbitration agreement.

Express or implied choice? Whether the parties have expressly or impliedly agreed on a choice of law to govern the arbitration agreement will be determined by construing the arbitration agreement and the contract containing it as a whole, applying English law rules of contractual interpretation. This will depend on the particular circumstances.

Law governing the main contract? Where the parties have not expressly or impliedly chosen the law governing the arbitration agreement, but they have chosen a law governing the main contract, the law of the arbitration agreement will usually be governed by the law chosen to govern the main contact. Such an approach fosters certainty, consistency and coherence, and avoids complexities, uncertainties and artificiality.

The choice of a different jurisdiction as the seat of the arbitration is not in itself enough to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement. Additional factors that may, however, imply that the arbitration agreement was intended to be governed by the law of the seat include where the chosen law would render the arbitration agreement invalid or defeat the commercial purpose of the arbitration clause.

The Court of Appeal's finding that, except in a minority of cases, there is a "strong presumption" that, by choosing a seat of the arbitration, the parties have impliedly chosen the same law to govern the arbitration agreement, was wrong. Whilst in some circumstances, a choice of seat could support such an inference, the Arbitration Act 1996 does not justify any general inference where the chosen seat is England.

Closest connection test? This case was relatively unusual because the parties had not chosen a law to govern the main contract (or the arbitration agreement). Where no choice (express or implied) has been made, the court must determine objectively with which system of law the arbitration agreement has its closest connection. This involves the application of a rule of law.

The majority found that, as a general rule, in the absence of choice, the law of the place chosen as the seat of arbitration will be the law most closely connected with the arbitration agreement, even if it differs from the law applicable to the law of the main contract, because:

- The seat of arbitration is the legal place where the arbitration agreement is to be performed.
- It is consistent with international law, such as the New York Convention, and English laws that give effect to it.
- It gives effect to commercial purpose and is likely to uphold the reasonable expectations of parties who have chosen to resolve their disputes by arbitration in a specified place but have not chosen a governing law for their contract.
- Applying a clear default rule that, in the absence of choice, an arbitration governed by the law of the seat of the arbitration (where designated) is in the interests of legal certainty and enables the parties to predict easily which law the English courts will apply.

There may be exceptions to the ordinary default rule, namely where the arbitration agreement would be invalid under the law of the seat but not under the law governing the rest of the contract or where no seat has been designated, but these cases were "exceptional" and they did not apply in this case.

The majority concluded that, because, in their view, the main contract contained no express or implied choice of Russian law, the default rule applied. The law of the arbitration agreement was the law with which the arbitration agreement was most closely connected: the law of the seat of arbitration. Affirming the Court of Appeal's decision – albeit for different reasons – the majority found that the law of the arbitration agreement was therefore English law.

On the other side of the fence – the "main contract" approach

Lord Burrows and Lord Sales gave dissenting views in Chubb's favour. They agreed with the majority that, where parties expressly or impliedly choose the law of the main contract, that choice would generally also apply to the arbitration agreement. They disagreed what the default position should be absent such a choice.

Lord Burrows and Lord Sales took the view that the parties had in fact made an implied choice that Russian law governed the main contract because of numerous references to Russian law in the main contract and the broader circumstances of the contract pointing to Russia.

However, even if the parties had not made a choice of Russian law for the main contract, Lord Burrows and Lord Sales would have found that the law of the arbitration agreement was the same as the law of the main contract and therefore subject to Russian law. In their view, commercial parties would expect the whole of a contract (including the arbitration agreement) to be governed by the same law. This approach would also avoid practical issues such as the potential for different laws applying to the arbitration agreement and the wider dispute resolution clause in which the arbitration agreement sat or between the "notification" and "written notice" terms used in the dispute resolution clause that were defined elsewhere in the main contract.

What are the court's supervisory powers?

Chubb argued that, because, in its view, the arbitration agreement was governed by Russian law, the English court should decline to grant relief and leave it to the Russian courts to determine whether the Russian proceedings fell within the scope of the arbitration clause. However, had the minority view prevailed that Russian law applied to the arbitration agreement, the Supreme Court unanimously considered that this did not affect the English court's supervisory powers. The English court had supervisory jurisdiction as the court of the chosen

seat of the arbitration. The Supreme Court would therefore have remitted the case back to the Commercial Court to determine, applying Russian law (with the use of expert evidence), whether the Russian proceedings breached the arbitration agreement and if an anti-suit injunction should be granted.

Where next?

Whilst the Supreme Court's decision demonstrates persuasive arguments from whichever side of the "seat" versus "main contract" fence you instinctively sit on, the Supreme Court's majority decision provides welcome clarity to an area that has been muddy and unclear for some time. In the absence of a choice of law, it provides greater certainty for commercial parties opting for London seated arbitration which law will govern their arbitration agreements.

As a practical matter, the Supreme Court's decision is a helpful reminder that the key features of an agreement should be spelt out in clear, express terms. In the interests of certainty, parties negotiating cross-border contracts with arbitration clauses should consider including an express choice of law in the main contract *and* in the arbitration agreement.

Finally, similar issues have been raised in the case of *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6. In that case, the Commercial Court (whose decision was upheld by the Court of Appeal) adjourned enforcement of an arbitral award pending a challenge in the French courts, but decided certain preliminary issues, including that the arbitration agreement was governed by English law. The case has reportedly been appealed to the Supreme Court. It will be interesting to see whether the Supreme Court in that case provides any further gloss to the principles laid down in *Enka v Chubb*.

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