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Governing Law Of Arbitration Agreements: *An Analysis Of Enka v Chubb*

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In an international commercial contract that contains an arbitration clause, three distinct systems of law may be engaged to govern different aspects of the agreement: the main contract itself, the agreement to arbitrate and the arbitration process.

The question of which system of law governs the agreement to arbitrate is not always clear-cut. In the absence of an express choice, some commentators say that it should be governed by the laws of the seat of the arbitration. On the other hand, some say that it should be governed by the same system of law as that governing the main contract. There is also no uniformity on the applicable principles on this issue across common law and civil law jurisdictions.

The recent United Kingdom Supreme Court decision in *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb*[1] provides some clarity on this issue. This landmark decision confirmed the applicable principles in ascertaining the governing law of an arbitration agreement.

Background Facts

Enka was a Turkish sub-contractor for the construction of a power plant in Russia. The construction contract contained an arbitration agreement providing for disputes to be settled by International Court of Arbitration (ICC) arbitration seated in London. The contract, however, did not expressly provide for the governing laws of the main contract or the arbitration agreement.

Following a fire at the power plant, Chubb brought legal action against Enka in the Russian Court seeking damages for losses arising from the fire. In response to the Russian proceedings, Enka commenced proceedings against Chubb in the English Commercial Court, seeking an anti-suit

[1] [2020] UKSC 38

injunction to restrain the Russian proceedings on the ground that they have been brought in breach of the arbitration agreement.

The English Commercial Court dismissed Enka's claim on the basis that the English Court is not the appropriate forum to decide the matter. However, on Enka's appeal, the Court of Appeal held that the English Court, being the court having supervisory jurisdiction over the arbitration, was the appropriate forum for the claim and proceeded to grant the anti-suit injunction. Dissatisfied with the decision, Chubb appealed to the Supreme Court.

Legal Issue Before The Supreme Court

The issue of whether the anti-suit injunction should be granted turns on whether the arbitration agreement is to be governed by Russian or English laws. If it is to be governed by Russian law, Chubb argues that the dispute would fall outside the scope of the arbitration agreement and thus, the Russian proceedings were brought correctly. As there was no breach of the arbitration agreement, the anti-suit injunction should not be granted. On the other hand, if it is to be governed by English law, the dispute would fall within the scope of the arbitration agreement and the ICC arbitration should be given precedence over the Russian proceedings.

Supreme Court's Decision

In a majority decision, the Supreme Court held that the law applicable to the arbitration agreement will be:

- The law chosen by the parties to govern it, whether expressly or impliedly; or
- In the absence of any express or implied choice, the system of law with which the arbitration agreement is 'most closely connected' to.

Express or implied choice

It is easy to ascertain the governing law of an arbitration agreement when the parties expressly stipulate it in their agreement. The answer is less clear when the parties have

made an express choice of the law to govern the main contract but not the arbitration agreement. Will this constitute an implied choice by the parties to use the same law to govern the arbitration agreement?

The Supreme Court held that the inference to be drawn in such a situation is that the same law governing the main contract will also govern the arbitration agreement. This is because the arbitration agreement and the main contract containing it should be construed as a whole and not separately. To apply different systems of law to different parts of a contract would give rise to inconsistency and uncertainty. The parties' express choice of the seat of the arbitration, by itself, is not sufficient to negate the inference.

Closest connection test

On the facts of *Enka*, as the parties have not made any express or implied choice of the system of law to govern the main contract or the arbitration agreement, the question of which system of law is to govern the arbitration agreement falls to be answered using the 'closest connection' test.

Given the parties' choice of London as the seat of the arbitration, the Supreme Court found that the arbitration agreement had the closest connection to England and was, thus, governed by English law. The Supreme Court concluded that the dispute fell within the scope of the arbitration agreement and that the Russian court proceedings were commenced in breach of the arbitration agreement. Accordingly, it upheld the Court of Appeal's decision to grant the anti-suit injunction.

Commentary

Although the Supreme Court arrived at the same conclusion as the Court of Appeal[1] in the case, it is important to note that it rejected the Court of Appeal's approach of finding a 'strong presumption'. The 'strong presumption' is that by choosing the seat of the arbitration the parties are presumed to have chosen the same law to govern the arbitration agreement. The Supreme Court found no basis in the Arbitration Act 1996 to justify such a presumption. Instead, the Supreme

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Court affirmed the three-stage process set out by the Court of Appeal in the *Sulamerica*[2] case of enquiring into:

- express choice
- implied choice
- the system of law with which the arbitration agreement has the closest and most real connection.

In Malaysia, the Federal Court in the *Thai-Lao Lignite Co Ltd* case[3] adopted the 'closest connection test' in determining the governing law of the arbitration agreement when there is no express choice of law. This will usually yield the result of the governing law of the arbitration agreement being the same as that of the seat of the arbitration, as the parties' stipulation of the seat of the arbitration is taken as their tacit agreement for the arbitration agreement to be governed by the same law. The Federal Court did not adopt the *Sulamerica* three-stage process despite making reference to the case.

In the drafting of a commercial contract, sometimes the governing law of the arbitration agreement may be overlooked. However, as the *Enka* case demonstrates, a failure to stipulate the governing law could lead to unintended legal consequences. Parties should consider the need to provide for an express choice of law in the contract to bring about certainty and avoid any disputes further down the road.

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[2] [2012] EWCA Civ 638
[3] [2017] 9 CLJ 273