UK SUPREME COURT ISSUES GUIDANCE ON THE GOVERNING LAW OF AN ARBITRATION AGREEMENT: ENKA V CHUBB

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UK International Arbitration Alert

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INTRODUCTION

On 9 October 2020, the UK Supreme Court decision in *Enka Insaat ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38 provided welcome clarity as to the English law principles and approach involved in ascertaining the governing law of an arbitration agreement.

It is well established that an arbitration agreement within a contract is regarded as a separate agreement and may be governed by a different law to the contract as a whole (the main contract). The Supreme Court has affirmed the three stage process set out by the Court of Appeal in *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA [2012] EWCA Civ* 638 to determine the governing law of an arbitration agreement.

However, the Supreme Court has departed from the Court of Appeal's strong presumption that parties to a contract have impliedly chosen the law of the seat of arbitration as the law applicable to the arbitration agreement. The Supreme Court said that where the parties have not specified the law applicable to the arbitration agreement but have chosen the law of the main contract, they will generally be presumed to have intended, by way of implied choice, that law to apply to the arbitration agreement as well. But where the parties have not chosen the law of the main agreement or the arbitration agreement, generally the law of the seat will be the law most closely connected to the arbitration agreement, and will therefore be applied.

THE FACTS OF THE CASE

The dispute in this case arose out of OOO Insurance Company Chubb (Chubb Russia) commencing proceedings in the Moscow Arbitrazh Court against Enka Insaat Ve Sanayi AS (Enka) and ten other defendants. Enka was a sub-contractor involved in building works on the Berezovskaya power plant in Russia and Chubb Russia acted as insurer to the head contractor. Chubb Russia sought damages in relation to a fire causing damage to the power plant. The building contract provided that the method of dispute resolution should be ICC arbitration with a London seat, but did not specify the governing law of the contract or the arbitration agreement.

Enka issued an Arbitration Claim Form in the Commercial Court in response, seeking (i) a declaration that Chubb Russia was bound by the arbitration agreement in the building contract and that it applied to the claim in the Moscow Arbitrazh Court, and (ii) an anti-suit injunction pursuant to section 37 of the Senior Courts Act 1981 to prevent Chubb Russia from continuing the proceedings in the Moscow Arbitrazh Court in breach of the agreement to arbitrate.

The Commercial Court refused to grant an anti-suit injunction. The Court of Appeal allowed the appeal against the Commercial Court decision and held that the choice of seat of arbitration as London meant that the arbitration agreement was governed by English law, notwithstanding that the main contract was held to be governed by Russian law. The Court of Appeal issued an anti-suit injunction restraining Chubb Russia's claim in the Moscow Arbitrazh Court.

The Supreme Court held that the Court of Appeal was correct to issue an anti-suit injunction, as the claim in the Moscow Arbitrazh Court was brought in breach of the arbitration agreement. It held that the arbitration agreement was governed by English law, but the approach taken to decide the governing law of the arbitration agreement was different.

GOVERNING LAW OF THE ARBITRATION AGREEMENT

In dismissing Chubb's appeal against the Court of Appeal decision, the Supreme Court held that English common law rules (rather than the Rome I regulation) should be applied when determining the law of the arbitration agreement, finding (as in *Sulamérica*) that an arbitration agreement will be governed by (i) the law expressly chosen by the parties; (ii) the law impliedly chosen by the parties; or (iii) in the absence of such choice, the law with which the contract is most closely connected. Beyond that, the following key principles emerge from the Supreme Court's approach to determining the law applicable to an arbitration agreement:

- Where the parties have expressly agreed on a choice of law to govern the arbitration agreement, this will be the applicable law of the arbitration agreement.
- Where there is no express provision in relation to the governing law of the arbitration agreement, an express choice of governing law in the main contract will generally be considered to represent an implied choice of law applicable to the arbitration agreement.
- Whilst the Court of Appeal found that there was a strong presumption that the parties impliedly chose the law of the seat of the arbitration as the governing law of the arbitration agreement, the Supreme Court found that "*the choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract [i.e. the main contract] was intended to apply to the arbitration agreement.*"
- If there is a provision which indicates that the arbitration will be treated as governed by the law of the seat, or there is a serious risk that the arbitration agreement would be ineffective if governed by the same law as the main contract, this would be sufficient to negate the inference that the governing law of the main contract should be applicable to the arbitration agreement.
- In the absence of any choice of law for the main contract and the arbitration agreement, the arbitration agreement is governed by the law with which it is most closely connected. Where the parties have chosen a seat of arbitration, this will generally be the law of the seat, and that was the determining factor in the Enka case.

COMMENT

The choice of governing law of an arbitration agreement can determine whether or not a dispute falls within the scope of that agreement. The governing law of an arbitration can also affect the validity of the arbitration

agreement and the jurisdiction of the arbitral tribunal. When drafting agreements which include an agreement to arbitrate, it remains advisable to give specific thought to the law governing the arbitration agreement, and if there is a wish for the arbitration agreement to be governed by a system of law different to that of the main contract, then in accordance with this decision of the UK Supreme Court there needs to be express provision within the arbitration clause for the governing law of the arbitration agreement.

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