SUPREME COURT RULES ON LAW OF ARBITRATION AGREEMENT: IMPLICATIONS OF *ENKA V CHUBB*

In *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"*, the Supreme Court clarified definitively the principles for ascertaining the law governing an arbitration agreement (the **AA law**). The Supreme Court held that where the AA law is not expressly specified, a choice of the law governing the main contract (the **main contract law**), whether express or implied, will generally also apply to an arbitration agreement which forms part of that contract. In the absence of an express or implied choice of AA law, the default position is that the AA law will be the law of the seat.

Key issues

- The Supreme Court has provided much-needed certainty on the principles for determining the law of arbitration agreements.
- Where the AA law is not expressly specified, a choice of the law governing the main contract, whether express or implied, will generally also apply to an arbitration agreement which forms part of that contract.
- The court shall apply a three-stage test to identify:

  (i) whether there was an express choice of AA law;

  (ii) whether there was an implied choice of AA law;

  (iii) in the absence of any express or implied choice of AA law, with which system of law the arbitration agreement is most closely connected. The default rule is that the law most closely connected with the arbitration agreement will be the law of the seat.
- The judgment should be a powerful reminder that an arbitration agreement requires attentive drafting.
- Parties should consider including an express choice of governing law for both the underlying contract and the arbitration agreement (and should always do so where the governing law of the underlying contract and the law of the seat are different).

BACKGROUND

It is well established that an arbitration agreement within a contract may be governed by a law different from the main contract law. The determination of the main contract law is governed by the choice of law rules in the EU Rome I Regulation (593/2008). However, since arbitration agreements are expressly excluded from the scope of the regulation, the AA law falls to be determined by traditional common law choice of law rules.

Before *Enka v Chubb* the leading authority, *Sulamerica v Enesa*, set out a three-stage test:

- Have the parties made an express choice of the AA law?
- If not, have they made an implied choice of the AA law?
- If not, with which system of law does the arbitration agreement have its closest and most real connection?

The application of the three-stage inquiry is not always straightforward. The difficulty arises when parties have not made an express choice of the AA law (which is often the case), and the particular circumstances of the case point to different laws as the potential AA law, either a law applicable as a matter of implied choice or the law with the "*closest and most real connection*". A prime example is when the main contract is governed by one system of law, but the arbitration agreement provides for arbitration seated in a different jurisdiction.

The Dispute

In May 2019 Chubb Russia, the first defendant in the case, commenced proceedings against Enka in the Moscow courts. Enka asserted that Chubb Russia brought this claim in breach of an arbitration agreement contained in a

contract which was silent as to the governing law of the main contract and of the arbitration agreement.

In September 2019 the Moscow court accepted to hear Chubb Russia's claim. Enka subsequently issued a claim in the Commercial Court in London, seeking a declaration that Chubb Russia was bound by the arbitration agreement, and an anti-suit injunction restraining Chubb Russia from continuing the claim before the Moscow courts. Enka's injunction application was dismissed at first instance and the matter referred to the Court of Appeal.

Court of Appeal decision

The Court of Appeal overturned the first-instance decision and granted the anti-suit injunction. The Court of Appeal held that there is a "*strong presumption*" that where there is no express choice of AA law, the parties have impliedly chosen the law of the seat to govern the arbitration agreement. In a departure from *Sulamerica*, the court went even further to conclude that the main contract law has little relative weight on the determination of the AA law, and that this general rule was subject only to any particular features of the case demonstrating powerful reasons to the contrary.

SUPREME COURT DECISION

By a majority of three to two the Supreme Court dismissed the appeal and affirmed the Court of Appeal's decisions that the AA law was that of the seat of arbitration, English law, and to grant an anti-suit injunction. However, the Supreme Court's reasoning in reaching this conclusion differed significantly from that of the Court of Appeal.

While the Supreme Court found the Court of Appeal was right to affirm the three-stage test in *Sulamerica*, it reformulated the relative weight to be attached to the law of the seat of the arbitration where the main contract law and the law of the seat differ, or where the main contract does not include a choice of law. It held that the correct approach was as follows (and as set out in the decision tree at page 4 of this briefing):

First limb

The court will consider first whether there was an express choice of AA law. This is ascertained by construing the arbitration agreement and the main contract containing it, as a whole, applying the ordinary principles of contractual interpretation of English law.

Second limb

Second, the court will consider whether there was an implied choice of AA law. The Supreme Court reaffirmed the general rule in *Sulamerica* that, where there is a choice of law for the main contract, the parties impliedly chose the main contract law to govern the arbitration agreement as well, unless there is good reason to find otherwise. However, in *Enka* the Supreme Court went further and stated that this general rule applies where there is an implied choice of main contract, as well as an express choice.

Importantly, in a marked contrast to the Court of Appeal, the Supreme Court found that simply because an arbitration clause is to be treated as a distinct agreement for the purposes of determining its validity, existence and effectiveness, it does not follow that the arbitration agreement is regarded as a different and separate agreement for the purpose of determining the AA law. Therefore, the choice of curial law is not, by itself, sufficient to negate the

inference that the parties intended the choice of the main contract law to apply to all clauses within the contract, including the arbitration clause.

Third limb

In the absence of any express or implied choice of AA law, the court must decide with which system of law the arbitration agreement is most closely connected, irrespective of the intentions of the parties.

Citing the leading authorities of *Sulamerica* and *C v D*, the court held that the default rule is that the law most closely connected with the arbitration agreement will be the law of the seat of the arbitration. The sole exception to this default rule which the court elaborated on was an obiter comment that the default rule may not apply where the arbitration agreement would be invalid under the law of the seat, but not under the law governing the rest of the contract (in circumstances where, as in *Enka*, no choice of main contract law had been made).

Ultimately, the court held that the parties had not chosen (expressly or impliedly) either the main contract law or the AA law. The court held that the main contract was governed by Russian law due to the close connection of the main contract with Russian law. The law of the seat of the arbitration (i.e., English law) was held to govern the arbitration agreement also on the basis of the close connection.

TAKEAWAYS

The Supreme Court's decision provides much-needed certainty on the principles that courts should apply to determine the AA law, specifically in cases where there is no express choice and the main contract law differs from the curial law. This is good news not only for international arbitration users at large, but also for London as one of the world's most popular seats.

Although the underlying principles have now been clarified, the weight given by the Supreme Court to an implied choice of the main contract law will mean more uncertainty for the parties in respect of the AA law (where the latter is not expressly chosen). This is likely to result in more disputes, which will only be resolved by the courts on the specific facts of every case.

The facts and ultimate decision in *Enka* should be a powerful reminder that an arbitration agreement requires attentive drafting. Parties should consider including an express governing law choice for both the underlying contract and the arbitration agreement (and should always do so where the governing law of the underlying contract and the law of the seat are different – e.g. '*The governing law of this arbitration agreement shall be the substantive law of England.*'). Failing to draft with sufficient clarity may give rise to lengthy and costly proceedings on procedural issues before any dispute on the merits can be heard.

Case references

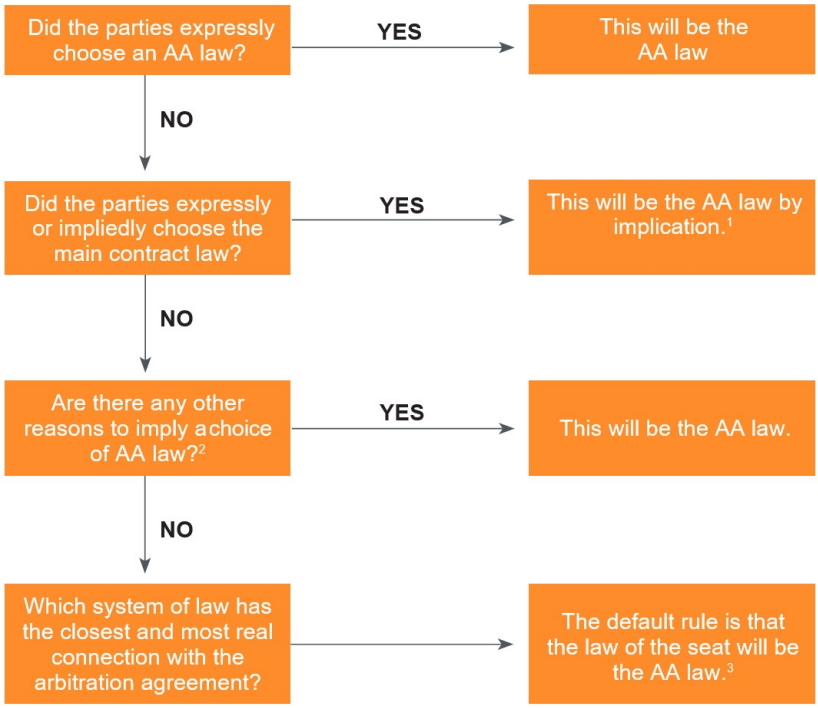
Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb" [2020] UKSC 38.

Sulamerica Cia Nacional de Seguros SA v Enesa Engelharia SA [2013] 1 WLR 102.

C v D [2007] EWCA Civ 1282.

The Supreme Court's decision in *Enka v Chubb*

Test to determine law of the arbitration agreement (AA law)



1. The general rule is that, where the parties expressly or impliedly chose the main contract law, the parties impliedly intended that the AA law should follow the main contract law unless there is good reason to find otherwise. The following were given as examples of circumstances which may negate such an inference:

(a) any provision of the particular curial law which indicates that, where an arbitration is subject to the curial law, the arbitration will also be treated as governed by that country's law;

(b) where there is a serious risk that the arbitration agreement would be ineffective if it were governed by the same law as the main contract;

(c) the arbitration agreement contains a standard form clause with distinctive or well-known legal meanings in the law of the seat. The provision of a curial law alone is not enough to establish a general rule that the parties impliedly intended the law of the seat to be the AA law.

2. The court stated that the provision of a curial law alone is not enough to establish a general rule that the parties impliedly intended the law of the seat to be the AA law. However, the court also stated that whether a choice of curial law carries any implication that the parties intended the same system of law to govern the arbitration agreement will depend on the content of the relevant curial law.

3. The sole exception to this default rule which the court gave as an example was an obiter comment that the default rule may not apply where the arbitration agreement would be invalid under the law of the seat, but not under the law governing the rest of the contract (in circumstances where, as in *Enka*, no choice of main contract law had been made).

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