The Supreme Court clarifies the test for determining the governing law of an arbitration agreement: Enka v Chubb

The Supreme Court has given judgment in Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38, which is now the leading authority on how the governing law of an arbitration agreement is to be determined when there is no express choice made by the parties.

In summary, where the parties have not chosen the law applicable to the arbitration agreement, but they have chosen the law to govern the main contract, the law applicable to the main contract will generally apply to the arbitration agreement.

The Key Facts

The underlying dispute concerned a powerplant in Russia which was severely damaged by fire. Chubb Russia had insured the owner of the power plant against such damage and Enka, a Turkish engineering company, was a sub-contractor in the construction project. Chubb Russia paid an insurance claim by the owner and, by doing so, assumed any rights of the owner to claim compensation from third parties, including Enka, for damage caused by the fire.

In May 2019, Chubb Russia brought a claim against Enka in Russia. In response, in September 2019, Enka brought an arbitration claim in the High Court in London arguing that Chubb Russia was in breach of the arbitration agreement and seeking an anti-suit injunction to restrain Chubb Russia proceeding in the Russian courts.

First Instance and Court of Appeal

The High Court dismissed Enka's claim on the basis that the appropriate forum to determine the scope of the arbitration agreement was the Russian court.

The Court of Appeal judgment, handed down by Lord Justice Popplewell, overturned the first instance decision. It was held that in the absence of an express choice of the law that is to govern the arbitration, there is a strong presumption that the arbitration agreement is to be governed by the law of the seat. In application of this test, it was determined that there was no express choice of law; the arbitration agreement was governed by English law; and it was appropriate to grant an anti-suit injunction.

The Supreme Court's Decision

The Supreme Court dismissed Chubb Russia's appeal by a 3:2 majority with the majority judgment being given by Lord Hamblen and Lord Leggatt with whom Lord Kerr agreed and Lord Sales and Lord Burrows dissenting. In summary, the majority held that:

- Where an English court must decide which system of law governs an arbitration agreement, it should apply the English common law rules for resolving conflict of laws.

- Applying English common law rules, the law applicable to the arbitration agreement will be: (i) the law expressly or impliedly chosen by the parties; or (ii) in the absence of such choice, the system of law "most closely connected" to the arbitration agreement.

- Where the parties have not specified the law applicable to the arbitration agreement, but the parties have (expressly or impliedly) chosen the law to govern the contract, the choice of governing law for the contract will generally apply to the arbitration agreement.

- The Court of Appeal was wrong to find that there is a "strong presumption" that the parties have, by implication, chosen the law of the seat of the arbitration to govern the arbitration agreement.

- Where the parties have not chosen the law to govern the contract, the court must determine the law with which the arbitration is most closely connected. In general, the arbitration agreement will be most closely connected with the law of the seat of arbitration.

The majority held that in this case the parties had not chosen the law to govern the contract. In these circumstances the validity and scope of the arbitration agreement was governed by the law of the chosen seat of the arbitration, namely London. Therefore, the majority upholds the Court of Appeal's conclusion that English law governed the arbitration agreement, albeit for very different reasons.

Comment & Practical Implications

The New Test

The Supreme Court's decision is to be welcomed as it provides a straightforward test to determine which law applies to the arbitration agreement:

1. If the parties have specified the law applicable to the arbitration agreement, such law will apply;

2. Failing this, if the parties have chosen the law to govern the main contract, this choice will generally apply to the arbitration agreement;

3. Failing this, the law of the seat of the arbitration will generally apply to the arbitration agreement, as the law which the arbitration agreement is most closely connected.

A key take-away for parties is that the decision represents a clear presumption in favour of the law governing the main contract where specified, over the law of the seat.

Further, the decision exemplifies the attractiveness of the English courts for international dispute resolution. The trial, the appeal to the Court of Appeal and the appeal to the Supreme Court were all heard in just over seven months, amidst the coronavirus pandemic. The majority described this as *"a vivid demonstration of the speed with which the English courts can act when the urgency of a matter requires it"*.

Future Litigation

Further litigation in this area is expected and each case will be fact-specific. First, the Supreme Court identified possible exceptions to the general test above. For example, some factors may imply that the arbitration agreement was intended to be governed by the law of the seat such as: (a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration will also be treated as governed by that country's law; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective.

Second, it remains open to parties to argue that on the basis of English law principles of interpretation and construction that (a) there is an express choice as to the law governing an arbitration agreement (as in *Kabab-Ji v Kout Food* [2020] EWCA Civ 6); or (b) there is an implied choice as to the law governing the main contract, even if there is not an express choice.

Parties are recommended to take time when drafting international contracts containing an arbitration clause to include an express choice of law in respect of the arbitration agreement, as well as the main contract.

Written by Tom Poole and Hannah Fry of 3 Hare Court