Enka v Chubb: Finally, a Final Decision on the Law of Arbitration Agreements

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On 9 October 2020, the Supreme Court handed down judgment in ***Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb*** [2020] UKSC 38, unanimously confirming the Court of Appeal's decision to grant injunctive relief restraining proceedings in Russia in apparent breach of the parties' agreement to arbitrate their disputes in London.

However, the members of the court were not unanimous in the route they took to arrive at their decision, notably on the important issue of the position of English law on the governing law of agreements to arbitrate. In giving judgment, the majority also departed from the position of the Court of Appeal on this issue of law – reaching the same outcome, but for different reasons.

In this short article, we touch on the intricacies and nuances of the majority and minority positions, before reflecting on the finality the decision brings in relation to this vexing question of arbitration law, and the implications for contract drafters when it comes to making considered selections of a governing law and place of arbitration.

The Issue

The question of the law applicable to an arbitration agreement which is part of a main contract has come before the English courts on a number of occasions. The analyses and outcomes have not, however, always been consistent. Given the impact that different findings as to the applicable law can have on the invalidity, non-applicability or unenforceability of an arbitration agreement, it was not surprising to hear Poppelwell LJ in the Court of Appeal in ***Enka*** declare that "the time has come to seek to impose some order and clarity on this area of the law" ([2020] EWCA Civ 574).

Essentially, two possible approaches have emerged when it comes to determining the law applicable to arbitration agreements, absent an express choice of governing law for the contract:

(i) The first involves determining the law that governs the main contract, and presuming that this is also the law that governs the arbitration agreement.

(ii) The second involves the presumption that the parties' choice of a seat of arbitration reflects their choice of governing law for the arbitration agreement more generally.

In his dissenting judgment, Lord Burrows used the shorthand of the "main contract" and "seat" approaches respectively.

The High Court and Court of Appeal Decisions

At first instance, Baker J in the High Court concluded that there was no need to determine the law applicable to the arbitration agreement, refusing to issue the anti-suit injunction sought by the claimant, Enka, on the basis of *forum non conveniens* ([2019] EWHC 3568 (Comm)).

Subsequently, the Court of Appeal reversed that decision, issuing the injunction on the basis of the "seat" approach. It considered that the parties' choice of an English seat meant that they had impliedly chosen English law as the law that governed the arbitration agreement. This, the Court of Appeal determined, might even be the outcome based on a proper construction of the contract as a whole, where the parties had included an express choice of law provision in their agreement (para 90).

The Supreme Court Majority Decision

Chubb appealed the decision, arguing that the parties had chosen Russian law to govern their contract; that this therefore governed the arbitration agreement; and that, as a result, the Russian courts were best placed to decide whether or not the Russian proceedings which Enka sought to restrain were in breach of the arbitration agreement.

On the governing law question, the majority in the Supreme Court adopted the "seat" approach. They did so by applying English common law on the principles as to conflicts of law, as the Rome I Regulation does not apply to arbitration agreements. In doing so, they concluded that the choice of seat represented the choice of a system of law by the parties that they considered to be most closely connected with the arbitration agreement. There were four reasons why this was so:

(i) **Place of performance**: The majority considered that the seat represented the place where "legally, if not physically" the arbitration agreement was to be performed. As such, the seat was the place "to whose system of law the arbitration agreement is most closely attached" (para 121).

(ii) **Consistency with international law and legislative policy**: The majority found it compelling that, in setting out the limited circumstances in which recognition or enforcement of an arbitral award may be refused, Article V(1)(a) of the New York Convention refers amongst other things to proof that the arbitration agreement is not valid "under the law of the country where the award was made" (para 125).

(iii) ***Giving effect to commercial purpose***: Curiously, the majority only came to the question of the parties' implied choice of governing law as the third of four considerations. They opined that "if the parties had been required to make a common choice of law to govern their arbitration agreement at the time of contracting" it was "much more likely that [the parties] would have settled on the law of the place which they had chosen as the seat of arbitration" (para 142).

(iv) **Legal certainty**: The majority considered that providing a general rule of English law as to the law governing arbitration agreements was important in itself, as it would "enable the parties to predict easily and with little room for argument which law the court will apply by default" (para 144).

The Minority View

The question of the applicable law divided the members of the Supreme Court, just as it has divided the English other common law courts around the world in recent decades (notably including ***Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA*** [2012] EWCA Civ 638 and ***C v D*** [2007] EWCA Civ 1282 in England; and the recent case in the Singapore Court of Appeal of ***BNA v BNB*** [2019] SGCA 84). A minority of Lord Burrows and Lord Sales favoured what Lord Burrows referred to in his dissenting judgment as "a principled solution" – namely, the "main contract" approach. This solution would address his concern that "insufficient weight has traditionally been given to the implied choice of the parties", with the odd result that while an express choice of law in a main contract would generally be taken to apply to an arbitration agreement, an implied choice would not. Lord Burrows was vociferous: "it makes no rational sense to place heavy weight on an express choice in the main contract while placing little weight on an implied choice in the main contract" (para 245).

Lord Burrows went on to set out several powerful reasons why the implied choice of law of the main contract should not be overlooked in favour of the choice of a place of arbitration. In doing so, he referred to the interesting analogy of an exclusive jurisdiction clause, stating that whereas the courts have on occasion seemed all too ready to presume that an arbitration agreement in a contract was understood by the parties to be governed by a law different from that of the main contract, "It would be surprising if, at least normally, the proper law of the jurisdiction clause is anything other than the same as the proper law of the main contract" (para 254).

Ultimately, it appears that the minority's greatest concern was that the doctrine of separability of an arbitration agreement from its main contract had at its origin the interest that parties undoubtedly have of insulating their dispute resolution clause in the case of the invalidity of the broader contract in which it appeared. This is reflected in section 7 of the Arbitration Act 1996. As Lord Burrows concluded, "that purpose does not extend to working out the conflict of laws rules applicable to an arbitration agreement. It follows that in deciding on the proper law of the arbitration agreement, the arbitration agreement should be regarded as part of the main contract" (para 233).

The Implications

At last, with the decision of the highest court in the land comes finality. Whether one sides with the logic and principles of the majority, or the persuasive and forceful arguments of the minority, we now know with a significant degree of certainty what the decision of the English courts will be when it comes to determining the law applicable to an arbitration agreement absent an express choice. This has two important implications for contract drafters.

The first is that parties should stipulate, in clear terms, the system of law that they have chosen to govern their contract. Only in exceptional circumstances will the English courts conclude that their arbitration agreement is governed by another system.

Ideally, the parties will also spell out which law they have chosen to govern their arbitration clause. That may not be realistic in all circumstances and is probably more than one has a right to expect where the parties have not stipulated a law that governs the contract more generally.

Accordingly, the second important point is that parties need to be aware of the consequences that follow from their choice of a place to arbitrate. Certain jurisdictions that are considered to be supportive of the arbitration of international disputes have emerged as the predominant choice in recent years. As the Supreme Court noted in the majority decision, "the primary reason for selecting London as a place of arbitration is no longer the international character of London as a commercial centre but its attractiveness specifically as a forum in which to arbitrate international disputes" (para 113). That could hardly be better illustrated than the Supreme Court's unanimous decision in Enka to act to restrain foreign proceedings where the parties had chosen the English courts to supervise and enforce their arbitration agreement – regardless of its governing law, or the methodology used to work out what that is.

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"Truly a super silk - devastatingly sharp and exceptional on his feet." (Legal 500 UK, 2020)

Simon Rainey QC is one of the best known and most highly regarded practitioners at the Commercial Bar. He has a reputation which is second to none for his intellect and legal analysis ("fantastically intelligent and tactically astute"). He is acclaimed for his advocacy skills ("a stunning advocate") and his cross-examination ("excruciatingly superb"). But he is equally well known to his clients as a cheerful team player, who rolls up his sleeves in long and complex trials and arbitrations and who prides himself on high standards of client care ("incredibly user friendly" and "lovely to work with").

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