Enka v Chubb: The Supreme Court Rules on the Law Applicable to Arbitration Agreements

On 9 October 2020, the Supreme Court of the United Kingdom handed down an important judgment on the test for determining the applicable law of an arbitration agreement: Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38. The judgment provides welcome clarity to an area of arbitration law which had become unnecessarily complex and uncertain as reflected in conflicting Court of Appeal decisions. In this alert, we summarise the background to the decision and the decision itself before discussing some of the possible implications for parties who choose London as a seat for international arbitration.

Background

Where, as is common in international transactions, parties agree that their contract shall be governed by the law of a given country, but that any arbitration shall be ‘seated’ in a different country, this may give rise to different applicable laws.

In common with almost all ‘arbitration-friendly’ jurisdictions, English arbitration law recognises that the arbitration clause or agreement contained within a contract is to be treated as if it were a separate agreement: the so-called principle of separability. This is important to ensure, amongst other things, that any alleged invalidity of the main contract would not similarly taint the arbitration agreement and potentially deprive a party of its right to arbitrate when it matters most.

The law that governs an arbitration agreement governs the existence, validity and scope of the parties’ agreement to arbitrate, and may have an important bearing on the jurisdiction of a tribunal and the enforceability of any award. Enka v Chubb is therefore of critical importance to parties who select arbitration as a method of dispute resolution.

In English law, the approach to determining the applicable law of an arbitration agreement has been to engage in a common law conflicts of law analysis. In broad terms, an arbitration agreement is governed by its applicable law, namely: (1) the law expressly or impliedly chosen by the parties; and (2) in the absence of such choice, the law which is most closely connected with the arbitration agreement.¹

In practice, however, parties rarely provide in express terms that their arbitration agreement shall be governed by a particular law. What then is the applicable law of an arbitration agreement absent express

¹ Dicey, Morris & Collins on the Conflict of Laws, 15 ed., Rule 64(1).
choice? The rival contenders are: (1) the law of the ‘main’ contract; or (2) the law of the ‘seat’ of the arbitration.

For almost two decades there have been conflicting decisions from the English courts regarding the correct approach.²

The Supreme Court has put an end to the debate. In summary:

- An express choice of law in the main contract will generally apply to an arbitration agreement which forms part of the main contract;
- The choice of a different country as the seat of the arbitration will not, without more, be sufficient to negate an inference that a choice of law to govern the main contract was intended to apply to the arbitration agreement as well;
- That inference may be overcome where there is, for instance, a serious risk that if the arbitration agreement were governed by the same law as the main contract, the arbitration agreement would be ineffective; and
- Where the parties have not chosen a law to apply to the arbitration agreement (either expressly or impliedly), then the applicable law will generally be the law of the seat, even if that differs from the law of the main contract.

The Supreme Court decision is welcome as it promotes certainty. It is also welcome because it demonstrates once again the supportive role of the English courts and the speed with which they can act where the urgency of a matter requires it.

The judgment is comprehensive and addresses a number of important issues in English arbitration law.

Summary of Case

The underlying dispute related to an extensive fire which severely damaged a power plant in Russia in February 2016. Enka was a subcontractor engaged to perform works within the plant, while Chubb acted as insurer to the plant’s owner. Following the fire, Chubb paid out a significant sum under an insurance policy and related agreements and subsequently filed a claim against Enka (in addition to ten other parties) in the Moscow Arbitrazh Court seeking damages. In response, Enka issued an Arbitration Claim Form in the English Commercial Court seeking: (i) a declaration that Chubb was bound by the arbitration agreement contained in the relevant contract; and (ii) an anti-suit injunction pursuant to section 37 of the Senior Courts Act 1981 restraining Chubb from continuing the proceedings in Russia and ordering it to discontinue the proceedings.

At first instance, the dispute focused on the question of whether Russian or English law could properly be said to govern the arbitration agreement. Andrew Baker J declined to determine the law of the arbitration agreement, and instead refused Enka’s request for relief on the grounds of forum non conveniens.³ He

---

² In particular, compare Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638 with C v D [2007] EWCA Civ 1281.

³ Enka v Insaat ve Sanayi A.S. v OOO “Insurance Company Chubb” [2019] EWHC 3568 (Comm)
concluded that questions of the scope of the arbitration agreement and its impact on the Moscow claim fell to be determined by the Moscow Arbitrazh Court in the Russian proceedings.

Enka appealed to the Court of Appeal. Following an expedited hearing in April 2020, the Court of Appeal overturned the first instance decision, holding that *forum conveniens* considerations are irrelevant in such circumstances. The judgment of Popplewell LJ (with whom Flaux and Males LJJ agreed), summarised the applicable principles for determining the proper law of an arbitration agreement.

First, the Court restated the English common law conflict of law rules applicable to determining the governing law of an arbitration clause, namely: (i) is there an express choice of law of the arbitration agreement?; (ii) if not, is there an implied choice of law?; and (iii) if not, with what system of law does the arbitration agreement have its closest and most real connection?

Secondly, the Court reasoned that contracting parties’ express choice of law to govern their main contract may also amount to an express choice of the governing law of the arbitration agreement. However, such a determination should be based on the interpretation of contract as a whole (including the arbitration agreement). In the event that the law of the main contract was not English law, the principles of construction of the foreign law selected would be applicable. Finally, and crucially, the Court of Appeal determined that, in all other cases, there is a strong presumption that the parties have impliedly chosen the law of the seat as the governing law of the arbitration clause (unless there are powerful countervailing factors in the relationship between the parties or the circumstances of the case).

Applying these principles to the facts of the case, the Court of Appeal found that there was no express choice of Russian law to govern the arbitration agreement and no countervailing factors to suggest that the law of the seat should not be the governing law. As such, English law as the law of the seat governed the arbitration agreement. The Court of Appeal found that there were no strong reasons not to grant the anti-suit injunction sought by Enka, and therefore issued an injunction to restrain the continuation of the Russian proceedings in breach of the arbitration agreement.

**The Supreme Court Decision**

In a landmark ruling handed down on 9 October 2020, the Supreme Court dismissed Chubb’s appeal of the Court of Appeal’s earlier decision. However, the Supreme Court’s reasoning differed in several key respects from that adopted by the Court of Appeal. *Enka v Chubb* is now the leading authority on the approach to determining the applicable law of an arbitration agreement. In a judgment given by Lord Hamblen (with whom Lord Leggatt and Lord Kerr agreed), the majority held that—in the absence of an express choice of law—it can be inferred that the law of the main contract should apply to the arbitration agreement. The majority concluded that the main contract in this case did not contain any express or implied choice of Russian law. In the absence of any express or implied choice of law of the substantive agreement, the court held the law of the seat governed the arbitration agreement. Accordingly, the Court held that Enka was entitled to the relief sought.

Crucially, the majority judgment set out a number of principles to be applied when determining the governing law of an arbitration agreement. These principles are outlined at paragraphs [53]-[146] of the judgment and summarised at paragraph [170].

---

4 *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] EWCA Civ 574 at [105].
First, the Court determined that the proper law of an arbitration agreement should be determined through applying English common law conflict of laws rules, as opposed to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). These rules require that the arbitration agreement will be subject to: (a) the law chosen by the parties to govern it; or (b) in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected.5

Secondly, in order to determine whether contracting parties have agreed on a choice of the governing law of an arbitration agreement, the English Courts should apply English law rules of contractual interpretation (where England is the law of the forum) in order to construe the arbitration agreement and the main contract as a whole.6

Thirdly, the Supreme Court stated that in cases where the parties had failed to specify the governing law of the arbitration agreement, the default position is that the governing law of the main contract will apply to the arbitration agreement contained within it. This conclusion is in marked contrast to the reasoning of the Court of Appeal.7 The Supreme Court was critical of what it perceived as an overstatement of the doctrine of separability by the Court of Appeal, and noted that the lower Court’s conclusion “puts the principle of separability of the arbitration agreement too high.”8

Further, the Court observed that there were a number of practical considerations which affirmed the reasonableness of a general rule whereby the law of the main contract would be extend to the arbitration agreement in the absence of an explicit choice of law by the parties. These included the promotion of certainty, the avoidance of unnecessary complexity whereby the relationship between commercial parties would be subject to two systems of law and the need to avoid artificiality created by a reliance on the doctrine of separability.9 The Court noted that commercial parties would be unlikely to reasonably expect that a contract would contain an arbitration agreement as a collateral or ancillary agreement to which a separate legal regime would apply.10

Fourthly, the Court concluded that the mere fact that contracting parties chose a certain country as the seat of the arbitration will not be enough to negate the default inference that the choice of governing law of the substantive contract was intended to apply to the arbitration agreement. Additional factors would be required in order to suggest that the arbitration agreement was intended by the parties to be governed by the law of the seat.

The two factors cited by the Court were: (i) 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; and (ii) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective. Further, the Court may take into account additional

5 Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38 at [170(i)-(ii)].
6 Enka v Chubb at [170(iii)].
7 Enka v Chubb at [170(iv)].
8 Enka v Chubb at [61].
9 Enka v Chubb at [53(iii)-(iv)].
10 Enka v Chubb at [53(iv)].
circumstances that may suggest that the seat was intended to be a neutral forum for the arbitration. In respect of this latter factor, namely that in circumstances in which the law of the main contract would render the arbitration agreement ineffective, an inference may be drawn that the arbitration agreement was intended to be governed by the law of the seat, the Court went some way to recognise the ‘validation principle’ in English arbitration law.

The ‘validation principle’ provides that an interpretation of a contract which results in the relevant agreement, clause or transaction being found to be valid is to be preferred to an interpretation which would result in its being declared invalid or ineffective. The Court reaffirmed the principle in respect of arbitration agreements specifically, concluding that commercial parties are unlikely to have intended their agreement to arbitration to be invalid, and therefore cannot have reasonably intended for the laws of the jurisdiction chosen to govern the substantive contract to create such a result. It is therefore clear that in cases in which the governing law of a substantive contract would render the parties’ agreement to arbitrate invalid, it is likely that English law will prefer an interpretation which results in the law of the arbitration agreement being governed by the law of the seat.

Fifthly, the Court established that in cases in which the parties’ agreement provides for no express choice of law governing the main contract, then a clause which provides for arbitration in a particular place will not by itself justify any inference that the arbitration agreement (or the wider contract) was intended to be governed by the law of said place.

Sixthly, the Court ruled that in the absence of any choice of law governing the arbitration agreement, the arbitration agreement is governed by the law with which it is most closely connected. In cases in which the parties have chosen a seat for the arbitration, the law most closely connected with the arbitration agreement is likely to be the law of the seat (even where the law of the seat differs from the law applicable to the parties’ substantive contractual obligations).

Finally, the Court provided insight into the proper interpretation of a ‘multi-tiered’ arbitration clause, such as those requiring mediation as a first step prior to the commencement of arbitral proceedings. The Court determined that clauses requiring parties to attempt Alternative Dispute Resolution (“ADR”), through good faith negotiation, mediation or any other procedures, are not capable of displacing the law of the seat of the arbitration as the law governing the arbitration agreement. Instead, references to ADR or other steps prior to the commencement of arbitration are not part of the arbitration agreement at all.

The Court also provided guidance in respect of the impact of the governing law of an arbitration agreement on non-mandatory provisions of the Arbitration Act 1996. The majority concluded that section 4(5) of the Arbitration Act 1996 should be interpreted to mean that the choice of any foreign law to govern the arbitration agreement (whether express or implied) will serve to displace the non-mandatory

---

11 Enka v Chubb at [170(v)-(vi)].
12 Enka v Chubb at [95]-[109].
13 Enka v Chubb at [170(vii)].
14 Enka v Chubb at [170(viii)].
15 Enka v Chubb at [168], [169] and [170(ix)].
16 Enka v Chubb at [169].
provisions of the Arbitration Act.\textsuperscript{17} This means that where the arbitration agreement is determined to be governed by a foreign law, the non-mandatory provisions of the Arbitration Act 1996 are likely to be excluded.

Lord Sales and Lord Burrows gave dissenting judgments. There are a number of points of difference from the majority decision, but the key aspect was the focus on implied choice. In particular, Lord Burrows considered that insufficient weight had been given to the implied choice of the parties, meaning that an express choice of law in the main contract would be taken to extend to the arbitration agreement, whereas an implied choice would not do so. If anything, the minority view was that the majority decision did not go far enough in recognising the importance of an express or implied choice of law as extending to the arbitration agreement.\textsuperscript{18}

Further, Lord Burrows took the view that the separability principle was devised for the particular purpose of ensuring the validity of the arbitration agreement, and it does not extend to working out the conflict of laws rules applicable to an arbitration agreement.\textsuperscript{19}

**Comment**

The decision is welcome and provides a clarification of the approach of English law to determining the applicable law of an arbitration agreement. It is also noteworthy that the Supreme Court engaged with extensive international authority and commentary in reaching its decision, reflecting the importance the courts attach to international arbitration.

There are, however, two aspects of the decision that are likely to give rise to further disputes.

First, in giving primacy to the law of the main contract over the law of the seat, the English courts will now be required to investigate—to a greater extent than previously—the arbitration law of other countries in order to determine the scope of an arbitration agreement in a foreign law governed contract. This is likely to give rise to complexities when the English courts deal with challenges to an award made by an English seated tribunal or on enforcement.

It also has other consequences. In the seminal *Fiona Trust* case, the House of Lords held that the interpretation of an arbitration agreement should start from the presumption that the parties are likely to have intended to refer any dispute arising out of the relationship into which they have entered to be decided by the same tribunal.\textsuperscript{20} This ‘one stop-shop’ presumption means that tribunals and courts do not generally have to be concerned about linguistic distinctions and can infer that the parties intended any dispute arising out of their relationship (including, for example, tort claims) to be determined by the same dispute resolution process.

This is, however, a principle of English arbitration law; it will not apply to an arbitration agreement governed by a foreign law. Instead, that arbitration agreement will need to be interpreted in accordance

---

\textsuperscript{17} *Enka v Chubb* at [73]-[75].

\textsuperscript{18} *Enka v Chubb* at [245].

\textsuperscript{19} *Enka v Chubb* at [233].

\textsuperscript{20} *Premium Nafta Products Limited v Fili Shipping Co Limited* [2007] UKHL 40, approving the judgment of Longmore LJ in the Court of Appeal sub nom. *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20.
with its applicable law. In many cases, that will now be the law of the main contract. If that law does not contain a similarly broad approach to interpreting arbitration agreements, then tort claims and other claims arising out of the parties’ relationship may instead need to be brought before local courts. Fortunately, most modern international arbitration laws do indeed adopt a similar approach, as the Supreme Court itself recognised by reference to decisions of the United States Supreme Court and the German Federal Supreme Court (Bundesgerichtshof).

There are a number of laws where the same cannot be said. It may well be that, in applying the validation principle, a court will be able to uphold an arbitration agreement by determining that the applicable law is the law of the seat. Alternatively, if it can be shown that the parties selected London, for example, as a ‘neutral’ seat, then that may be sufficient to negate the inference that they intended the law of the main contract to extend to the arbitration agreement.

It seems to us, with respect, that this is one area where the law is potentially now less certain than it was before the Supreme Court’s decision.

Furthermore, there are also potential concerns about how Enka v Chubb has limited the importance of the principle of separability now enshrined in section 7 of the Arbitration Act 1996. This is the case for two reasons.

First, as section 7 is a non-mandatory provision, if the arbitration agreement is determined to be governed by a foreign law, then this may well exclude the provision. Most arbitration laws recognise the principle, but some potentially do not and, in dealing with a challenge to an award under section 67 of the Arbitration Act 1996, the court will now need to grapple with the limits of other arbitration laws on the issue.

Secondly, the Supreme Court has ‘rowed back’ from the high point of the separability principle, as recognised in the Fiona Trust case and as endorsed by the Court of Appeal in Enka v Chubb. This appears to us to be inconsistent with the broad approach recognised in pre-1996 cases, particularly, Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] 1 Lloyd’s Rep 455. It is also, with respect, surprising given the international importance attached to the principle which has been described by the House of Lords as being “part of the very alphabet of arbitration law.”

We anticipate that these issues will give rise to future litigation, and imagine that it will not be long until the courts are required to grapple with the consequences of Enka v Chubb.

21 Enka v Chubb at [107].

22 Quaere how easy this will be to establish on ordinary English principles of contractual interpretation which would exclude pre-contractual negotiations and drafting history, particularly given that these are the principles which must be applied to the putative choice of law.

23 See the argument advanced in National Iranian Oil Co v Crescent Petroleum Co International Ltd [2016] 2 Lloyd’s Rep 146 in respect of Iranian arbitration law.

Lessons for Contracting Parties

*Enka v Chubb* has clarified an area of English law which has long been the subject of confusion and subject to a number of conflicting decisions before the Courts.

The decision reaffirms that contracting parties should take care to specify the applicable law of their arbitration agreement in the event that they wish for a particular law to apply. In the event that they fail to do so, but do specify an applicable law of the main contract, this may well be found to extend to the arbitration agreement. Conversely, in the event that a court determines that there is no express choice of law applicable to the main contract, the law governing the arbitration agreement may be found to be the law of the seat. Any such determination will depend on the interpretation of the contract and the arbitration agreement as a whole.

Parties may find that, as a result of imprecise drafting, the law applied to their arbitration agreement may not be the law that they anticipated. Particular care should be taken, and legal advice sought, in order to carefully draft an arbitration agreement best suited to the needs of the parties.

The case also serves as a reminder of the ability of the English Court to deal with the appeals process in cases of interim relief in a timely manner, with the time between the first instance trial and the Supreme Court Appeal being heard within a timeframe of only seven months. This was described by the Supreme Court in its judgement as "a vivid demonstration of the speed with which the English courts can act when the urgency of the matter requires it."25

---

25 *Enka v Chubb* at [24].
Authors:
James Barratt
Rebecca Meredith

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

Contacts:
James Barratt +44.20.7972.9215 james.barratt@friedfrank.com
James Kitching +44.20.7972.6295 james.kitching@friedfrank.com
David Morris +1.212.859.8204 david.morris@friedfrank.com