

CASE REVIEW

**ENKA V. CHUBB: THE UK SUPREME COURT’S DECISION ON THE LAW
GOVERNING THE ARBITRATION AGREEMENT**

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I. INTRODUCTION

The Supreme Court of the United Kingdom [“UKSC”] on 9 October 2020 handed down a much-anticipated judgment in the realm of international arbitration law. *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb*¹ [“**Enka v. Chubb**”] enabled the UKSC to offer greater clarity in the ascertainment of the law governing the arbitration agreement, a quandary long unsettled. Notable decisions in this regard in the past include *C v. D*,² *Sulamerica Cia Nacional de Seguros SA v. Enesa Engenharia SA*,³ [“**Sulamerica**”] and *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait)*,⁴ all of which have been examined by the UKSC to reach a conclusion in this case.

This article attempts to recount the facts of the case in question, analyze the holding of the UKSC and delineate the implications of this judgment as regards the arbitration practice.

II. ENKA V. CHUBB: BRIEF FACTS

Enka Insaat Ve Sanayi AS [“**Enka**”] is a Turkish company that was engaged by a Russian company called Energoproekt as a sub-contractor, out of the many others involved in the construction of a power plant situated at Berexovskaya in Russia. PJSC Unipro [“**Unipro**”], the company that owned the power plant, was insured by OOO Insurance Company Chubb [“**Chubb**”] against damage caused by fire.

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¹ *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb*, [2020] UKSC 38 [hereinafter *Enka v. Chubb*].

² *C v. D*, [2007] EWCA Civ 1282.

³ *Sulamerica Cia Nacional de Seguros SA v. Enesa Engenharia SA*, [2012] EWCA Civ 638 [hereinafter *Sulamerica*].

⁴ *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait)*, [2020] EWCA Civ 6.

By way of an assignment agreement between Energoproekt, Unipro, and Enka, all rights and obligations of the Energoproekt under its construction agreement stood transferred to Unipro. As per the dispute resolution clause of the assignment agreement, any dispute between Unipro and Enka was to be finally and exclusively resolved by arbitration in accordance with clause 50.1 of the construction contract.⁵ Clause 50.1 stated thus:

“....If the matter is not resolved within twenty (20) calendar days after the date of the notice referring the matter to appropriate higher management or such later date as may be unanimously agreed upon, the Dispute shall be referred to international arbitration as follows:

- the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
- the Dispute shall be settled by three arbitrators appointed in accordance with these Rules,
- the arbitration shall be conducted in the English language, and
- the place of arbitration shall be London, England.”⁶

The following events culminated in the present appeal:

Date	Event
1 February 2016	A power plant at Berezovskaya in Russia was severely damaged by fire
	Chubb paid 26.1 billion roubles to Unipro under its property insurance policy as it became subrogated to any rights of Unipro to claim compensation from third parties for the damage caused by the fire
25 May 2019	Chubb Russia filed a suit in Moscow’s Arbitrazh Court [“ Russian Court ”] against Enka and other sub-contractors alleging that they caused the fire and claiming \$400 million from Enka and other involved sub-contractors
16 September 2019	Enka sought an anti-suit injunction in the Commercial Court of London to restrain Chubb from further pursuing the Russian proceedings

⁵ Enka v. Chubb, *supra* note 1, at ¶11.

⁶ Enka v. Chubb, *supra* note 1, at ¶10.

Date	Event
	on account of it breaching their arbitration agreement
15 October 2019	Carr J of the Commercial Court of London refused to grant an ad-interim anti-suit injunction and gave directions to proceed with an expedited trial
17 September 2019	Enka filed a motion in the Russian proceedings seeking dismissal of Chubb's claim on account of a subsisting arbitration agreement
20 December 2019	Baker J, dismissed Enka's claims against all defendants and held that the appropriate forum to decide whether Chubb's claims fell within the arbitration agreement was the Russian Court and not the English Commercial Court
18 March 2020	The Russian Court decided to deal with Enka's motion as well as the merits of Chubb's claim, denying Enka's reference to arbitration and dismissing Chubb's claims against all the sub-contractors on the merits. Both Enka and Chubb filed appeals to this decision
29 April 2020	English Court of Appeals allowed Enka's appeal and issued an anti-suit injunction restraining Chubb Russia from continuing the Russian proceedings
10 January 2020	Enka issued notice to Chubb under clause 50 of the construction contract kickstarting the arbitration process
5 June 2020	Chubb Russia's application for permission to appeal against the Court of Appeals decision and stay of the anti-suit injunction was granted by the UKSC

III. MAIN ISSUES

The central issue according to the UKSC was the determination of the system of national law which governs the validity and scope of the arbitration agreement when the law applicable to the contract containing it is different from the law of the seat of the arbitration. The broad ruling of the UKSC aligned with the Court of Appeals on the conclusion but took a different route to reach this point. The following segment gives a brief overview of their respective decisions.

IV. LAW GOVERNING THE ARBITRATION AGREEMENT: TWO PATHS LEADING TO THE SAME DESTINATION

A. Court of Appeals – First Path

In a unanimous decision rendered by Popplewell LJ, the Court of Appeals held that the law of the seat of arbitration would usually govern the arbitration agreement, “*subject only to particular features of the case demonstrating powerful reasons to the contrary.*”⁷ The following are some of the reasons provided to reach this conclusion:

1. Separability – a choice of law to govern the contract has “*little if anything to say about the arbitration agreement law choice because it is directed to a different and separate agreement*”, due to the doctrine that an arbitration agreement is severable from the contract.
2. The ‘overlap’ argument – drawing from *XL Insurance v. Owens Corning*,⁸ “*the overlap between the scope of the curial law and that of the [arbitration agreement] law strongly suggests that they should be the same*”, deeming it natural to regard a choice of the seat as an implied choice of the law applicable to the arbitration agreement.
3. Relationship between curial law and arbitration agreement law – since there is no clear division between procedural and substantive provisions in the Arbitration Act 1996, choosing an English seat implies the parties’ intention to choose English law to govern their arbitration agreement.

⁷ *Enka v. Chubb*, *supra* note 1, at ¶91.

⁸ *XL Insurance Ltd v. Owens Corning*, [2001] 1 All ER (Comm 530).

B. UKSC – Second Path

According to the UKSC, the law governing the arbitration agreement would be the same as the law governing the contract if the same has been specified by the parties. However, in the absence of the same, the ‘closest connection’ test applies, thereby implying that the law of the seat of arbitration would govern the arbitration agreement. The reasons for construing a choice of law to govern the contract as applicable to the arbitration agreement according to the UKSC include certainty, coherence, consistency, prevention of complexities and uncertainties, and prevention of artificiality.⁹ The following are some of the factors which influenced the UKSC’s decision:

1. Validation principle – an interpretation which upholds the validity of a transaction is to be preferred to one which would render it invalid or ineffective (e.g., an arbitration agreement without names of the arbitrators to be appointed would be valid in English law, but invalid in Scottish law, and hence, the former must prevail). As per Moore LJ in *Sulamerica*,¹⁰ commercial parties are unlikely to have intended a choice of governing law for the contract to apply to an arbitration agreement if there is “*at least a serious risk*” that a choice of law would “*significantly undermine*” that agreement.¹¹
2. Closest connection test – in the absence of a choice of law governing the contract, it is reasonable to start from the assumption that all the terms of the contract, including the arbitration clause, are governed by the same system of law. However, if a seat of arbitration has been indicated, the law of the seat of arbitration shall be regarded as the law of the arbitration agreement in accordance with precedent.
3. Place of performance – as the subject matter and purpose of an arbitration agreement are different from those of the overarching contract, there is no reason to interpret the place of performance of these two laws to be closely connected.
4. Consistency with the New York Convention [“**Convention**”] – as per Article V(1)(a) of the Convention, the limited grounds of refusal to recognize or enforce a foreign arbitral award are – invalidity of the arbitration agreement, failing any indication thereon, under the law of the country where the award is made. Hence, the Convention also assumes application of the law of the seat of arbitration by default, if no choice of law governing the arbitration agreement is made.

⁹ *Enka v. Chubb*, *supra* note 1, at ¶53.

¹⁰ *Sulamerica*, *supra* note 3, at ¶31.

¹¹ *Enka v. Chubb*, *supra* note 1, at ¶109.

Applying these principles to the present case, the UKSC summarized its position stating 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 was intended to apply to the arbitration agreement*”.¹² The additional factors which do negate such an inference are –

- (a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country’s law; and
- (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective.¹³

However, in the absence of a choice of law provision to govern the contract the closest connection test must be applied to ascertain the law governing the arbitration agreement. Accordingly, the UKSC affirmed the Court of Appeals decision, although for different reasons, and held that English law governed the arbitration agreement.

V. ANALYSIS AND TAKEAWAYS

This is a welcome judgment from the UKSC, which, along with the entire international arbitration community, has long struggled with the determination of the law governing the arbitration agreement. As is already known, the execution of any international arbitration broadly involves three distinct sets of laws: *firstly*, the law governing the substantive contract; *secondly*, the law governing the arbitration agreement; and *thirdly*, the law governing the arbitration proceedings. It hardly needs restating that the law governing the contract would be applicable to substantive obligations relating to the rights and obligations of parties. Similarly, the law governing the arbitration agreement applies solely to the arbitration agreement and resolves questions as to its legality and the arbitrability of the dispute in question. Lastly, the law governing the arbitral proceedings – or the curial law – is the law under which the award is enforced. The main question before the UKSC was the determination of the law governing the arbitration agreement in the absence of any indication to that effect being made in the agreement itself by the parties.

However, certain issues remain unsolved: for instance, the ascertainment of an indication by the parties of a choice of law of contract is a subjective exercise which ought to be guided by

¹² *Enka v. Chubb*, *supra* note 1, at ¶170.

¹³ *Ibid.*

principles enshrined in the Rome Regulations. Although the UKSC went into adequate detail applying the Rome Regulations to ascertain the governing law of contract, why the inferred law was not considered an implied choice of the parties for governing the contract would require further clarification.

Furthermore, although the decision is certainly pro-arbitration, whether it can be considered pro-party choice is another concern. As Burrows J mentions in the minority judgment, the emphasis on the seat of arbitration can arguably be excessive, and possibly stems from a conception that “*arbitrators at the seat would only be comfortable applying their own law.*”¹⁴ This, at least considering the current arbitration landscape, is an antiquated position as it ignores the flexibility of arbitral procedures and the expertise of arbitral tribunals and centres in applying a certain intended set of laws. It is also stated by Burrows that an implied choice by the parties should be given the same amount of weight as an express choice made by the parties.¹⁵ This echoes the concern raised in the previous paragraph regarding according importance to a choice of law of contract not expressly indicated by the parties. What qualifies as an indication of choice of law by the parties is perhaps a ripe area for further discussion.

Notwithstanding, the aforementioned unresolved issues, the UKSC recently upheld the ratio in *Enka v. Chubb*, in the case of *Kabab-Ji SAL v. Kout Food Group*¹⁶ where a similar question about the law that governed the arbitration agreement was raised. However, unlike in *Enka v. Chubb*, the question of governing law was raised after the award was passed during the enforcement stage in English courts. Nevertheless, the UKSC opined at paragraph 35 that “*it would be illogical if the law governing the validity of the arbitration agreement were to differ depending on whether the question is raised before or after an award has been made*”.¹⁷ While applying the ratio in *Enka v. Chubb*, the UKSC held that providing a choice of law that would govern the entire contract would be “*sufficient indication*” of the parties to have chosen that same law to govern the arbitration agreement as well. This judgement strengthens the applicability of the ratio in *Enka v. Chubb* and consequently, reinforced the importance of unresolved issues as discussed in the previous paragraph.

¹⁴ *Enka v. Chubb*, *supra* note 1, at ¶242.

¹⁵ *Enka v. Chubb*, *supra* note 1, at ¶245.

¹⁶ *Kabab-Ji SAL v. Kout Food Group*, [2021] UKSC 48.

¹⁷ *Enka v. Chubb*, *supra* note 1, at ¶35.

VI. POSITION OF LAW IN INDIA AND OTHER JURISDICTIONS

The position of law with respect to law governing arbitration agreements was settled by the Supreme Court of India in *NTPC v. Singer Co.* [“NTPC”].¹⁸ It is concurrent with the position of the UKSC that the law governing the arbitration agreement is normally the same as the law governing the main contract. In the event the law governing the contract has not been specified, *NTPC*, like *Enka v. Chubb*, also gives rise to a presumption that the law of the country where the arbitration is agreed to be held is the law of the arbitration agreement. However, in the words of the Supreme Court, this is only a “*rebuttable presumption*”.¹⁹

Conflicting decisions can be seen in the United States such as *Balkan Energy (Ghana) Ltd. v. Republic of Ghana*,²⁰ wherein the law of the arbitral seat was held to govern the arbitration agreement, on the basis of Albert van den Berg’s interpretation of the Convention. Another disparate jurisdiction is France, whereas prescribed in *Municipalité de Khoms El Mergeb v. Société Dalico*²¹ – the arbitration clause is considered to be legally independent from the main contract, and as a result, French substantive rules of international arbitration are applied to the arbitration agreement. Neither does Singapore have a consistent approach to ascertaining the law with respect to arbitration agreements. In *BNA v. BNB*,²² the Singapore Court of Appeals disregarded the validity principle and held that the law of the People’s Republic of China would govern the arbitration agreement, despite it potentially invalidating the same.

VII. CONCLUSION

A conclusive decision in respect of ascertaining the law governing the arbitration agreement was long due. It is not always easy deciphering the intention of parties in selecting a law to govern a certain part of the contract, and especially an arbitration clause that defies commonly accepted notions of contractual interpretation on account of its severability and its far-reaching legal implications. Over the course of time, the convergence of judicial opinions is sure to have a positive impact on international arbitrations on account of greater consistency and support by apex courts of pro-arbitration jurisdictions.

¹⁸ National Thermal Power Corporation v. Singer Company, [1992] 3 SCC 551 [hereinafter *NTPC v. Singer*].

¹⁹ *NTPC v. Singer*, *supra* note 18, at ¶23.

²⁰ *Balkan Energy (Ghana) Limited v. Republic of Ghana*, PCA Case No. 2010-07.

²¹ Cour de cassation [Cass.][supreme court for judicial matters], civ., Dec. 20, 1993.

²² *BNA v. BNB & Anr.*, [2019] SGCA 84.