English Supreme Court Clarifies the Common Law Test in Determining Applicable Law of Arbitration Agreement

In a recent judgment issued by the United Kingdom Supreme Court (Supreme Court) in *Enka Insaat ve Sanayi A.S. v. OOO Insurance Company Chubb [2020] UKSC 38*, the Supreme Court held, *inter alia*, that where there is no express governing law clause in the arbitration agreement, it should be a presumption or general rule that the governing law of the main contract should also be the governing law of the arbitration agreement.

The above judgment is a much-welcomed clarification, given it provides helpful guidance on the application of the three-stage common law test in determining the applicable law of an arbitration agreement, *i.e.*, is there an express choice of law? If not, is there an implied choice of law? If not, with what system of law does the arbitration agreement have its closest and most real connection?

In particular, according to the judgment, the governing law clause of the main contract would be construed, by an implied choice of law, as the governing law for the arbitration agreement on the basis, *inter alia*, that this result is consistent with the reasonable expectations of commercial parties who would deem the arbitration agreement as part of the main contract, which therefore should follow the governing law clause contained therein. The Supreme Court also stated that such presumption is subject to certain grounds to rebut, such as the "validity principle," *i.e.*, where the arbitration agreement would be invalid under the governing law of the contract but would be valid under the law of the seat.

The underlying dispute arose from a subrogation claim for negligence brought by the insurer of the owner of a power plant in Russia against Enka, a Turkish engineering company, following the reimbursement payment made by the insurer as a result of a fire at the power plant. Enka applied for an anti-suit injunction alleging that it had an

arbitration agreement with the owner of the plant providing for ICC arbitration seated in London. The insurer challenged the injunction on the basis that the applicable law of the arbitration agreement shall be Russian law, under which the claim was not within the scope of the arbitration agreement.

By applying the above principles, the majority of the Supreme Court finally concluded that the parties had made no express or implied choice of law to either the main contract or the arbitration agreement, and the governing law of the arbitration agreement therefore should be English law, as the law of the seat, given it had the closest and most real connection to the arbitration agreement.

When determining the applicable law of an arbitration agreement contained in a main contract, different jurisdictions may apply different rules.

For example, under Chinese law, in general the governing law of the contract will not be applied as the governing law of an arbitration agreement by the Chinese court. The parties may expressly agree on the governing law of the arbitration agreement. If there is no such agreement, the Chinese court would apply the law of the arbitration seat as the governing law of the arbitration agreement. If there is no agreement on the arbitration seat, the Chinese court would apply Chinese law as the governing law of the arbitration agreement.

In Singapore, the courts consider the governing law of the main contract a strong indicator of the governing law of the arbitration agreement unless there are indications to the contrary. The Singapore High Court in *BCY v. BCZ* held that when applying the three-stage common law test, when there is no express agreement on the governing law of the arbitration agreement, the implied choice of law is likely the same as the expressly chosen law of the substantive contract. Click here to read our previous briefing on this case.

In Hong Kong, the High Court in *Klöckner Pentaplast Gmbh & Co Kg v. Advance Technology (H.K.) Company Limited* held that when determining the applicable law of an arbitration agreement, "*the starting point must be the terms of the particular clause and the contract in question. First, the contract between the parties including the arbitration clause must be examined to see if there is any agreement, express or implied, by the parties as to both the proper law of contract, or the lex arbitri. It is only if agreement cannot be found that the implication arises from the choice of seat, that the law of that place will be the lex arbitri.*"

By taking into account 1) the governing law, which was German law as agreed in the contract, 2) the parties' agreement that the third arbitrator shall be admitted to practice law in Germany, and 3) the fact that the governing law and the arbitration clause were under the same heading, "Governing Law and Jurisdiction," in the contract, the High Court determined that the parties impliedly intended that the governing law of the arbitration agreement should be the law of Germany, *i.e.*, the governing law of the contract.

Despite the varying practice in different jurisdictions, a critical and fundamental takeaway is that parties must always explicitly choose the governing law of the arbitration agreement, in order to avoid unnecessary legal battles before even getting to the real dispute on the merits.

Authors