U.K Supreme Court Clarifies Rules To Determine Arbitration Agreements' Governing Law

On 9 October 2020, the U.K. Supreme Court (the ***Supreme Court***) handed down a judgment in which it ruled on the law governing an arbitration agreement.

Building on previous decisions handed down by English courts (in particular the decision of the English Court of Appeal in *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA*), the judgment of the Supreme Court provides greater clarity in respect of the test to be applied to determine the governing law of an arbitration agreement, especially when the law applicable to the underlying contract containing that arbitration agreement differs from the law of the seat of arbitration.

Factual background

The dispute at hand related to the interpretation of an arbitration agreement contained in a construction contract (the ***Contract***). The Contract was initially concluded in 2012

between a head-contractor, and a Turkish engineering company *Enka Insaat Ve Sanayi A.S*. (***Enka***), the sub-contractor. The Contract was for the construction of an industrial power plant in Russia. However, in 2014, the head-contractor transferred its rights and obligations under the contract with Enka to the owner of the plant.

In 2016, a fire broke and severely damaged the plant.

Subsequently, *Chubb Russia Limited* (***Chubb Russia***), an insurance company, compensated the owner of the plant, and by doing so, assumed the rights of the owner to claim compensation from third parties responsible for the fire that damaged the plant. Chubb Russia therefore initiated legal proceedings before Russian courts against Enka as the latter had performed engineering works during the construction of the plant. However, since the Contract initially concluded between Enka and the head-contractor contained an arbitration agreement which provided that any dispute between them would be settled pursuant to London-based arbitration proceedings, Enka brought a claim before UK courts seeking an anti-suit injunction to prevent Chubb Russia from pursuing the Russian claim. An anti-suit injunction is an order preventing an opposing party in a dispute from commencing or continuing legal proceedings in another State or forum.

Importantly, however, neither the Contract nor the arbitration agreement provided for an express choice-of-law clause and the parties therefore disagreed as to which law governed the scope of the arbitration agreement, and on whether the existence of that agreement could be relied upon by Enka to oppose to the Russian proceedings.

At first instance, the High Court dismissed Enka’s claim and ruled that the appropriate forum to determine the scope of the arbitration agreement was the Russian court. The Court of Appeal however overturned that judgment. It held that unless there has been an express choice of law that governs the

arbitration agreement, the general rule should be that the arbitration agreement is governed by the law of the seat of arbitration. Consequently, since in the present case London was the designated seat of arbitration, English law governed the interpretation of the arbitration agreement contained in the Contract.

Chubb Russia appealed that judgment before the Supreme Court.

The Supreme Court's decision

In its decision of 9 October 2020, the Supreme Court found that:

> – The law applicable to an arbitration agreement is either the law chosen by the parties or, in the absence of such choice, the system "*most closely connected*" to the arbitration agreement (para. 27);
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> – Where the parties have not specified the law applicable to the arbitration agreement, but have chosen the law to govern the underlying contract containing the arbitration agreement, this choice will generally apply to the arbitration agreement (paras 43-52);
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> – Where the parties have made no choice of law to govern the arbitration agreement (either specifically or by choosing the law which governs the underlying contract), the law applicable to the arbitration agreement will be the law with which the arbitration agreement is the "*most closely connected*". In general, that would be the law of the seat of arbitration (paras 118-119), although a choice of the seat of arbitration cannot by *itself* be construed as an implied choice of law to the arbitration agreement (para. 117).

Applying these principles to the case at hand, the Supreme Court found that although the parties had not made a choice of law to govern the Contract, they had nevertheless chosen

London as the seat of arbitration. Consequently, the arbitration agreement was considered as "*most closely connected*" to (and thus governed by) English law.

With respect to the grant of the anti-suit injunction (which is the basis of Enka's claim), the Supreme Court held that the question of whether or not to grant such anti-suit injunction is, in principle, indifferent whether the arbitration agreement "*is governed by English law or by a foreign law*" (para. 183). The enquiry should simply be "*whether there has been a breach of the arbitration agreement and whether it is just and convenient to restrain that breach by the grant of an anti-suit injunction*" (para. 183). In light of the elements of the case, the Supreme Court found that the Court of Appeal had validly granted the anti-suit injunction to restrain Chubb Russia from pursuing its claim before Russian courts.

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The decision of the Supreme Court provides major clarification for U.K.-based arbitration.

However, it must be recalled that there is no universal test to determine the law that applies to an arbitration agreement. For instance (and although such methodology may be difficult to apply in practice), the French Supreme Court considers that the existence and scope of an arbitration agreement should exclusively be determined by the common intention of the parties, without it being necessary to refer to any national law (except for the application of mandatory provisions of French law or if the parties have expressly designated a national legal system) (*see* the decisions of the French Supreme Court in *Dalico* and *Uni-Kod*).
