How to Determine the Proper Law of an Arbitration Agreement

In *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb*, the Supreme Court was required to provide the answer to a question which has been often debated: which system of national law governs the validity and scope of the arbitration agreement when the law applicable to the contract containing it differs from the law of the seat of the arbitration? The Supreme Court's decision, by a majority of 3 (Lords Hamblen, Leggatt and Kerr) to 2 (Lords Burrows and Sales), manifests (some) of the tensions which have hitherto existed in the relevant case law and academic commentary but provides interesting insight for commercial parties.

The proper approach

The correct way (taken from the judgment of the majority) to answer the question set out above can be summarised as follows:

• where a contract contains an agreement to resolve disputes arising from it by arbitration, the law applicable to the arbitration agreement is to be determined by applying the English common law approach, namely looking for: (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;

• whether the parties have chosen the law to govern the arbitration agreement is ascertained by construing the arbitration agreement and the contract containing it, as a whole, applying the rules of contractual interpretation of English law as the law of the forum;

• where the law applicable to the arbitration agreement is not specified, the law governing that agreement may be inferred from the parties' choice of is not easily negated but such negation may occur where, inter alia, a serious risk exists that, if governed by the same law as the main contract, the arbitration agreement would be ineffective; and

• in the absence of any choice of law to govern the arbitration agreement, that arbitration agreement is governed by the law with which it is most closely connected. Where the parties have chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations.

Lessons for commercial parties

Commercial parties, and those who draft arbitration agreements contained within commercial contracts, may take the following lessons from the judgment of the majority:

• as is always the case, where one wishes to be sure of the law that governs the arbitration agreement, the best course of action is to state, expressly, that law;

• where parties do not expressly choose the law governing the arbitration agreement, the focus turns to whether the parties have chosen the law which governs their contract. Where the parties have chosen the law which governs their contract, the proper, but not irrefutable, inference is that the proper law of the arbitration agreement will be the chosen law of the contract. Of course, whether parties have chosen the law which governs their contract is a question of construction; and

• where, by contrast, the parties have not chosen the law which governs their contract, the general rule is that the law of the seat of the arbitration will govern the arbitration agreement. The

judgment of the majority therefore seemingly delineates sharply between situations where the parties have chosen the law of the contract and where they have not. The sharpness of this delineation was criticised by the minority but its confirmed existence means that, when considering whether or not to choose the law which governs a contract containing an arbitration agreement, parties must be aware of the impact of their decision on the law which will (likely) be held to govern the arbitration agreement. In other words, the decision whether to choose the law governing the contract affects more than simply the parties' substantive rights and obligations under that contract.

Conclusion

The judgment of the Supreme Court in *ENKA* demonstrates just how difficult the question asked in that case is to answer. Irrespective of whether one agrees, as a matter of theory, with the approach outlined by the majority – and, with respect, it does not appear to be wholly without difficulty – commercial parties do now have an authoritative set of rules by which they can organise their activities. The law, as a tool for commercial parties, is much the better for that.

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