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Achieving clarity in contracts and arbitration agreements

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On October 9, 2020, the UK Supreme Court (UKSC) released its decision in *Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb (Appellant), [2020] UKSC 38* (the Decision) clarifying the law regarding arbitration agreements. While the Decision is from the UK, it will likely have an impact on the common law around the world.

Arbitration agreements can help limit legal fees by keeping disputes out of the courts. However, prior to the Decision, there was a lack of clarity as to what jurisdiction's law governed the scope of these agreements. The Decision will no doubt result in new challenges and opportunities for those analyzing arbitration agreements. Understanding the key points from this case is essential.

Background

The proceedings resulted from the alleged faulty work of a subcontractor, Enka Insaat Ve Sanayi AS (Enka). Enka was involved in the construction of a Russian power plant damaged by a fire in 2016. Fortunately, the power plant's owner, PJSC Unipro (Unipro), had coverage through an insurance policy with OOO Insurance Company Chubb (Chubb Russia). After paying Unipro ₽26.1 million roubles (approximately $400 million US dollars) under the insurance policy, Chubb Russia asserted that Enka was the one responsible for the damages and wished to commence a subrogated recovery action. However, the contract between Unipro and Enka contained an arbitration agreement providing for London-seated arbitration, dictated by the rules of the International Chamber of Commerce. Notably, the contract did not articulate the law governing the contract or the arbitration agreement.

The issue and why it matters

The UK proceedings sought to answer which law applies to the arbitration agreement. The UKSC provides a well-reasoned judgment on this issue. Although the Decision is specific to the construction context, the UKSC's analysis is relevant to any business that chooses international arbitration as its preferred dispute-resolution

method. The Decision highlights the importance of establishing what law governs the agreement, in order to prevent unnecessary disputes.

Analysis

Some of the notable points detailed in the Decision are:

Majority

Lords Hamblen, Leggatt & Kerr (the Majority) addressed several principles, including:

- The law applicable to a contract containing an arbitration agreement is determined by applying UK common law rules;
- Pursuant to these common law rules, the law applicable to the agreement is the law:
    - chosen by the parties; or
    - with which the arbitration agreement is most closely connected.

Applying these principles, the Majority decided that the parties did not specifically choose the law governing their arbitration agreement or the underlying contract. Overall, the court concluded that Russian law governed the contract, though English law was applicable to the arbitration agreement. In analyzing the arbitration agreement, the Majority decided that the law of the place chosen as the “seat” of the arbitration (London) was the law most closely connected with the arbitration agreement.

To summarize, what we learn from the Majority is the following:

Is there law clearly governing the **contract**?	Is there law clearly governing the **arbitration agreement**?	What law governs the arbitration agreement?
	X	The choice of the **law for the contract** will apply to the arbitration agreement, even if a country has been nominated for the "seat" of the arbitration — this is the "default" rule
X	X	The arbitration agreement will be governed by the law with which it **most closely connected** — typically, this is the law of the "seat"

Dissent

Lords Burrows & Sales made the following points, which the Courts may address in the near future:

- There are problems arising from the division required by the “seat” approach. They found that the majority’s approach would unnecessarily force the same contract to be governed by laws from different jurisdictions, placing too much emphasis on the “seat”. Consequently, an arbitration agreement has its “closest connection” to the law of the underlying contract – not the law of the “seat”.
- No “express” choice of law in the arbitration agreement means that the law of the underlying contract (whether express or implied) also governs the arbitration agreement. Therefore, since Russian Lawwas determined to be the “implied” law of the underlying contract, this would be the law governing the arbitration agreement.

Anticipated developments

In order to avoid confusion and disputes, it is evident that the parties to a contract must stipulate the law governing both:

- The main contract between them; and
- The arbitration agreement, which may differ from the choice of “seat” of the arbitration.

We have yet to understand the impact that the Decision may have on future disputes in Canada. However, it is of paramount importance to have a clear understanding of its potential implications – particularly its effect on arbitration, which is a pragmatic means of alternative dispute resolution (ADR). Canadian Courts continually encourage litigants to use arbitration in resolving their disputes. This has especially been the case throughout the COVID-19 pandemic, as courts encourage ADR to further access to justice in these unprecedented times.

By

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