

**Implication and imputation; the Supreme Courts decision in *Enka***

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*This article considers some of the particular aspects in the recent Supreme Court decision of Enka Insaat Ve Sanayi v OOO Insurance Company Chubb & Others [2020] UKSC 38. In particular it looks at the significance of the distinction between implication of agreement through application of ordinary contractual principles and imputation of terms by the application of conflict of law provisions contained in the Rome I Regulation or as established by the common law.*

These proceedings arose following a fire at a power plant in Russia. The owner’s insurers, Chubb Russia, brought a claim against one of the engineering sub-contractors, Enka, in respect of the loss sustained. As would be expected, the construction contract in question was a substantial document running to almost 100 pages and included a dispute resolution clause which contained a provision for ICC arbitration in London. Not only was there no specific clause to identify the law applicable to the arbitration agreement, there was no governing law clause in the contract at all.

Notwithstanding the arbitration agreement, Chubb issued proceedings in Russia prompting Enka to seek an anti-suit injunction to restrain it from pursing the matter further in the Russian courts. As part of its defence to the application Chubb sought to argue that if the law that applied to the arbitration agreement was a foreign law this would make a material difference to the way the injunction application was decided. Chubb argued that the considerations of *forum (non) conveniens* and international comity which would arise in such a circumstance were relevant to the way that the discretion involved was to be exercised.

Thus the Supreme Court was called upon to consider an issue which is loved by lecturers, vexes students and frustrates practitioners who want, perhaps not unreasonably, to give a straight answer to a simple question; in the absence of an express agreement how is the law applicable to arbitration agreements determined?

There are two schools of competing thought. Firstly, that the law that governs the contract as a whole should generally also govern the arbitration agreement. Secondly, that it should be the law of the seat that should be applied when dealing with issues that arise under the arbitration agreement. The majority of the Supreme Court held, as all expert lawyers do, that it depends. If there has been some form of express or implied agreement as to a choice of law in the main contract then the law that applies to the arbitration agreement will generally be the same. In the absence of such agreement, then it will be the law of the seat that will apply.

*A choice of law for the substantive contract*

The majority started by acknowledging that English law had previously accepted that different obligations in the same contract may be governed by different laws. The view was then expressed that where the parties had agreed on a particular law to govern the main provisions of a contract it was generally reasonable to assume that parties would intend or expect such contract to be governed by a single system of law. To do otherwise could give rise to inconsistency and uncertainty. They went on to suggest that the assumption that all the terms of a contract are governed by the same law applies to an arbitration clause as it would do to any other clause of the contract. The Supreme Court identified that the benefit of such an approach was that it would provide a degree of certainty, achieve consistency and avoid complexity and artificiality.

The principal domestic authority that suggested otherwise was the case of *C v D* [2007]EWCA Civ 1282*.* This involved an insurance contract governed by New York law. During the course of his judgement in that case Longmore LJ suggested that, even with an express choice of substantive law, if there was no choice of law for the arbitration agreement, then the approach that should be taken was to look at the law with which it was most closely connected. That would be the law of the place where the parties had chosen to arbitrate i.e. England. However as observed by the Supreme Court, echoing the reservations made in the well-known case of *Sulamerica v Enesa Engenharia SA* [2012] EWCA Civ 638 , this conclusion was reached without the benefit of the full citation of authority and was contrary to the dicta in earlier domestic cases.

The majority identified that the central justification for the argument that it is the law of the seat that should apply in such circumstances is that it is so closely related or intertwined with the law governing the arbitration agreement that a choice of law to govern the contract should generally be presumed not to apply to an arbitration clause when the parties have chosen a different curial law. In simple terms the point was that the curial law ‘overlapped’ with the agreement about how to resolve any dispute. This raised the question of whether the choice of the law of the seat carried with it any implication that the parties intended a different law from that which governed the main contract to apply to the arbitration agreement. In their Lordships view this depended on the content of the relevant curial law, in this case the Arbitration Act 1996. It was apparent that this piece of legislation contemplated and provided for a situation in which the arbitration agreement would be governed by a different law from that which governed the arbitration process. Since English law did not assume that the law applicable to both would be the same, it could not be implied that by agreeing to English law as the law of the seat, the parties were agreeing to English law as the law of the arbitration agreement. The mandatory provisions of the Arbitration Act did not touch on any issues relating to the arbitration agreement. The provisions which did were non-mandatory and could be displaced by agreement to the contrary. Therefore it was concluded that not only did the drafters of this piece of legislation not presume that the law of the seat would apply to the arbitration agreement but also those that submitted to its provisions by choosing England as the seat did not presume so either. This, as will be appreciated, leaves open the argument that different curial law may well support a submission that another choice of curial law *would* imply the same choice of law for the arbitration agreement, for example, if there were mandatory provisions in a particular curial law which applied to arbitration agreements.

Another factor which might displace the presumption was validity. The fact that an arbitration agreement either will be invalid or that there is a ‘serious risk’ that it might be if a particular curial law applied would be another reason for interpretating it in a way which provides for application of a different law in respect of the arbitration agreement. Practitioners will recall this was the approach adopted most famously in *Sulamerica*. Commercial parties are unlikely to have intended a choice of governing law if that would, or would seriously risk, defeating or undermining that agreement.

Therefore if the choice of curial law did not carry with it sufficient to displace the primary assumption that the law of the rest of the contract should apply and if there was no issue regarding validity then the answer, so far as the majority was concerned, was clear.

Chubb therefore sought to argue that there was, as a matter of contractual interpretation, a choice of a system of law for the substantive provisions of the contract, namely Russian law. They sought to do this primarily by arguing that the reference to contractors having to comply with the applicable law (i.e. Russian law) throughout the rest of the contract was sufficient. The view was that this, on its own, was simply not enough. The fact that there was agreement that a contractor had to comply with the laws and regulations in which the work was to take place i.e. Russia is insufficient; there is no necessary inference that a contractual obligation requiring compliance with such laws is itself determined by applying the contract law of that country.

*No choice of law for substantive contract*

Thus having determined that there was no choice of law for the substantive provisions the question that then arose was where did that leave the arbitration agreement? Applying Article 4 of the Rome I Regulation conflict of law rules to the substantive contract would result in Russian law being applied as matter of imputation. The contract was to be performed in Russia and required compliance with Russian laws and regulations, the authoritative version of the contract was in the Russian language and the price was paid in roubles and paid to a Russian bank account. The main body of the contract was manifestly ‘more closely connected’ for these purposes with Russian than with any other country.

However an arbitration agreement was of a different nature to the provisions of the main contract. Not only was it a different type of obligation but it was also to be considered applying the English common law test rather than the Article 4 Rome I Regulation test. This was because arbitration agreements were specifically excluded from Rome I. That said it was recognised that both tests were very similar and should generally give the same result. Applying an approach based on the common law test which, in the absence of agreement, would impute the law with which the arbitration agreement had the ‘most close and real connection’ gave, as far as the majority were concerned, a clear answer; it was the law of the seat. This was the place where this particular obligation was to be performed, it was an interpretation which was consistent with Article V(1)(a) of the New York Convention, it gave effect to commercial purpose and enhanced legal certainty. Indeed Chubb did not argue against the contention that the law most closely connected with the arbitration agreement was, in general, the law of the seat of arbitration.

*The anti-suit injunction*

Chubb were thus left in a position where the substantive provisions of the main contract were governed by Russian law and the arbitration agreement was governed by English law. That clearly meant they were not able to advance their argument that the injunction should be reconsidered on the basis of a foreign law applying to the arbitration agreement. However for the avoidance of doubt the majority, briefly and robustly, rejected these arguments on the basis that *forum conveniens* factors were irrelevant and comity had little role to play in such an exercise in any event.

Thus it can be seen that, on the majority view, the case turns on whether there had been clear agreement, either express or implied, on the substantive provisions in a contract. However it appears that the central point is actually the acknowledgement that the purposes of an arbitration agreement and agreement on the substantive provisions of a contract are different. On one hand the substantive obligations set the standard that the parties have to comply with. On the other hand, the arbitration agreement simply sets out how the parties are going to resolve that dispute. It is perhaps no surprise that different results are reached when considering the different parts of the contract.

*The dissenting judgement*

Lord Burrows, with whom Lord Sales agreed, was however troubled by the approach taken by the majority. In his view it depended too much on whether there was a ‘choice’ (whether it be express or implied) or whether the default rules applied. The line between implication and imputation was in his view very thin. In this case his view was that there was sufficient to show an implicit choice of Russian law for the main contract (in his judgement it had been demonstrated by the terms of the contract and the circumstances) and therefore, given that this was a case of a ‘choice’ having been made as to the substantive law, that choice should extend to the arbitration agreement. However even if he was wrong that there was such a choice, there was so little difference between those factors which suggested whether there should be held to be a ‘choice’ compared with an ‘imputation’ in default of such a choice that they should all give the same result.

Thus, it might be suggested, that whilst this case may have brought certainty to the question of which law applies in default of agreement to an arbitration agreement, it simply emphasises the much wider uncertainty as to where implication for choice ends and imputation in default begins and the potential for different results on the same facts as demonstrated by the different views reached in the course of the judgements delivered.

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