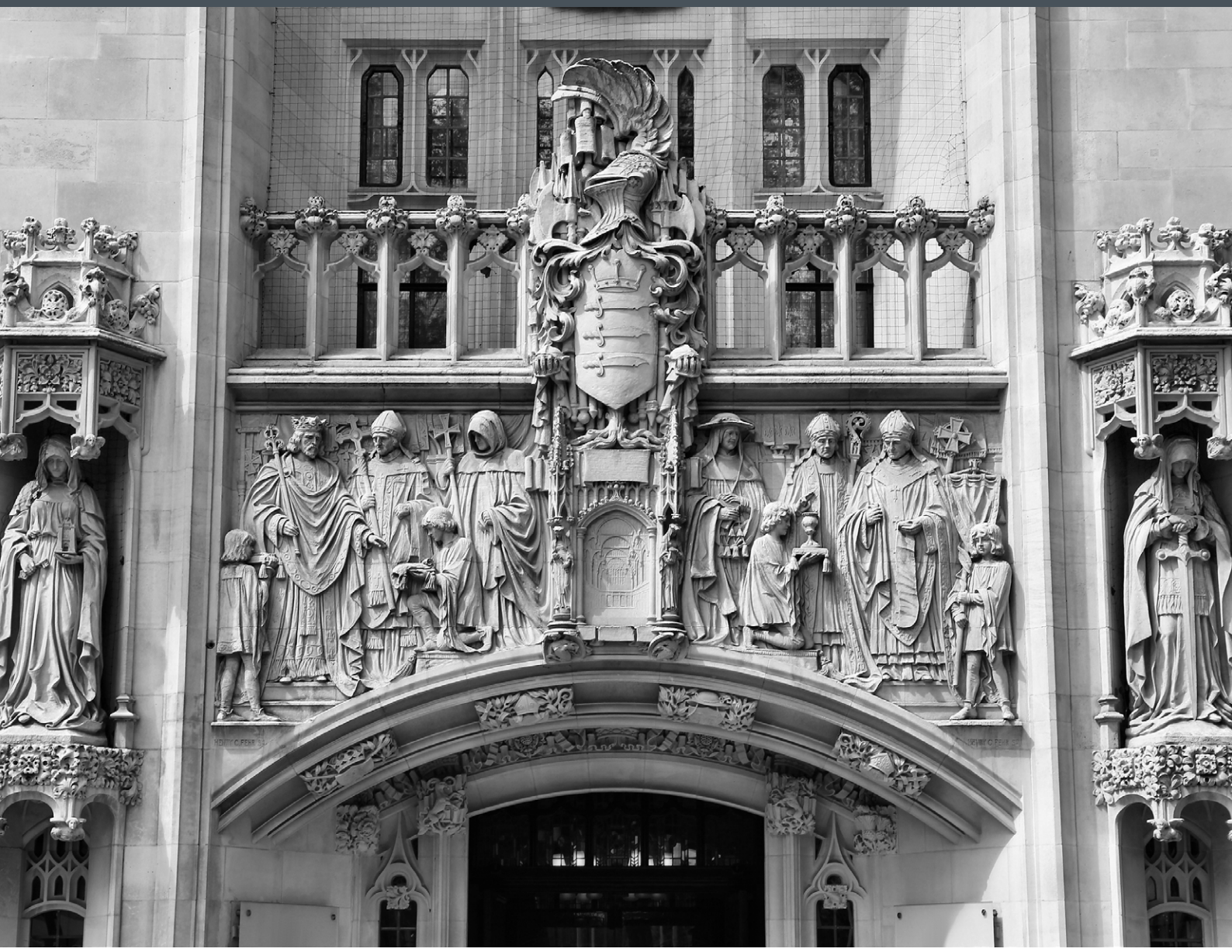

ENGLISH SUPREME COURT CONFIRMS PRINCIPLES FOR DETERMINING THE GOVERNING LAW OF AN ARBITRATION AGREEMENT

In its recent judgment, the English Supreme Court has given welcome clarification on how to determine the governing law of an arbitration agreement, in the absence of an express choice of law.

Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb[1] is an important decision in an area where there have been conflicting judgments, and will be of interest to all who wish to make use of arbitration.

1 https://www.supremecourt.uk/cases/docs/uksc-2020-0091-judgment.pdf

The principle of separability that applies to arbitration agreements under the English Arbitration Act 1996 [2] (**AA1996**) enables them to stand-alone from the main contract, and survive defects in the main contract by, in effect, creating a 'contract within a contract'. In so doing it has created issues where the governing law of the agreement is not expressed. This Supreme Court decision clarifies those issues.

Whilst the case arose from a construction dispute, the principles for determining governing law will apply irrespective of the underlying sector.

In essence, the Supreme Court held that:

- where the arbitration agreement is silent on the law governing it, but the main contract contains a governing law clause this will generally apply by extension to the arbitration agreement and that governing law will apply to the arbitration.
- in the absence of a governing law clause in the main contract as well as in the arbitration agreement, the governing law in the arbitration agreement will be deemed to be the law most closely connected to the parties' choice of seat of arbitration.

In Detail:

Following conclusion of a dispute arising from a fire at a Russian power plant in 2016, a dispute arose between the property insurer Chubb, who paid out US$400 million in relation to the claim, and who consequently pursued a claim as the subrogated insurer against the subcontractor, Enka, whose faulty work was alleged to have caused the fire.

Whilst the relevant contract between the Russian power plant and Enka contained an arbitration agreement, it did not contain a governing law clause in respect of the contract or the arbitration agreement, and so the parties issued proceedings in Russia and England respectively.

The contractual position:

- *The contract* provided for Russian law to govern specific provisions of the contract, but there was no express governing law provision.
- The *arbitration clause* provided for arbitration under the ICC Arbitration Rules, with London as the arbitration seat, but did not provide for an express choice of governing law.

The Russian proceedings:

- In 2019 Chubb issued proceedings in tort against Enka in Russia's Moscow Arbitrazh Court, to recover sums it had paid out. This was later dismissed on the merits.
- Enka sought to dismiss these proceedings on the basis that they fell within the arbitration clause, which it said was governed by English law. This argument was also later dismissed (but after the English Commercial Court had ruled).

The English proceedings:

- Subsequent to the issue of the Russian proceedings, in 2019 Enka issued proceedings in the English Commercial Court seeking an anti-suit injunction that would force Chubb to discontinue their Russian proceedings.
- Chubb argued that the arbitration agreement was governed by Russian law, under which the Russian proceedings would not fall within the scope of the arbitration agreement.
- The English proceedings were dismissed by the Commercial Court, which decided that on the basis of forum conveniens, an argument that neither party put forward, England was not the proper forum for the dispute.
- On appeal by Enka, the Court of Appeal rejected the concept of forum conveniens, but determined that under the seat of the arbitration it had supervisory powers to issue the anti-suit injunction preventing Chubb from continuing proceedings in Russia (the judgment pre-dated the Russian judgment which dismissed those proceedings).
- The Court of Appeal concluded that the jurisdiction of the English court arose by virtue of the parties' choice to arbitrate in England which, in the absence of a choice of law clause, meant that the law of the seat would determine the law applicable to the arbitration.
- Chubb appealed to the Supreme Court, but for the reasons set out below and on the basis of a majority, its appeal was dismissed, and English law was held to be the governing law of the arbitration.

The Supreme Court judgment:

The Supreme Court reviewed the recent case law, including the Court of Appeal decision in *Sulamerica CIA Nacional de Seguros SA v Enesea Engenharia SA [2012] EWCA Civ 638* [3], which held that a London arbitration clause in an insurance policy was governed by English law, even though the policy contained a Brazilian choice of law clause, and which was thought to have confirmed the position, but following which there were several subsequent conflicting judgments.

In Enka, the Supreme Court by a 3:2 majority held that the governing law of the arbitration agreement should be English law and confirmed, by reference to nine principles, that:

- The English court will apply English common law principles of interpretation in order to interpret and determine the relevant law of the contract and the arbitration agreement.
- Where the arbitration agreement is silent on the law governing it, but the main contract contains a governing law clause, this will generally apply by extension to the arbitration agreement.
- In the absence of a governing law clause in the main contract, the governing law in the arbitration agreement will be deemed to be that closest to the agreement – which will usually be the parties' choice of seat of arbitration.

2 Section 7 of the Arbitration Act 1996

3 http://www.bailii.org/ew/cases/EWCA/Civ/2012/638.html

What this means for you:

This judgment gives important and much needed clarity on how the English courts will deal with arbitration agreements that do not have an express governing law provision.

However, our recommendation is always for parties to be clear on the choice of law and jurisdiction for their main contracts and also for their arbitration agreements, and thereby avoid the possibility of having to seek confirmation from the courts - who in England will now follow the principles set out in this case, but where the position in other jurisdictions, may not be so clear.

This case also demonstrates the willingness of the English courts to arrive at a legally sound and commercially practical decision, and to do so quickly.

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