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Arbitration Agreement in the Main Contract - Landmark Judgment

In a recent case, the Supreme Court handed down judgment in *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38 (9 October 2020), unanimously confirming the Court of Appeal's decision to grant injunctive relief restraining proceedings in Russia in apparent breach of the parties' agreement to arbitrate their disputes in London.

Any contract ('*main contract*') is governed by law such as English Law, Chinese Law, the US Law, India law. Most contracts also have arbitration clause that is considered separate from the main contract. If this *arbitration agreement* is considered separate from the main contract, which law governs the arbitration agreement at a particular place ('*seat of the arbitration*' that decides the procedural law for conducting the arbitration). This case reached Supreme Court, highest court in England.

In this case, one of the parties (Chubb) to the dispute had chosen Russian law to govern their contract; that this therefore governed the arbitration agreement; and that, as a result, the Russian courts were best placed to decide whether or not the Russian proceedings which Enka sought to restrain were in breach of the arbitration agreement.

In order to resolve the issues by the court, there are, essentially, two possible approaches that have emerged when it comes to determining the law applicable to arbitration agreements, absent an express choice of governing law for the contract:

- (i) The first involves determining the law that governs the main contract, and presuming that this is also the law that governs the arbitration agreement; and
- (ii) The second involves the presumption that the parties' choice of a seat of arbitration reflects their choice of governing law for the arbitration agreement more generally.

On the governing law question, the majority in the Supreme Court adopted the "*seat*" approach. In doing so, the Supreme Court concluded that the choice of seat represented the choice of a system of law by the parties that they considered to be most closely connected with the arbitration agreement according to the principles of Conflict of Laws of England & Wales.

FDD department of ALCO's advice to the client of Andrew Liu is as follows:

- a) As a result of this judgment, parties need to select the place of arbitration more carefully than before as the law of the main contract will not be considered as same as the law of arbitration agreement contained in the arbitration clause. This legally will have serious implications including legal costs.
- b) It is advisable that in addition to the law governing the main contract such as bill of lading or charterparties, 'English Law', the parties should write that 'English Law also governs the arbitration agreement'. It will bring certainty to some extent.
- c) Additionally, as discussed earlier, the parties should never let go of their choice of appointing their own arbitrator in any clause, including in Small Claims Arbitration (where appeal is also not possible). When appointing arbitrator, the clients can call FDD department or Baker Heng in Hong Kong to discuss the possible names.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk