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A Roundup of recent UK Supreme Court cases relevant to London seated arbitrations and suggestions for in-house lawyers

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1. Overview

Recently, the UK Supreme Court issued two notable decisions in cases regarding arbitrations seated in London. One is about the governing law of an arbitration agreement (which has long been an area of complexity) and the other is about the duties of impartiality and disclosure of an arbitrator. In this article, we would like to overview these two decisions and we would also like to consider what in-house lawyers can do based on these two decisions. Please note that any opinions in this article are the authors' individual opinions and these opinions are not relevant to any companies, firms or organizations where the authors belong to or used to belong to.

2. Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38

The proper approach to determining the governing law of an arbitration agreement is an area of law which has long been unclear. All too often, parties will specify the governing law of their contract but neglect to specify which law governs the severable arbitration agreement contained within it, leading to disputes about whether the law of the underlying contract, the seat, or some other law should apply.

In *Enka v Chubb* the UK Supreme Court provided helpful clarity on the correct approach to determining the governing law of an arbitration agreement under English law. The dispute arose

out of Enka's request for an anti-suit injunction to prevent Chubb from pursuing a claim in the Russian courts. The underlying claim concerned Chubb's payment of approximately $400m under an insurance policy for damages caused by a fire at a power plant, subsequent to which Chubb moved against the subcontractors, including Enka, to recover the amount paid for the insured event. Enka alleged that the claim in the Russian courts was in breach of an arbitration agreement in the underlying contract. The applicable contract contained an arbitration agreement which provided for a London seated ICC arbitration, but did not specify the law governing the arbitration agreement. The parties' contract also did not expressly specify the governing law for the substantive contract itself.

The judgment seeks to promote certainty and enforceability of arbitration agreements, by providing that:

1. The parties' choice of law in the governing law clause under the contract should generally also be interpreted as an express choice of law governing their arbitration agreement.

2. Parties should generally, as a matter of implied agreement, be taken to have chosen a system of law to govern their arbitration agreement under which it would be valid.

3. In the absence of any express or implied agreement by the parties, the governing law of an arbitration agreement will generally be that of the seat of the arbitration.

The Supreme Court's decision departs from the Court of Appeal's judgment, which held that, given that an arbitration agreement is separable from the contract which contains it, express wording would be required to conclude that the governing law clause extended to the arbitration agreement. Absent such express wording, on the Court of Appeal's approach, there would be no express choice of law and the court would be required instead to search for an implied choice. Instead, the Supreme Court held that a governing law clause should generally be interpreted as an express choice determining the governing law of the arbitration agreement.

The Supreme Court was also not prepared to accept that, in the absence of an express choice of law, the parties had impliedly intended the law of the seat to govern the arbitration agreement. The Supreme Court did, however, endorse decisions in previous cases to the effect that parties should be taken impliedly to have chosen a governing law pursuant to which their arbitration agreement would be valid.

In the absence of any express or implied choice under the contract, the court will consider what system of law the arbitration agreement has the "closest and most real connection" with. The majority of the Supreme Court held that an arbitration agreement would generally have the closest and most real connection with the law of the seat. It gave several reasons for reaching this conclusion, noting, among other things, that this approach:

1. Reflected the status of the seat as the place where the arbitration was legally to be performed.

2. Was consistent with the approach taken by international law, in particular the New York Convention.

3. Would uphold the reasonable expectations of contracting parties who specified a seat without choosing a law to govern their main contract.

4. Would promote certainty by allowing parties to predict easily which governing law would apply in the absence of express or implied party choice.

Finally, the court's judgment also reaffirms that, where English law is the law of the seat, the English courts generally have jurisdiction to grant anti-suit injunctions to restrain breaches of the arbitration agreement, even where that agreement is not itself governed by English law.

Although this much anticipated judgement provides helpful clarity, parties can seek to address this issue in advance at the drafting stage by expressly specifying the governing law of the arbitration agreement. In this regard, parties can either include in the arbitration agreement a governing law provision (where parties want the governing law of the arbitration agreement to follow the law of the seat), or extend the contract governing law provision so that it also covers the arbitration agreement (where the parties want the governing law of the contract to apply).It is crucial to consider how you should specify the governing law of the arbitration agreement considering the negotiations with the counterparty and based on the legal advice from your legal counsel.

3. Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48

In *Halliburton v Chubb* the UK Supreme Court addressed the circumstances in which an arbitrator may appear to be biased and when an arbitrator must disclose circumstances which may give rise to justifiable doubts about their impartiality. In reaching its decision, the UK Supreme Court received interventions from a number of interested parties, including the ICC and the LCIA.

The dispute arose out of insurance claims regarding the Deepwater Horizon incident. Halliburton commenced arbitration proceedings against Chubb following a refused insurance claim. The arbitration was brought under the Bermuda Form policy in question, which was governed by New York law and provided for London-seated ad hoc arbitration.

Halliburton and Chubb each appointed one arbitrator under the arbitration clause. However, the parties could not agree on the third arbitrator (to act as chair), so he was appointed by the English High Court. Subsequently, and without Halliburton's knowledge, the appointed arbitrator then accepted arbitrator appointments in two further arbitrations arising out of the same incident.

When Halliburton learned of these appointments, it applied to the High Court under section 24(1)(a) of the Arbitration Act 1996 to have the arbitrator removed for apparent bias. The High Court and the Court of Appeal refused Halliburton's application. Halliburton appealed to the Supreme Court.

3.1 Duty of impartiality

The Supreme Court emphasised the importance of impartiality in arbitration, highlighting that it is a "*cardinal duty*" of an arbitrator. The test for whether an arbitrator has shown impartiality or apparent bias is an objective test. This requires considering "*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*" (*Porter v Magill* [2001] UKHL 67).

However, in the arbitration context, this test must be applied taking into account the differences between judicial and arbitral determination of disputes. The test should take into account the private and consensual nature of arbitration; the limited nature of appeals; the divergent views of arbitrators arising out of their differing expertise, jurisdictions and legal traditions; the differing perceptions of the role of a party-appointed arbitrator in the arbitration field; and, due to the mainly private nature of arbitration, a party's inability to inform itself (by attending other proceedings) of a common arbitrator's response to evidence and submissions in arbitrations to which it is not a party.

While taking these differing perspectives into account, the duty of impartiality applied in the same way to every member of the arbitral tribunal and "*the party-appointed arbitrator in*

English law is expected to come up to precisely the same high standards of fairness and impartiality as the person chairing the tribunal".

3.2 Duty of disclosure

An arbitrator in London-seated arbitrations has a legal duty to disclose facts or circumstances known to him or her which would or might reasonably cause the objective observer to conclude that there was a real possibility that the arbitrator was biased.

However, this legal duty of disclosure does not override an arbitrator's duties of privacy and confidentiality, and where information is subject to these duties, disclosure requires express consent (although consent may be inferred from customs and practices in the relevant field of arbitration).

The court explored the interaction of the duty to disclose and the duty of impartiality and held that these questions fall to be assessed at different times. When considering whether there was a failure to disclose, one must consider the facts at the time the duty arose (e.g. when the arbitrator accepted an appointment in a potentially overlapping arbitration and during the period the duty subsists). In contrast, in assessing whether there is a real possibility that an arbitrator is biased, the Court must have regard to the facts and circumstances known at the date of the court hearing of the application to remove the arbitrator.

3.3 Considering overlapping references

There *may* be circumstances in which an arbitrator's acceptance of appointments in multiple arbitrations involving a common party and the same or overlapping subject matter would, without more, give rise to an appearance of bias. Whether such an appointment give rise an appearance of bias in fact, will depend on the facts of the case, the terms of the arbitration clause, and the customs and practices in the relevant field of arbitration.

Similarly, the fact that an arbitrator has accepted overlapping references is a matter which *may* have to be disclosed. Even if a real possibility of bias is not established, the duty to disclose arises nonetheless if it might "reasonably" give rise to such doubt. Again, whether an arbitrator needs to make disclosure will depend on the customs and practices in the relevant field of arbitration.

In this case, the court held that the arbitrator had breached his legal duty of disclosure, but that there was no apparent bias, and it could not be said on the facts that the "*fair-minded and informed observer*" would infer from the arbitrator's failure to disclose that there was a real possibility of bias.

This decision demonstrates the robust approach of the English courts to arbitrator challenges, consistent with the courts' pro-arbitration and non-interventionist stance. That being said, parties to proceedings should be careful to consider issues created by subsequent developments after the appointment of the tribunal, and the need for arbitrators to make ongoing or new disclosures.

4. Implications to in-house lawyers

In Enka v Chubb, the Court indicated several factors to decide which law would apply to an arbitration agreement if the governing law of that arbitration agreement is not expressly or impliedly indicated in the contract. As in-house lawyers, it is obviously preferable to clarify which law will apply to an arbitration agreement when drafting new contracts. However, depending on the bargaining power of the parties or due to the fact that often business teams would like to keep the contract as simple as possible, business teams may sometimes prefer you not to clarify the governing law of an arbitration agreement and open this point in negotiations. In these cases, in-house lawyers should consider the factors indicated by the UK Supreme Court decision and decide a negotiation strategy. In existing contracts it may not always be clear which law will

govern the arbitration agreement, in these circumstances the Enka v Chubb decision provides useful guidance.

- In addition, once arbitrators are appointed and an arbitration has commenced, it is natural for in-house lawyers to focus on formulating their own party's case. However, as we see in *Halliburton*, it is worthwhile to remain careful about whether an arbitrator, especially one appointed by a counterparty, is biased or whether there is a real possibility that the arbitrator is biased. In this regard, to the extent possible given the confidential nature of many arbitrations, we suggest following other similar or related arbitration cases where your company is not a party, and based on that, considering your arbitration strategy flexibly.

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