R K

Background

In a recent decision from of the Supreme Court, the Court considered the applicable national law in relation to an arbitration agreement where the law of the contract containing the agreement differed from the law of the seat of the arbitration.

In the Court of Appeal the decision was made in favour of the Respondent, Enka Insaat Ve Sanayi AS ("**Enka**"). It was held that, "unless there has been an express choice of the law that is to govern the arbitration agreement, the general rule should be that the arbitration agreement is governed by the law of the seat, as a matter of implied choice, subject only to any particular features of the case demonstrating powerful reasons to the contrary".

The Appellant to the Supreme Court, OOO Insurance Company Chubb ("Chubb") argued that the correct approach should instead be, in the absence of strong indications to the contrary, that the choice of law for the contract is also the governing law of the arbitration agreement.

The brief facts of the dispute are as follows. Chubb is a Russian insurance company which had insured a power plant in Russia which was severely damaged by a fire. Enka was one of many sub-contractors involved in the construction of the power plant. Enka's construction contract contained a dispute resolution clause which named London, England as the place of arbitration. Chubb paid approximately $400 million to PJSC Unipro, the owner of the plant, and filed a claim against Enka and ten other defendants who it claimed were jointly liable for the fire. Chubb began proceedings in Russia, but Enka obtained an anti-suit injunction from the Court of Appeal in England restraining Chubb Russia from continuing the Russian proceedings. Chubb appealed to the Supreme Court.

The decision

In a lengthy judgment, the Supreme Court dismissed Chubb's appeal. The majority agreed with Chubb's submissions on choice of law but, as there was no express or implied choice of Russian law, dismissed the appeal. Lord Hamblen and Lord Leggatt gave the leading judgment and Lord Kerr agreed.

The normal process applied by the English courts in contractual, civil and commercial matters when deciding an issue of conflict of laws is with recourse to the Rome I Regulation. However, arbitration agreements and agreements on the choice of court are excluded under article 3. English courts must therefore apply the common law rules to arbitration agreements. Under common law, the correct system of law is that which is expressly or impliedly chosen by the parties or, in the absence of such a choice, the law with which it is most closely connected to the contract.

The Supreme Court had to first decide which system of law to apply when determining if there had been a choice of law. The Supreme Court was of the opinion that the correct system of law was the law of the seat. Once a choice of law in relation to the main contract has been established, the courts would then have to decide whether that choice of law would also apply

to the arbitration agreement.

As a general rule, the Court of Appeal decided that only in a minority of cases would the chosen law of the contract also apply to the arbitration agreement where it is different from the law of the seat of arbitration. Instead, there was to be a strong presumption that the parties have impliedly chosen the law of the seat of arbitration to govern the arbitration agreement.

Lord Hamblen, Lord Leggatt and Lord Kerr, as a majority of the Supreme Court, disagreed with the Court of Appeal's general rule. The majority established a contrary general rule to replace that established by the Court of Appeal. The general rule now is that an agreement on a choice of law to govern a contract should generally be construed as applying to an arbitration agreement set out or otherwise incorporated in that contract.

Chubb was successful in establishing that an agreement on the choice of law to govern the contract would also apply to an arbitration agreement. However, returning to the first point, Chubb still needed to show that a choice of Russian law had been made in relation to the contract. On this point Chubb failed. The majority found that there was no express or implied choice of a system of law to govern the validity and interpretation of the contract. Nowhere in the contract did the parties state that the Russian system of law was to govern their contractual obligations.

In the absence of any choice of law to govern the contract, and therefore the arbitration agreement, it was necessary for the majority to fall back on the default position under common law and identify which system of law was most closely connected to the contract. The majority found that this will generally be the law of the seat chosen by the parties. In the current case, this was London.

The Supreme Court concluded that the arbitration agreement was governed by English law, not Russian law, and therefore dismissed Chubb's appeal.

Lord Burrows and Lord Sales dissented on both points. In their view there had been a clear choice of Russian law for the main contract. However, even if there had not been a clear choice of Russian law, they still would have held that the law applicable to the arbitration agreement was the same as that which applied to main contract.

Commentary

The Supreme Court's decision has attempted to provide clarity to a long contested area of law concerning the conflict of laws in arbitration agreements. It awaits to be seen whether the general rule adopted by the majority is intuitive enough to avoid the need for the point to be revisited in the future. In order to avoid having similar issues, as is always the case with any legal agreement, parties should make their choice of law decision as clear and unambiguous as possible.

In the current case, if Chubb had been able to demonstrate that a clear choice of Russian law

had been made in the main contract, it would not have mattered that the seat of arbitration was in London. Parties should remain mindful of the obligations that may be imposed by an arbitration clause. The system of law which is to be applied has a profound impact on the interpretation of the entire contract. The arbitration clause should be negotiated as meticulously as any other.

Should you wish to discuss this in more detail, please do not hesitate to contact Georgina Squire or the Partner who you normally deal with.