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# The Importance of Stating the Law of the Arbitration Agreement

*Enka Insaat Ve Sanayi A.S. v  
OOO Insurance Company  
Chubb [2020] UKSC 38*

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LEGAL  
UPDATE

# In this Update

Generally, there are at least *three* systems of law engaged in an arbitration: (i) the law which governs the substance of the dispute, (ii) the law of the chosen seat of the arbitration, and (iii) the proper law of the arbitration agreement.

It is the last of these which is often overlooked but it is of no less importance.

In this update, we highlight the reasons and discuss the recent significant case of the UK Supreme Court in *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38.

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## INTRODUCTION

Generally, there are at least three systems of law engaged in an arbitration: (i) the law of the underlying contract, which governs the substance of the dispute (“**substantive law**”), (ii) the law of the chosen seat of the arbitration, which governs the arbitration process (“**curial law**”), and (iii) the proper law of the arbitration agreement (“**proper law**”).

It is the last of these which is often overlooked and rarely expressly provided for in most arbitration agreements. But it is of no less importance as it is the proper law which governs the scope and validity of the arbitration agreement.

## KEYPOINT

*Failure to set out the proper law can lead to unnecessary and expensive litigation which may result in vastly different outcomes than that contemplated by parties, particularly where there is a divergence in the substantive law and curial law.*

For example, a party who thinks it would be more advantageous to have the dispute resolved by a national court may seek to frustrate arbitral proceedings by contending that the scope of the arbitration agreement does not cover the subject matter dispute. Should the dispute be resolved by a national court or by arbitration?

Or post a corporate restructuring and for enforcement reasons, arbitral proceedings are commenced against the new parent company of the counterparty to the underlying contract which on the face of the arbitration agreement is not a party to the arbitration agreement. Can the new parent company be dragged into arbitral proceedings? That may be permissible if for example, French law is the proper law.

The determination of such issues will depend on the proper law. And if the proper law is not spelt out, it would first have to be determined by a national court.

*Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38 (“**Enka v Chubb**”) demonstrates the importance of the proper law, to which we now turn.

## BACKGROUND

The dispute concerned the Berezovskaya power plant in Russia which was damaged by a fire, leading to a payout of some US\$400m by an insurer, OOO Insurance Company Chubb (“**Chubb**”).

In May 2019, Chubb commenced Russian court proceedings against Enka Insaat Ve Sanayi A.S. (“**Enka**”), among others, on the basis that Enka, one of the many sub-contractors involved in the construction of the power plant, was allegedly responsible in part for the fire (“**Dispute**”).

The relevant contract contained a tiered-dispute resolution clause which ultimately provided that any dispute arising from the relevant contract would be referred to arbitration. London was chosen as the seat of arbitration so the curial law was English law.

But the contract did not contain an express choice of substantive law nor did the relevant arbitration agreement provide for the proper law.

In September 2019, Enka commenced English proceedings to obtain, among other things, an anti-suit injunction to restrain Chubb from pursuing the Dispute before the Russian court which ought to be resolved by arbitration instead.

Chubb contested the English proceedings and contended that the substantive law was Russian law and thus the proper law was Russian law. Further, Russian courts were best placed to decide whether or not the Dispute fell within the scope of the arbitration agreement. As a matter of comity or discretion, the English courts ought not to interfere with the Russian court proceedings. On the other hand, Enka contended that the proper law was English law.

The central issue that had to be determined was the proper law.

## THE UK COURT OF APPEAL’S DECISION

At first instance, the UK High Court refused to grant Enka the anti-suit injunction. On 29 April 2020, the UK Court of Appeal in *Enka Insaat ve Sanayi AS v OOO “Insurance Company Chubb” and others* [2020] EWCA Civ 574 unanimously reversed that decision and granted Enka its anti-suit injunction against Chubb, among other things.

The UK Court of Appeal applied the 3-stage test set out in its earlier decision of *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2013] 1 WLR 102 (“**Sulamérica**”) (which has been applied and accepted by the Singapore courts), a formulation based on UK common law conflict of laws rules:

- (a) Stage 1: whether there was an *express* choice of the proper law;
- (b) Stage 2: whether there was an *implied* choice of the proper law; and
- (c) Stage 3: where there is neither an express nor implied choice of the proper law, the system of law which the arbitration agreement has the “*closest and most real connection*”, which would ordinarily be the curial law.

However, the UK Court of Appeal departed from *Sulamérica* in one material regard.

At stage 2, *ie* where there was no *express* choice of the proper law, the UK Court of Appeal considered that in the majority of cases, there is a strong presumption that parties impliedly chose the *curial law* as the proper law. (In contrast, in *Sulamérica*, it was held that absent an express choice of the proper law, where the arbitration agreement forms part of the underlying contract, a rebuttable presumption arises that the proper law is the same as the *substantive law*.)

Thus in the absence of countervailing factors, the proper law was presumed to be that of the curial law which was English law. That being the case, the UK Court of Appeal considered that the Dispute fell within the scope of the relevant arbitration agreement and the injunction was granted to Enka.

Chubb was granted leave to appeal to the UK Supreme Court.

## THE UK SUPREME COURT'S DECISION

The UK Supreme Court unanimously agreed that the proper law was English law and granted the injunction to Enka. However, some of the members of the UK Supreme Court did not agree with the UK Court of Appeal's reasoning in arriving at their decision.

As in *Sulamérica*, the majority considered that where parties have not specified the proper law but have chosen the substantive law, the *substantive law* will, in the absence of a "*good reason to the contrary*" also apply to the arbitration agreement.

## KEYPOINT

*Parties were assumed to have the whole of their relationship governed by the same system of law. Thus the natural and sensible inference was that the substantive law would govern all clauses in the underlying contract, including the arbitration agreement.*

As to when such inference could be negated, the fact that the curial law was different from the substantive law in and of itself was not sufficient. Rather, two factors were expressly identified which may overcome such inference:

- (a) First, where there is a serious risk that the arbitration agreement would be ineffective should the substantive law be taken as the proper law, as parties could not have rationally intended for an arbitration agreement to be void (“**Validation Principle**”).
- (b) Second, where parties’ choice of curial law provided that the arbitration agreement would be treated as governed by that jurisdiction’s laws, eg Section 6 of the Arbitration (Scotland) Act 2010 and Section 48 of the Swedish Arbitration Act. No such law existed in the English Arbitration Act 1996.

The UK Supreme Court considered that no express choice of substantive law had been made. It was thus necessary to proceed to the stage 3 of the inquiry and identify the system of law with which the arbitration agreement was most closely connected with. Generally, and on the facts, that system of law would be the curial law, *ie* English law.

## COMMENTS

Prior to *Enka v Chubb*, the UK court’s approach to determining the proper law was not settled and difficult to predict. In the absence of an *express* choice of the proper law, it was not clear whether the substantive law or curial law would be taken as the starting point of parties’ *implied* choice of the proper law. Indeed, there were conflicting UK Court of Appeal decisions falling on either side of the divide, including *Sulamérica*.

In April 2020, the UK Court of Appeal’s departure from the then prevailing approach was perceived as creating a divergence between the UK and prevailing Singapore courts’ approaches.

## KEYPOINT

*By a 3:2 split decision, the UK Supreme Court in Enka v Chubb did away with the uncertainty in the UK and the approaches in both the UK and Singapore courts are now largely aligned.*

With this comes a degree of certainty that the Singapore court’s approach, which has its roots in UK jurisprudence, is likely to remain unchanged for the time being.

### ***Further room for development in Singapore***

In the UK, *Enka v Chubb* makes clear that the Validation Principle features at the stage 2 inquiry. Indeed, the Validation Principle is not new to English law and featured in the *Sulamérica* framework. Thus if there is a serious risk that the arbitration agreement would be ineffective should the substantive law be taken as the proper law, the UK courts would likely proceed to the stage 3 inquiry and will have to identify the system of law with which the arbitration agreement was most closely connected with. At stage 3, other factors become relevant and the choice of curial law features prominently.

In Singapore, the position is less clear:

- (a) On the one hand, Justice Steven Chong (as His Honour then was) appeared to impliedly accept the Validation Principle as part of Singapore arbitration law in adopting the *Sulamérica* framework in the Singapore High Court decision of *BCY v BCZ* [2017] 3 SLR 357 (“**BCY Framework**”).
- (b) On the other hand, in another Singapore High Court decision of *BNA v BNB and another* [2019] SGHC 142, although the BCY Framework was applied, Justice Vinodh Coomaraswamy in a lengthy exposition resoundingly rejected that the Validation Principle (albeit in its broader formulation) formed part of Singapore’s arbitration law which His Honour considered was “*incompatible with the three-stage inquiry... which [Justice Steven Chong] was at pains to set out in BCY.*”
- (c) The BCY Framework was subsequently endorsed by the Singapore Court of Appeal in *BNA v BNB* [2020] 1 SLR 456 (SGCA). However, in the judgment delivered by Justice of Appeal Steven Chong (this time, seated on the Singapore Court of Appeal), the Singapore Court of Appeal considered it unnecessary to deal with Justice Coomaraswamy’s comments in the decision below.

While it would appear that the Validation Principle is part of Singapore’s arbitration law and would feature in Singapore’s 3-stage test, the extent to which its broader formulation forms part of Singapore law has yet to be considered.

## **CLOSING REMARKS**

By incorporating an arbitration agreement into a contract, parties contemplate that should a dispute arise, it ought to be referred to arbitration. But how an arbitration agreement will be enforced, and whether it would be in line with what parties had intended, will depend on the wording and construction of the arbitration agreement.

To forestall any uncertainty, the proper law ought to be spelt out in an arbitration agreement.

A related point is the choice of curial law. In recent years, courts of certain jurisdictions have emerged as particularly supportive and facilitative of arbitration. For one, we observe that the Singapore courts have in recent years adopted a pro-arbitration stance. The curial law should thus be carefully selected to ensure an added degree of certainty to arbitration.

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