

“Order and clarity” on law applicable to arbitration agreements with an English seat.

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Many parties adopt English law to govern their contracts and elect to resolve any disputes arising out of their contracts by arbitration seated in England. They do so because of the well-developed state of the law and the commercial sophistication of the judiciary and the legal community based in and around the City of London.

The English courts are aware that international businessmen and women have a choice of legal systems when entering into contracts and of the need to continue to develop English law in a way that makes it attractive to business. The latest evidence of that is the Court of Appeal's decision just handed down in *Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb*, 2020 WL 02045545 (29 April 2020) on the subject of the English law approach to identifying the law applicable to arbitration agreements that provide for an English seat. Followers of English law on this topic will know that it is one of the few areas of commercial law where the development of the caselaw has not been a model of clarity. In the decision, Poppelwell LJ said:

“In my view the time has come to seek to impose some order and clarity on this area of the law, in particular as to the relative significance to be attached to the main contract law on the one hand, and the curial law of the arbitration agreement on the other, in seeking to determine the [law applicable to the arbitration agreement]. The current state of the authorities does no credit to English commercial law which seeks to serve the business community by providing certainty.”

The test to identify the law applicable to an arbitration agreement under the English common law is a three step process: (i) is there an express choice of law; (ii) if not, is there an implied choice of law, failing which (iii) what law has the closest and most real connection to the arbitration agreement itself? The *Enka Insaat* decision provides useful clarity and certainty in the application of this test by establishing a general rule that, where there is no express choice by the parties of the law applicable to the arbitration agreement, there is a strong presumption that it is governed by the law of the seat as an implied choice that can only be overcome by “*powerful countervailing factors*” in the relationship between the parties and/or the circumstances of the case. Even where there are such factors, the analysis would then move to the third stage above, which the authorities show has consistently resulted in the application of the law of the seat because the separate arbitration agreement will almost always have its closest connection with the law of the seat.

This decision marks a further move towards favouring the law of the seat in situations where the law governing the underlying contract and the seat are different (a position which has been developing since the 2012 decision of the Court of Appeal in *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638). The English law approach is designed to create certainty by emphasising the principles of party autonomy and separability of the arbitration agreement. The *Enka Insaat* decision is further evidence of the pro-arbitration approach generally adopted by the English courts.

We hope that the further clarity provided by the *Enka Insaat* decision in what has proven to be a complex issue will help encourage parties to trust their international commercial relationships to English law and English seated arbitrations.

If you have any questions concerning this recent decision or any other points of English arbitration law please do contact:



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