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Client Alert

UK Supreme Court Decisions on Arbitration Agreements and Procedure in 2020-2021

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The last two years have seen three landmark decisions of the UK Supreme Court on arbitration agreements and procedure. This alert summarizes those decisions and their implications.

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

The applicable law of an arbitration agreement can have very important practical consequences for the parties, such as whether a non-signatory can be a party to the arbitration, whether pre-contractual negotiations are admissible evidence, whether tort claims are within the scope of the arbitration agreement, and even whether the arbitration agreement is valid at all. Nevertheless, while parties' contracts often expressly set out the law applicable to the contract, they rarely state the law that governs any arbitration agreement therein.

Prior to this decision, it was unclear what approach English Courts were likely to take when determining the governing law of an arbitration agreement in such circumstances, and in particular whether they would follow the 'main contract' approach (presuming that the parties intended the same system of law to govern their arbitration agreement as their main contract) or the 'seat approach' (presuming that the parties intended their arbitration agreement to be governed by the law of the seat of the arbitration).

Applying common law rules (because the Rome I Regulation on the law applicable to contractual obligations expressly excludes arbitration agreements from its scope), the Supreme Court unanimously held that, where the parties have (expressly or impliedly) chosen the governing law for their main contract, that law will also apply to their arbitration agreement, absent a good reason to the contrary. The decision therefore provides a large measure of certainty to parties that have stated the governing law of their contract – and this is the approach that parties are recommended to take.

Regrettably, the decision failed to provide the same certainty where the parties have not chosen the law of their contract. The judges were divided in this regard: the majority preferred the 'seat approach', and the minority the 'main contract' approach (with the law of the contract being determined under Rome I).

***Kabab-Ji-SAL v Kout Food Group* [2021] UKSC 48**

Here, the Supreme Court had to determine the governing law of an arbitration agreement at the enforcement stage, which required consideration of the position under Article V(1)(a) the New York Convention (as enacted by section 103(2)(b) of the Arbitration Act 1996 (the **"1996 Act"**)) rather than the common law.

In this regard, the Court recognised that the Convention should be applied uniformly by contracting states, but found no clear consensus among national courts and jurists as to the approach to be followed. It therefore

returned to first principles and applied the approach from *Enka v Chubb* described above. As such, as a matter of English law, arbitration agreements are likely to be governed by the law applicable to the main contract, regardless of the stage that the arbitration has reached.

While this clarity is to be welcomed, it should be noted that the Paris Court of Appeal, considering the same arbitral award, reached the opposite conclusion and decided that the arbitration agreement was governed by the law of the seat. In the circumstances of the case, this meant that the English Courts held that the arbitration agreement was governed by English law and the award was unenforceable, while the French Courts held that the agreement was governed by French law and the award was enforceable.

The prospect of conflicting decisions on enforcement reinforces the importance of contracting parties including governing law clauses for their arbitrationagreement (and not just for the main contract), especially in cases where the law of the contract differs from the law of the seat of the arbitration. Otherwise, they may face lengthy and costly proceedings, across multiple jurisdictions, challenging any arbitral award.

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

In this case, the Supreme Court was called upon to decide two issues relating to arbitrators' duties of impartiality and disclosure – namely, whether (and, if so, to what extent) an arbitrator may accept appointments in multiple references with overlapping subject matter and only one common party: (i) without creating an appearance of bias; and (ii) without making disclosure to the non-party who is not the common party. It laid down the following principles of general application:

1. Unless the parties to the arbitration have agreed otherwise, arbitrators have a legal duty, arising out of section 33 of the 1996 Act, to disclose matters known to them that might cause a fair-minded and informed observer to conclude that there is a real possibility that they are biased.
2. Appointment of the same arbitrator in multiple arbitrations with the same subject matter and only one common party may create the appearance of bias. Whether it in fact does so depends on all the circumstances of the case, and in particular the *"customs and practices of the relevant field of arbitration"*, including whether such multiple appointments are customary.
3. The arbitrator's disclosure duty is subject to their duties of privacy and confidentiality, so that the consent of the parties to whom these duties are owed is required for disclosure to be made. In the context of multiple appointments, if the arbitrator does not or cannot obtain the consent required to disclose either the earlier or later appointment, he or she must decline the later appointment.
4. The test for removing an arbitrator under section 24(1)(a) of the 1996 Act is whether a fair-minded and informed observer would conclude that there is a real possibility that the arbitrator is biased. This is a higher threshold than for the arbitrator's duty of disclosure.
5. For the purposes of determining whether an arbitrator ought to have disclosed a particular matter, the assessment of apparent bias may only consider facts existing within the period of the alleged duty to disclose. In the context of removal applications, however, the Court assesses apparent bias based on the facts as at the hearing date, including any breach by the arbitrator of their disclosure duty.

6. In cases where an arbitrator breaches their disclosure duty, but a subsequent removal application is unsuccessful, the arbitrator might nevertheless be liable for the costs of the application.

The Supreme Court's judgment thus confirms that arbitrators, however appointed, are under a legal duty to disclose potential conflicts of interest, which may include multiple appointments in related matters. Together with the possible cost consequences of material non-disclosure, it is hoped that this will promote greater transparency regarding arbitrator appointments, to the benefit of English-seated arbitrations generally.

These cases provide welcome clarity to arbitration practitioners but, as ever, important issues still remain to be decided and we await further judicial clarity in this regard.

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