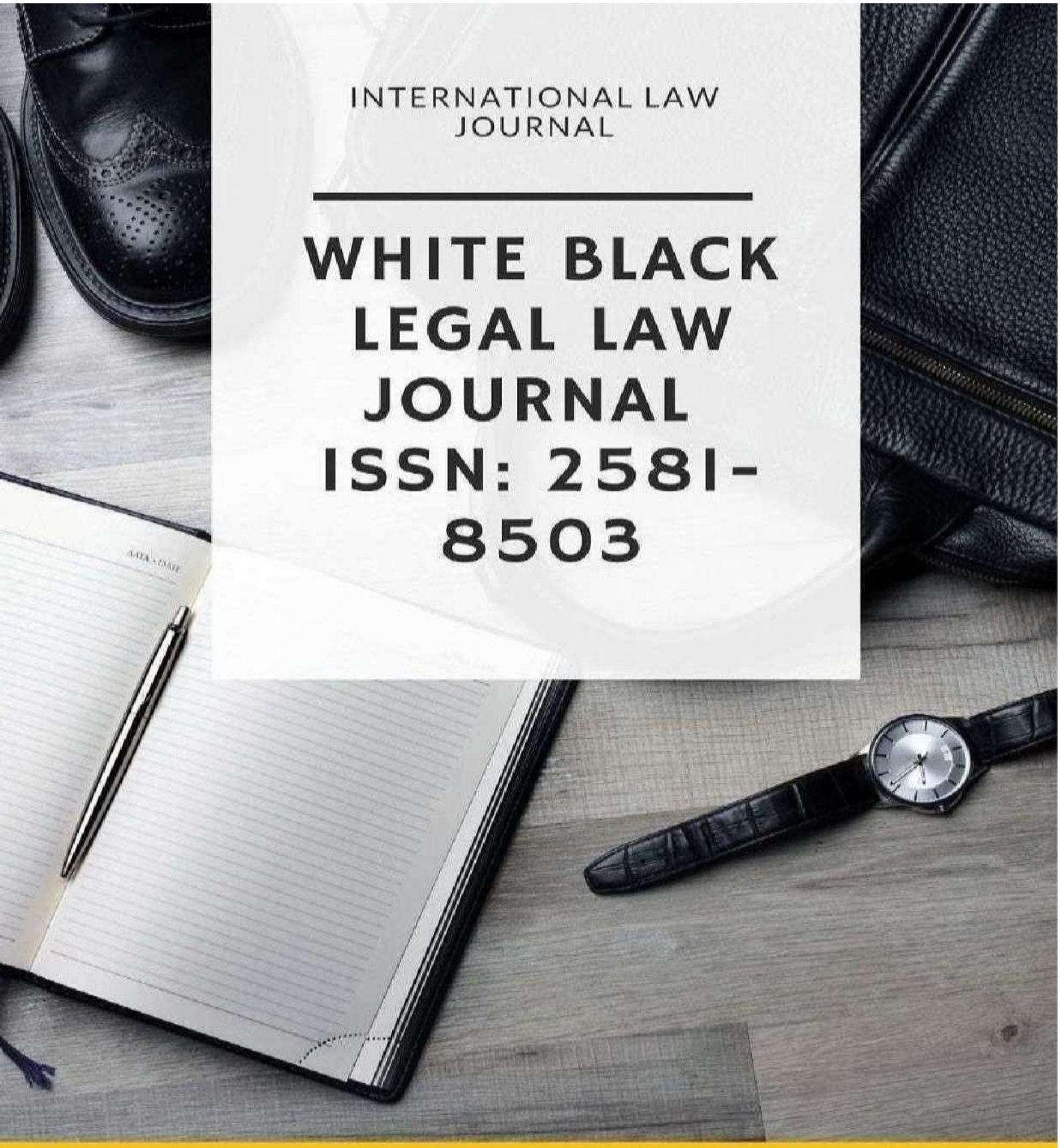

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

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Volume 3 Issue 1 | Dec 2024 ISSN: 2581-8503

ENKA INSAAT VE SANAYI A.S. V OOO INSURANCE COMPANY CHUBB: GOVERNING LAW AND JURISDICTION IN ARBITRATION AGREEMENTS

AUTHORED BY- VAGISHA GUPTA

INTRODUCTION

The case of *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* addresses the legal principle of determining the governing law for arbitration agreements, particularly in situations where the law governing the main contract is unclear or not specified. The core legal issue revolves around whether the law of the seat of arbitration or the law of the main contract should apply to the arbitration agreement when there is no express choice of law. This case is significant as it clarifies the approach English courts take in resolving conflicts of law in international arbitration, particularly with respect to the validity of anti-suit injunctions and the enforcement of arbitration agreements across jurisdictions. The decision has broader implications for future arbitration disputes, especially in cross-border contexts, as it upholds the principle that the law most closely connected to the arbitration agreement typically governs its validity and enforcement.

FACTS

The claimant, the Turkish engineering firm Enka Insaat Ve Sanayi A.S. (henceforth referred to as Enka), was a subcontractor in the project involved in the building of a power plant in Russia. An arbitration agreement was added to the contract with the Russian head contractor, stipulating that arbitration procedures in London would be used to settle any problems.

At the power facility, came about a fire that caused significant damage. The proprietor of the power plant was insured against these losses by a Russian insurance provider OOO Insurance Company Chubb (henceforth referred to as Chubb), the appellant. By paying the proprietor's insurance claim, Chubb took over their rights to pursue reimbursement from third parties, like Enka, to compensate for the fire's losses.[1]

[1] 'Enka Insaat vs v Chubb Re Arbitration: Expert Evidence' (Expert Evidence | Specialists in Dispute Resolution, 25 January 2023) <https://expert-evidence.com/enka-insaat-vs-v-chubb-re-arbitration/> accessed 6 October 2024

Next, in an attempt to recoup the funds that were given out, Chubb initiated proceedings in Russian courts against Enka and the other subcontractors. Enka countered in September 2019 by bringing an arbitration claim in the London commercial court. Enka contended that Chubb had violated the arbitration agreement by continuing in the Russian court and sought an anti-suit injunction preventing Chubb from pursuing the Russian claim.

PROCEDURAL HISTORY

The Commercial Court of England and Wales was the venue for the first proceedings. The court decided against Enka, holding that Russian courts were the proper forum to decide whether or not Enka and Chubb had a legitimate arbitration agreement, and that the court lacked authority to issue an anti-suit injunction.

Enka, displeased with the verdict, filed an appeal with the Court of Appeal. In a remarkable change of events, the Court of Appeal overruled the Commercial Court's ruling, accepting Enka's appeal and issuing an anti-suit order against Chubb.
Subsequently, Chubb appealed this ruling to the UK Supreme Court. [2]

ISSUES

1. What approach is applicable in determining the best-suited law of an arbitration agreement?
2. For the main contract under Rome I, what importance does the parties' choice of law have?
3. What's the role of the seat of the arbitration in determining if a foreign court's proceedings breach an arbitration agreement?

RULES

ROME I Regulations: The Rome I Regulation (EC/593/2008) prescribes the rules that must be followed in the courts of EU member states to identify what law controls a contract. [3]
Article 1(2)(e) of Rome I omits "*arbitration agreements and agreements on the choice of*

[2] Enka Insaat Ve Sanayi AS (Respondent) v OOO Insurance Company Chubb (Appellant), Supreme Court, 9 October 2020, UKSC 38 (UK) <www.bailii.org/uk/cases/UKSC/2020/38.html> accessed 6 October 2024
[3] 'BREXIT, ENGLISH LAW AND THE ENGLISH COURTS: WHERE ARE WE NOW?' (clifford chance, August 2018) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2018/08/brexit-english-law-and-the-english-courts-where-are-we-now.pdf> accessed 6 October 2024

court" from its scope.[4]

Seat of the Arbitration: The location designated by the parties as the legal place of arbitration which then sets the procedural framework of the arbitration.[5]

MAJORITY DECISION

Rather than using the Rome I Regulation, which omits arbitration agreements from its purview (A. 1(2)(e)), the English courts relied on common law norms for resolving conflicts of law when establishing which system of law regulates an arbitration agreement.

As per common law, arbitration agreements are governed by:

1. The law chosen by the parties (expressly or impliedly), or
2. If the absence of such a choice, the legal system most closely connected to the arbitration agreement would govern the agreement.

To assess whether a governing law has been selected by the parties, the court explained, that English contract interpretation rules (being the forum of the dispute) are meant to be utilized to interpret the arbitration agreement with reference to the main contract.

If the primary contract has a clear governing law, and the arbitration agreement does not, the primary contract's choice of law will typically result in that law being applied to the agreement of arbitration as well. The Supreme Court found that it would *"put the principle of separability of the arbitration agreement too high*" to hold that the arbitration agreement's choice of law had "*little to say*" in relation to the law of primary contract.

It is not sufficient to refute the assumption that the primary contract's governing law also governs the arbitration agreement solely because the arbitration's seat is different from the main contract's governing law.

Certain factors might indicate that a different governing law should apply to the arbitration agreement, such as the risk of rendering the arbitration agreement ineffective if it is governed

[4] Landbrecht J and others, 'Evolution of the EU Arbitration Law: From Conflict of Laws Rules to Substantive Requirements' (*Kluwer Arbitration Blog, 3 September 2024*) <https://arbitrationblog.kluwerarbitration.com/2024/09/11/evolution-of-the-eu-arbitration-law-from-conflict-of-laws-rules-to-substantive-requirements/#:~:text=Regulation%20(EC)%20No%20593%2F,not%20apply%20to%20arbitration%20agreements.> accessed 6 October 2024

[5] Milica S, 'Wiki Note: Seat of Arbitration' (Ugale Anastasiya ed, *Jus Mundi Academic Research*, 19 June 2023) <https://jusmundi.com/en/document/publication/en-seat-of-arbitration> accessed 6 October 2024

by the same law as the primary contract (this follows the validation principle in English Law that says that contracts should be interpreted in such a way that they are valid rather than ineffective). It was also explained that this requires consideration of the language used in the contract, the surrounding context, and the extent to which the arbitration agreement's validity and scope might be compromised if governed by that law.[6] The court relied on the case *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638[7] where t was noted that business parties are generally unlikely to choose the same governing law for both the contract and the arbitration agreement if there is a "serious risk" that this choice could "significantly undermine" the arbitration agreement. The other reason would be in case any clause within the law of the seat that specifies when arbitration is governed by that law, the arbitration agreement will likewise be considered subject to that country's legal framework (For instance, Section 6 of the Arbitration (Scotland) Act 2010)[8]. Each of the two aforementioned considerations may be strengthened if it is demonstrated that the seat was purposefully selected as a neutral venue for the arbitration.

Without an express choice of law governing the main contract, a provision that provides a specific place for arbitration will itself not be sufficient to justify an assumption that the contract or the arbitration agreement is to be governed by the law of such a place.

If no clear or implied choice of law is evident, the law most connected to the arbitration agreement must be determined. When the parties have selected the arbitration seat, the law most closely tied to the arbitration agreement is typically the law of the seat, even if it differs from the law governing the contract itself.

In the absence of a designated governing law for the arbitration agreement, the requirement in the contract for parties to attempt dispute resolution through negotiation, mediation, or other processes before arbitration usually does not justify replacing the law of the seat as the default governing law for the arbitration agreement.

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[6] Tench D and others (eds), 'Case Comment: Enka Insaat ve Sanayi a.s. v OOO Insurance Company Chubb [2020] UKSC 38' (*UKSCBlog*, 12 November 2020) <https://ukscblog.com/case-comment-enka-insaat-ve-sanayi-a-s-v-ooo-insurance-company-chubb-2020-uksc-38/> accessed 6 October 2024

[7] *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638* (High Court of Justice of England and Wales)

[8] Tench D and others (eds), 'Case Comment: Enka Insaat ve Sanayi a.s. v OOO Insurance Company Chubb [2020] UKSC 38' (*UKSCBlog*, 12 November 2020) <https://ukscblog.com/case-comment-enka-insaat-ve-sanayi-a-s-v-ooo-insurance-company-chubb-2020-uksc-38/> accessed 6 October 2024

In this matter, as no express or implied governing law was selected for the contract, the arbitration agreement falls under the law of the arbitration seat, which is London. Consequently, English law governs the arbitration agreement. Chubb did not contest the Court of Appeal's authority to issue an anti-suit injunction under English law.

The Supreme Court further affirmed that it is inconsequential whether the arbitration agreement is governed by English law or foreign law; the critical consideration is whether a breach of the agreement has occurred and, if so, whether it is just and convenient to issue an injunction to prevent that breach. Consequently, the appeal was dismissed.[9]

CONCLUSION

This case was crucial in clarifying the principles that clarify the governing law of the arbitration agreement. The governing law would be either (a) the law which is specified in the agreement to be applied to the contracts or (b) in cases where the parties have not made such an express choice, the law which has the closest relation to the arbitration agreement.

The court further emphasized that if the main contract specifies a governing law, this law will typically extend to the arbitration agreement as well except if there is a reason to not do so such as the risk of the arbitration agreement being rendered ineffective. Without such a choice of law, the arbitration agreement will generally be covered by the law of the seat of the arbitration which in this case was the English Law, London being the seat of the arbitration.[10]

DISSENTING OPINION

The dissenting view expressed by Lord Burrows, with the backing of Lord Sales, posits that when there is no express or implied choice of law governing the arbitration agreement, the law of the main contract (in this case, Russian law) should apply rather than the law of the seat (English law). They contend that the parties have implicitly selected Russian law for both the main contract and the arbitration agreement. Lord Burrows maintains that utilizing different laws for the contract and the arbitration agreement could result in inconsistent and unjust outcomes. They agree with the majority that the central issue regarding the issuance of an anti-suit injunction is whether the initiation of foreign proceedings constitutes a breach of the

[9] Ibid.
[10] Ibid.

arbitration agreement, rather than which legal framework governs the agreement. Having determined that the arbitration agreement falls under Russian law, they suggest referring the matter of whether a breach justifies an anti-suit injunction to the Commercial Court.[11]

CRITICAL ANALYSIS

IN LINE WITH INTERNATIONAL STANDARDS

The procedure established in this case is in line with what has been followed in different jurisdictions. One such example would be in Singapore where in the case Anupam Mittal v Westbridge Ventures II Investment Holdings[12], the Singapore Court of Appeal maintained the three-stage methodology for determining the law governing an arbitration agreement, which was established in BCY v. BCZ[13] .[14] During the second stage of the inquiry, the Singapore court recognized the validation principle, which states that if the law governing the main contract invalidates the arbitration agreement, the court will proceed to the third stage to determine which legal system the arbitration agreement is most closely related to.[15]

The controversy in Anupam Mittal emerged as a result of a shareholder agreement governed by Indian law. However, applying Indian law to the arbitration agreement would have rendered it invalid, as claims involving tyranny and mismanagement are not arbitrable in India. [16]As a result, the court proceeded to the third step, where it decided that Singapore law was the most closely related to the arbitration agreement since Singapore was the seat of arbitration. This is in line with the seat-based approach in Enka Insaat.

THE INDIAN POSITION

The legal framework surrounding arbitration agreements seems obscure in India when compared to the consistent rule of the Enka Insaat case. Earlier rulings like National Thermal Power Corporation v. Singer Company[17] held that where parties expressly choose the governing law for the contract, in the absence of any contrary intention, that same law would

[11] 'Enka Insaat vs v Chubb Re Arbitration: Expert Evidence' (Expert Evidence | Specialists in Dispute Resolution, 25 January 2023) <https://expert-evidence.com/enka-insaat-vs-v-chubb-re-arbitration/> accessed 6 October 2024
[12] *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1
[13] *BCY v. BCZ* [2016] SGHC 249
[14] Kapil Arora AT, 'Law Governing Arbitration Agreement: Which Way Are Indian Courts Headed?' (Dispute Resolution Blog, 20 August 2024) <https://disputeresolution.cyrilamarchandblogs.com/2024/08/law-governing-arbitration-agreement-which-way-are-indian-courts-headed/> accessed 6 October 2024
[15] Ibid.
[16] Ibid.
[17] *National Thermal Power Corporation v. Singer Company* (1992) 3 SCC 551

generally apply to the arbitration agreement. Where there is no election of governing law, the law of the seat of arbitration applies. This proposition was confirmed also in Sumitomo Heavy Industries Ltd v. ONGC[18] and later in Indtel Technical Services Pvt Ltd v. W.S. Atkins Rail Ltd[19] which ruled that ordinarily the law governing the main contract is extended to the arbitration agreement, which usually means Indian law.

However, Union of India v. Hardy Exploration[20] cited this position but failed to decisively lay it to rest, resulting in divergent interpretations by Indian Courts. For example, the Delhi High Court in Carzonrent India v. Hertz International[21] and by SC in Sakuma Exports Ltd v. Louis Dreyfus Commodities Suisse SA[22] have ruled that the law governing the main contract should also apply to the arbitration agreement.

On the other hand, in cases such as Katra Holdings Ltd v. Corsair Investments Ltd[23] and HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd[24], the Bombay High Court maintained that arbitration agreements are independent and that the law of the seat governs them.

PERSONAL ANALYSIS

In my opinion, countries, where the doctrine of separability is well established, should follow the law most closely connected to the arbitration agreement and not the main contract unless there are strong reasons to apply another law.

The doctrine of separability is already well-established in Indian jurisprudence. For instance, in *National Agricultural Co-op Marketing Federation of India Ltd. v. Gains Trading Ltd*.[25], the Apex Court ruled that an arbitration clause is separate and apart from the main contract, which means that it will still be enforceable even in the vent that the contract is deemed void. The autonomy of the arbitration provision is maintained by the theory of separability, which guarantees that it is unaffected by the outcome of the underlying contract.

[18] *Sumitomo Heavy Industries Ltd v. ONGC* (1998) 1 SCC 305
[19] *Indtel Technical Services Pvt Ltd v. W.S. Atkins Rail Ltd* (2008) 10 SCC 308
[20] *Union of India v. Hardy Exploration* (2019) 13 SCC 472
[21] *Carzonrent India v. Hertz International* (2015) SCC OnLine Del 10085
[22] *Sakuma Exports Ltd v. Louis Dreyfus Commodities Suisse SA* (2015) 5 SCC 656
[23] *Katra Holdings Ltd v. Corsair Investments Ltd* (2018) SCC OnLine Bom 4031
[24] *HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd* (2014) SCC OnLine Bom 102
[25] *National Agricultural Co-op Marketing Federation of India Ltd. v. Gains Trading Ltd* (2007) (5) SCC 692