

BRIEFING NOTE

Arbitration Agreements – What Happens When the Governing Law of the Arbitration Agreement is Not Expressly Specified?

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Introduction

In our earlier [briefing note](#), we discussed how the English and Singapore courts determine the governing law of the arbitration agreement where the contract is silent in this respect.

- The English approach determines this in two steps. The first step is that the arbitration agreement is governed by “the law to which the parties subjected to it”. Where no choice has been indicated, the second step is that the arbitration agreement is governed by the law of “the country where the award was made”. See *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 (“*Enka v Chubb*”).
- The Singapore approach determines this in three steps. The first step is that the arbitration agreement is governed by the parties’ express choice of law. Where no express choice has been indicated, the second step is to look at the implied choice. Otherwise, the third step is to apply the law which is closest and has the most real connection to the dispute. See *BNA v BNB* [2019] SGCA 84 (“*BNA v BNB*”).

For both *Enka v Chubb* and *BNA v BNB*, the courts determined the governing law of the arbitration agreement prior to the arbitral award. What happens when the courts determine this question after the award (and part of the award was not made in accordance with the approaches outlined above)? Would the courts change their approach in light of the award? At least for the English courts, the approach remains the same.

***Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48**

The claimant entered into franchise agreements with a Kuwaiti company. The franchise agreements contain arbitration agreements for disputes to be referred to the ICC and for the seat of the arbitration to be Paris, France. There was no mention of the governing law of the arbitration agreement (but the governing law of the franchise agreements was English law).

Following a restructuring exercise, Kout Food Group (“**KFG**”) became the holding company of the Kuwaiti company. There was a dispute under the franchise agreements. The claimant commenced arbitration against KFG (who was not a party to the franchise agreements). The tribunal determined, *inter alia*, that: (a) under French law, the law of the seat of the arbitration, KFG was bound by the arbitration agreements; and (b) KFG was in breach of the franchise agreements.

In enforcement proceedings in England & Wales, the UK Supreme Court disagreed that KFG was bound by the arbitration agreement.

- Applying *Enka v Chubb*, the judges decided that parties impliedly agreed to English law as the governing law of the arbitration agreement (because that was the governing law of the franchise agreements). The judges observed that even though this question was raised after the award was made, there was no reason for differences in approach.
- Under English law, KFG was not bound by the arbitration agreements. Accordingly, the judges refused enforcement of the award against KFG.

What Does This Mean for Parties?

Before commencing (or defending) any arbitration proceedings, parties ought to determine the likelihood of success. Success is not limited to a positive arbitral award, but also whether that award may be enforced in jurisdictions where the counterparty has assets.

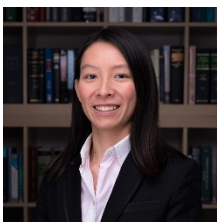
In our last [briefing note](#), we discussed how good counsel would provide clear advice on the likelihood of success prior to going ahead with the arbitration proceedings. Good counsel would also provide clear advice on the selection of arbitrators with the right expertise who would favour the party's case and would make an award in line with the relevant legal principles (and that may be enforced subsequently).

How We May Assist

Our lawyers are arbitration specialists. We advise clients on both domestic and international arbitration proceedings. We recognise that clients seek commercially sensible advice whilst managing the length and cost of proceedings, as well as the likelihood of success.

We take pride in being aligned with our clients. To find out how we may help, please feel free to reach out to any member of our team.

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