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DISPUTE RESOLUTION **ALERT**

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Quick and dirty investigations: Ticking both boxes

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Determining the law governing an arbitration agreement: Lessons from the UK for South Africa

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Quick and dirty investigations: Ticking both boxes

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The 1981 wedding of His Royal Highness Prince Charles, Prince of Wales and Lady Diana Spencer was a global event which is on the list of the most watched television broadcasts of all time. Approximately 1 billion people tuned in. This is remarkable as the event predated the internet and, lasting just a few hours on a Wednesday afternoon, had a similar viewership to the month-long football FIFA World Cup tournament in the USA in 1994 and the two weeks of the 2016 Wimbledon tennis championships.

It is no surprise then that the interview with Diana the Princess of Wales on 20 November 1995, three years after her 1992 separation from Prince Charles, drew a television audience of 23 million. It had been one of the most sought-after celebrity interviews but was eventually secured by an unknown British Broadcasting Corporation (BBC) reporter called Martin Bashir.

How did Bashir get such a scoop? Never had a senior member of the British royal family opened up to the media so candidly. Eventually it was reported in the press that Bashir had approached Princess Diana's brother, the ninth Earl Spencer, with fake bank statements purporting to show that a former employee of the earl's had received kickbacks in exchange for sensitive information about the princess. This was done to persuade the earl that Bashir should be the journalist to conduct the interview with Princess Diana. A BBC investigation cleared Bashir and the smell went away. Or did it?

More than 20 years later Earl Spencer was interviewed by *The Daily Mail* regarding proof of Bashir's deception that he had secured from the BBC under the Freedom of Information Act. The graphic designer commissioned by Bashir to fake bank statements was then interviewed on TV and, under pressure, particularly from Earl Spencer, the BBC announced a full independent investigation by eminent retired judge Lord Dyson into Bashir's career-defining interview and the BBC investigation.

Lord Dyson's methodology is an example of the impartial thoroughness required in corporate investigations. He:

1. reviewed the BBC's extensive disclosure of documents received from various key witnesses involved in the matter;
2. considered each witness's written statement submitted to the BBC in its investigation (Of these witnesses, Lord Dyson personally selected and interviewed 18 people);
3. provided each interviewee with at least five days' notice of the topics he wished to cover and delivered to each a bundle of relevant documents to consider;
4. conducted all interviews personally; and
5. when minded to challenge a witness, he gave the witness notice of the criticism and 14 days to respond, taking each response received into account before finalising his report, ensuring completeness in the performance of his duties.

Quick and dirty investigations: Ticking both boxes...*continued*

The BBC's quick investigation of serious impropriety on a topic of massive public interest has seen its reputation, and that of its investigator Lord Hall, take a big hit, albeit 25 years on.

Ultimately Lord Dyson found that the BBC should have "*introduced an element of true independence*" when it investigated the claims; its failure to interview Earl Spencer was "*a most serious flaw in the investigation*"; the BBC did not "*scrutinise Mr Bashir's account with caution and the necessary degree of scepticism*"; its answers given to the press were evasive; and its investigation fell short of the BBC's high standards of integrity and transparency. "*Without the benefit of hearing from Earl Spencer and without a credible explanation from Mr Bashir for what he had done and in the face of his serious and unexplained lies, Lord Hall could not reasonably have concluded that Mr Bashir was an honest and honourable man who had told the truth and he should not have done so.*"

The two defining features of quick fix investigations into serious issues are first, that they are aimed at an expedited restoration of the status quo and second, that too often they have unintended and unfortunate consequences. The BBC's quick investigation of serious impropriety on a topic of massive public interest has seen its reputation, and that of its investigator Lord Hall, take a big hit, albeit 25 years on. There was also a very sad and personal consequence of the Bashir interview and the BBC investigation, as Prince William, commenting after the release of the Dyson report, said:

> "*It is my view that the deceitful way the interview was obtained substantially influenced what my mother said. The interview was a major contribution to making my parents' relationship worse and has since hurt countless others … It brings indescribable sadness to know that the BBC's failures contributed significantly to her fear, paranoia and isolation that I remember from those final years with her.*"

Tim Fletcher, Tim Smit, Lisa de Waal and Paige Winfield

Determining the law governing an arbitration agreement: Lessons from the UK for South Africa

In practice, parties rarely provide in express terms that their arbitration agreement shall be governed by a particular national law.

As with all agreements, knowing and understanding which law governs an arbitration agreement is imperative for the parties for legal certainty and predictability. What most business people (even many commercial drafters) do not realise is that an arbitration clause in a main agreement is usually severable and is an agreement on its own, with an independent and separate existence from the substantive main agreement. For that reason, when we refer to arbitration agreement in this article, we refer to an arbitration clause in a main agreement.

It is possible that where an international commercial contract contains an arbitration clause, it may give rise to at least three systems of national law being engaged when a dispute arises. They are:

- The law governing the substance of the dispute: generally the law applicable to the contract from which the dispute has arisen.
- The law governing the arbitration process: generally the law of the "seat" of the arbitration, which is usually the place chosen for the arbitration in the arbitration agreement.
- The law governing the agreement to arbitrate: this governs the existence, validity and scope of the parties' agreement to arbitrate, and may have an important bearing on the jurisdiction of a tribunal and the enforceability of any award.

These systems of law may differ from each other. Each may also differ from the law which governs the validity and scope of the arbitration agreement.

In practice, parties rarely provide in express terms that their arbitration agreement shall be governed by a particular national law. What then is the applicable national law of an arbitration agreement absent an express or tacit choice? The question of which system of national law governs the validity and scope of the arbitration agreement when the law applicable to the contract containing it differs from the law of the seat of the arbitration has long divided the arbitration community. Even though this issue is yet to be authoritatively considered by South African courts, the Supreme Court of the UK in *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38 provides a useful reference.

Enka v Chubb

Enka, a global engineering and construction company incorporated and based in Turkey entered into a subcontract with a Russian based main contractor for certain works relating to the construction of a power plant in Russia. The subcontract contained an arbitration agreement requiring all disputes in respect of the subcontract to be referred to international arbitration seated in London and conducted under the International Chamber of Commerce Rules. However, the subcontract contained no express choice of law governing the substantive contract or the arbitration agreement.

A fire erupted at the plant causing significant damage. The owner of the plant received approximately US$400 million with respect to the damage under its insurance policy with Chubb. By doing so, Chubb became subrogated to any rights

Determining the law governing an arbitration agreement: Lessons from the UK for South Africa*...continued*

There is a general rule that the law of the place chosen as the seat of arbitration is the law most closely connected with the arbitration agreement and which, in the absence of choice, will apply by default.

the owner had against Enka or others in respect of liability for the fire. Chubb argued that Enka was responsible for the fire due to allegedly low-quality of works provided by Enka.

Following the launch of proceedings in Russia by Chubb against Enka, Enka launched proceedings in the Commercial Court in London seeking an anti-suit injunction to restrain Chubb from further pursuing the Russian proceedings against Enka on the ground that this was a breach of the arbitration agreement. At play was whether Russian or English law could properly be said to govern the arbitration agreement.

Majority judgment

By a three-two majority, the UK Supreme Court held that an English court which has to decide which system of law governs the validity, scope or interpretation of an arbitration agreement must apply the rules developed by the common law for determining the law governing contractual obligations. Those rules are that a contract (or relevant part of it) is governed by:

- the law expressly or impliedly chosen by the parties; or
- in the absence of such choice, the law with which it is most closely connected.

The proper law of an arbitration agreement can be said to be determined by undertaking a three-stage enquiry into: (i) express choice; (ii) implied choice; and (iii) the system of law with which the arbitration agreement has the closest and most real connection.

As to the first point, the majority was clear that the starting point at common law is that contracting parties are free to choose the system of law which is to govern their contract, provided only that their choice is not contrary to public policy. The court must therefore construe the arbitration agreement to see whether the parties have agreed, expressly or tacitly, on a choice of law to govern it. Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the main agreement, that is, the law governing the substance of the dispute, will generally apply to an arbitration agreement which forms part of the main agreement.

As to the second point, there is a general rule that the law of the place chosen as the seat of arbitration is the law most closely connected with the arbitration agreement and which, in the absence of choice, will apply by default. This is because the seat of arbitration is the place where (legally, even if not physically) the arbitration agreement is to be performed and it accords with international law as embodied in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, and other international instruments, thus ensuring consistency with international law and legislative policy. It is also likely to uphold the reasonable expectations of contracting parties who have chosen to settle their disputes by arbitration in a specified place but made no choice of law for their arbitration agreement, and it provides legal certainty and predictability in the absence of choice in that the parties predict easily and with little room for argument which law the court will apply by default.

Determining the law governing an arbitration agreement: Lessons from the UK for South Africa*...continued*

This dissenting judgment evidences that there remains diverging views on the approach to determining the proper law of an arbitration agreement which will no doubt continue to be debated by courts and commentators alike.

Applying these principles, the majority concluded that the agreement from which a dispute had arisen in this case contained no choice of the law that is intended to govern the contract or the arbitration agreement within it. In these circumstances the validity and scope of the arbitration agreement (and the rest of the dispute resolution clause containing that agreement) was governed by the law of the chosen seat of arbitration, as the law with which the dispute resolution clause was most closely connected was English law.

Minority judgment

The minority found that on combination of factors, the proper law of the arbitration agreement was, by reason of an implied choice, Russian law. As the parties had impliedly chosen Russian law for the main agreement, it was natural, rational and realistic to regard that choice for the main contract as encompassing, or carrying across to, the arbitration agreement. That implied choice was the correct objective interpretation of the parties' main contract and arbitration agreement.

This dissenting judgment evidences that there remains diverging views on the approach to determining the proper law of an arbitration agreement which will no doubt continue to be debated by courts and commentators alike.

Position under South African law

The Model Law on International Commercial Arbitration (Model Law) adopted by the United Nations Commission on International Trade Law (UNCITRAL) has now been incorporated into South African law as Schedule 1 to the International Arbitration Act 15 of 2017.

Article 2A of the Model Law provides that in interpretating the Model Law, regard must be had to its international origin and to the need to promote uniformity in its application and the observance of good faith. In addition, section 8 of the Model Law of the International Arbitration Act mandates that the material to which an arbitral tribunal or a court may refer in interpreting matters relating to international commercial arbitration and the Model Law must include relevant reports of UNCITRAL and its secretariat.

Article 28(1) of the Model Law requires that, failing any agreement by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. On this score, a court must first determine if any tacit choice of law exists. If no tacit choice exists, the court will determine which legal system is most closely connected to the agreement. A South African court is therefore obliged to have regard to the international origin of the Model Law and the need to promote uniformity and the observance of good faith.

It is important to bear in mind that the purpose of the Model Law is to assist states in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It was developed to address considerable disparities in national laws on arbitration. The need for improvement and harmonisation was based on findings that national laws were often particularly inappropriate for international commercial disputes. The Model Law therefore constitutes a sound basis for the desired harmonisation and improvement of national laws.

Determining the law governing an arbitration agreement: Lessons from the UK for South Africa*...continued*

The judgment in *Enka v Chubb* provides insightful clarity to an issue that has been somewhat unnecessarily complex and uncertain and may well prove to be persuasive should a South African court face a similar challenge.

The current position under South African law can therefore be summarised as follows: the arbitral tribunal must apply:

- the law expressly or impliedly chosen by the parties; and
- in the absence of such choice, the law which is most closely connected with the arbitration agreement. This would arguably usually be either the place where the contract was concluded or performed.

The judgment in *Enka v Chubb* provides insightful clarity to an issue that has been somewhat unnecessarily complex and uncertain and may well prove to be persuasive should a South African court face a similar challenge. Even though the UK has not adopted the Model Law, the UK Arbitration Act was in many respects influenced by the Model Law. The jurisprudence of the English courts in cases such as *Enka v Chubb* would therefore be highly persuasive in the South African context.

In practice, it is, however, advisable that parties expressly state both the choice of governing law of the main agreement as well the governing law of the arbitration clause. A failure to specify both has the potential to lead to interlocutory quarrels and unnecessary litigation as evidenced in *Enka v Chubb*. One striking feature of the English proceedings is that that the trial, the appeal to the Court of Appeal and the appeal to the Supreme Court were all heard in just over seven months in what can be said to be a vivid demonstration of the speed with which the English courts can act when the urgency of a matter requires it. If anything, that is something South African courts can adopt.

Jackwell Feris and Vincent Manko

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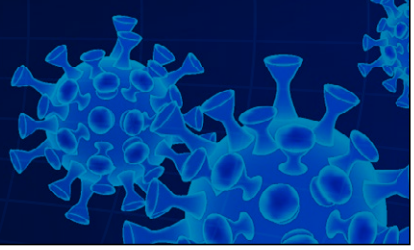

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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