



# Case in Brief:

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*How much of a contract is impacted  
by a governing law clause?*

The Hong Kong Court of First Instance (the Court) has recently provided clarity on how the governing law of an agreement should be determined. In *China Railway (Hong Kong) Holdings Limited v Chung Kin Holdings Company Limited* [2023] HKCFI 132, the Court adopted the principle from *Enka v Chubb*<sup>1</sup> that in circumstances where the law governing an arbitration clause in a contract is not clear, the existence of an express choice of law clause used for the main contract will also apply to a dispute resolution clause.

<sup>1</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38.

## The facts

The dispute between China Railway (Hong Kong) Holdings Limited (**China Railway**) and Chun Kin Holdings Company Limited (**CKH**), both Hong Kong companies, was spurred by an unpaid loan. Throughout a 15-year period, the parties had signed multiple agreements supporting and confirming the loan.

In 2021, China Railway brought proceedings against CKH for the purpose of recovering the debt it believed was owed. CKH argued that the existence of a dispute resolution clause meant that the proceedings should be redirected to the Court of Wuhan in the People's Republic of China (the **PRC**), as this was the seat nominated. China

## Clarity on how the governing law of an agreement should be determined.

→ The Court of First Instance applied *Enka v Chubb* to determine which jurisdiction the dispute should be heard under

Railway, in turn, argued that without a clear expression of the governing law in this clause, the governing law clause present in the broader contract itself must fill-in the blank.

The issue necessary for the Court to determine was whether the use of a foreign court within the dispute resolution clause could be considered an exclusive jurisdiction clause. If so, the Court would likely need to allow the dispute to be heard in the nominated PRC forum. Conversely, a determination that it was non-exclusive would mean that CKH assumes the responsibility of having to demonstrate that the foreign forum was clearly and distinctly more appropriate.

### The decision

Applying the principles in *Enka v Chubb*, the Court underscored the significance of there being an express choice of law clause elsewhere in the contract. The presence of the clause provides a window into what may have been intended by the parties. In this case, that was the law of Hong Kong. The Court looked at whether there had been a subsequent agreement which determined the governing law. Unable to find that



there was such an agreement, the Court determined that the dispute resolution clause ought to be governed by Hong Kong law.

The Court then considered whether the dispute resolution clause was exclusive or non-exclusive. Two factors led the Court to find that the clause was non-exclusive:

- the clause discusses the use of the foreign forum in a way suggestive that it is permissible to use, but not a mandatory requirement; and
- the ability to use the foreign forum is only prescribed for China Railway.

Having established that the jurisdiction clause was non-exclusive, it fell on CKH to demonstrate that the foreign forum in Wuhan was the best place for the dispute to be heard. After hearing an attempt, the Court called

CKH's justification *vague in the extreme*, and lacking any sense of precision. Furthermore, it had failed to comment on any of the factors necessary to make a convincing case.

### Conclusion

The decision is a further example, across multiple common-law jurisdictions, of the courts' commitment to finding a common intention between the parties. Arbitration and other forms of dispute resolution are accepted as crucial parts of an agreement, and the courts have shown themselves to actively apply legal principles to bring them to life. However, as good as this is for the efficacy of arbitration, none of this is necessary if contracting parties simply were to make it clear which jurisdiction governs their dispute resolution clause.