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Welcome to our latest bulletin featuring various legal and market updates

- Continuing Listing Criteria for Listed Issuers – Sufficiency of Operations and Assets;
- Reform of the patent system in Hong Kong – The new and direct local original grant patent (OGP) route in parallel with the existing re-registration route; and
- Arbitration, Separability and the Importance of the Seat.

We hope that you find this edition informative and we welcome your comments and suggestions for future topics.

If you have any questions regarding matters in this publication, please refer to the contact details of the contributing authors.

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Continuing Listing Criteria for Listed Issuers – Sufficiency of Operations and Assets

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Background

In order to combat the shell creation or maintenance activities and backdoor listings so as to reduce speculative trading or market manipulation activities, after market consultation, The Stock Exchange of Hong Kong Limited (**Exchange**) amended the Rules Governing the Listing of Securities on the Exchange (**Main Board Rules**) and the Rules Governing the Listing of Securities on the GEM of the Exchange (**GEM Rules**), including Main Board Rule 13.24 / GEM Rule 17.26, and such amendments came into effect on 1 October 2019. In October 2020, the Exchange further updated the Guidance Letter GL106-19 to provide guidance on the purpose behind and the general application of Rule 13.24. The same guidance also applies to GEM issuers.

We set out below some of the key issues to consider when applying Rule 13.24.

Rule 13.24

Rule 13.24 imposes an enhanced continuing listing obligation on a listed issuer to carry out, directly or indirectly, a business with a sufficient level of operations and assets of sufficient value to support its operations to warrant its continued listing. Unlike the previous practice which allowed either sufficient level of operations or assets, an issuer that holds significant assets but does not carry out a sufficient level of operations is not compliant with Rule 13.24.

Rule 13.24 generally excludes proprietary trading and/or investment in securities when examining sufficiency of operations and assets of an issuer (other than a banking company, an insurance company or a securities house).

Instead of quantitative criteria for sufficiency, the Exchange regards Rule 13.24 as a qualitative test and assesses each issuer based on its specific facts and circumstances.

Application of Rule 13.24

Where an issuer is not operating a business of substance and/or that is viable and sustainable, the Exchange may question its suitability for continued listing. In particular, the Exchange raised concerns on listed issuers with the following characteristics or circumstances.

- Minimal operations or low level of assets

  An issuer who only maintains a very low level of operating activities and assets which does not generate sufficient revenue and profits, resulting in net losses and negative operating cashflow for years (and not on a temporary basis) would not be generally considered to have a viable and sustainable business.

  Other circumstances, including being insolvent, encountering financial difficulties which affect business operations or lead to suspension of operations, and/or losing major operating subsidiaries, may also lead to issuers having minimal operations and failing to comply with Rule 13.24.

  See also: Listing Decisions LD105-2017, LD115-2017, LD116-2017 and LD118-2018.

- Business of no substance

  The Exchange noted that certain issuers carried on their activities for the purpose of maintaining their listing status rather than genuinely developing their underlying businesses, and issuers principally engaged in money lending business or indent trading business would especially raise such concern.

  In assessing whether an issuer is operating a business of substance, the Exchange would examine the specific facts and circumstances of the issuer including its business model, operating scale and history, source of funding, size and diversity of customer base and internal control systems, taking into account the industry norms and standards. Circumstances like reliance on a limited number of transactions or customers, asset-light business with low setup and maintenance cost and low entry

barrier, unclear revenue generation stream, may also raise concerns over the substance of a business.

- Disposals of principal businesses

  An issuer is required to maintain a business which is viable and sustainable and has substance after disposal or discontinuation of its principal business (or a material part thereof), failing which, it would not be compliant with Rule 13.24.

  See also: Listing Decisions LD35-2012, LD88-2015, LD97-2016, LD98-2016, LD99-2016 and LD112-2017.

- Establishment or acquisition of new business

  There may be circumstances where an issuer, after disposing of or scaling down its business, establishes or acquires a new business which may be unrelated to its original business. If such new business is of no substance and/or of a limited scale and is operated only by a few employees without management expertise, it is unlikely to be compliant with Rule 13.24.

  See also: Listing Decisions LD105-2017, LD112-2017, LD115-2017, LD116-2017 and LD118-2018.

General obligations of listed issuers

To demonstrate compliance of the continuing listing obligation under Rule 13.24, an issuer must make adequate disclosure of its business affairs, operation status and financial performance in its financial results and reports and in the announcements or other disclosures made pursuant to the Main Board Rules and the Inside Information Provisions. The Exchange makes a preliminary assessment of the issuer's compliance based on such disclosures on an ongoing basis.

If the Exchange has concerns on the Rule 13.24 compliance, it may send a letter to the issuer setting out its observations and requesting the issuer to provide a written submission to demonstrate that it has a business which is viable and sustainable and has substance within a specified time period. Certain information, including but not limited to the business objectives and strategies and plans, business model, scale of operation, diversity of customer base, role of and relationship with key business stakeholders (e.g. internal systems or controls) together with comparison with industry norms, and the board's views on the business prospect supported by a credible profitable forecast (if any), is expected to be included in such submission for the Exchange's consideration.

If the issuer fails to address the Exchange's concerns, the Exchange will inform the issuer of its decision of non-compliance with Rule 13.24. The issuer is required to publish an announcement before the market opens on the next business day after it received the Exchange's decision letter. In addition, the issuer should also include a statement in the announcement that trading in its shares will be suspended after the expiry of seven business days from the date of the decision letter, unless the issuer applies for a review of the decision. Further announcements should be made on the suspension or its decision to review. In case of suspension, the issuer must publish quarterly announcements of its developments. In addition to a trading halt or suspension of dealings in the securities, if the Exchange still considers that the issuer fails to meet the requirements under Rule 13.24 upon expiry of a specified period, it may cancel the listing of the issuer's securities in accordance with the procedures set out in the Main Board Rules.

In summary, issuers should be mindful of the continuing requirements in Rule 13.24 (sufficient operations and assets to warrant a continued listing) as mentioned above, and should therefore conduct internal compliance checks on an ongoing basis, in particular, when making acquisitions or disposals of major business or assets, and take necessary action to ensure that the requirements are met.

Reform of the patent system in Hong Kong – The new and direct local original grant patent (OGP) route in parallel with the existing re-registration route

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Overview

In Hong Kong, the law that regulates the local patent system is the Patents Ordinance, Cap 514, and its subsidiary legislation.

The patent system encourages innovation. In order to qualify for grant of a patent, an invention must be new, involve an inventive step and be susceptible of industrial application, and it must not fall into the category of excluded items as set out in the Patents Ordinance. Once a patent is granted, a limited monopoly is given to the proprietor for a period of up to 20 years. Essentially, for a patented product, the patent proprietor is given the right to prevent unauthorized third parties from making, putting on the market, using, importing or stocking the product in Hong Kong; while for a patented process, the patent proprietor is given the right to prevent unauthorized third parties from using the process, or offering the process for use, in Hong Kong. In return, the patent proprietor is required to disclose details of the relevant invention.

On 19 December 2019, there was a reform of the patent system in Hong Kong. One of the most significant changes is the launch of an original grant patent (OGP) system for direct filing of standard patent applications in Hong Kong, as an alternative to the existing re-registration system. Accordingly, after the reform, there are now two types of standard patents in Hong Kong, namely the standard patents under the re-registration system and the OGP system respectively.

An invention may also be protected by a third type of patent in Hong Kong, namely a short-term patent. This article will focus on the abovementioned two types of standard patents.

Re-registration system

The existing re-registration system is retained after the reform. A standard patent under this system is referred to as a "standard patent (R)".

Under this re-registration route, a standard patent (R) application for an invention can be filed at the Patents Registry based on a corresponding designated patent application for that invention which has been filed in any one of the three designated patent offices outside Hong Kong, namely:-

1) the China National Intellectual Property Administration;

2) the United Kingdom Intellectual Property Office; and

3) the European Patent Office (for a patent application designating the United Kingdom).

The standard patent (R) application is made in Hong Kong in two stages:-

1) Stage 1 – a "Request to Record" must be filed at the Patents Registry within six months of the date of publication of the designated patent application in the designated patent office. Provided that the Request to Record contains the necessary supporting information and documents and satisfies the other formal requirements as set out in the Patents Ordinance, the Registrar will enter the particulars of the Request to Record in the register and publish the same; and

2) Stage 2 – a "Request for Registration and Grant" must be filed at the Patents Registry within six months of the date of grant of the designated patent by the designated patent office or the date of publication of the Request to Record in Hong Kong, whichever is the later. Provided that the Request for Registration and Grant contains the necessary supporting information and documents and satisfies the other formal requirements as set out in the Patents Ordinance, the Registrar will grant and publish the standard patent (R).

There is no substantive examination carried out by the Patents Registry in Hong Kong during or as part of either Stage 1 or Stage 2 procedures. It is a purely recordal system.

Once the standard patent (R) is granted, it will be maintained independently in Hong Kong subject to payment of renewal fees for a maximum of 20 years beginning with the filing date of the corresponding designated patent application.

Original Grant Patent (OGP)

The OGP system is an entirely new patent system in Hong Kong. A standard patent under this system is referred to as a "standard patent (O)".

Under the OGP system, a standard patent (O) application can be filed directly in Hong Kong without the need for the applicant to file an earlier corresponding designated patent application in a designated patent office outside Hong Kong.

Provided that the standard patent (O) application contains the necessary supporting information and documents and satisfies the other formal requirements as set out in the Patents Ordinance, the Registrar will publish the standard patent (O) application. The Registrar is required to publish the standard patent (O) application as soon as practicable on the expiry of 18 months after the date of filing of the standard patent (O) application or the earliest date of priority claimed (if applicable). The applicant may request early publication of the application.

Unlike a standard patent (R) application under the re-registration system which does not undergo any local substantive examination process in Hong Kong, a standard patent (O) application under the OGP system must be subject to a substantive examination by the Patents Registry in Hong Kong before it will be granted. The applicant of a standard patent (O) application must request the Registrar to carry out a substantive examination within 3 years after the date of filing of the standard patent (O) application or the earliest date of priority claimed (if applicable).

Upon receipt of a request for substantive examination, the Registrar should examine the standard patent (O) application as to whether it complies with the requirements as set out in the Patents Ordinance, which in particular include a determination of the patentability of the relevant invention, ie. whether the invention is new, involves an inventive step and is susceptible of industrial application. If the Registrar is of the opinion that the standard patent (O) application complies with all the prescribed requirements, the Registrar will grant and publish the standard patent (O).

As with other OGP systems in other countries, the Registrar may issue office actions due to prior art objections and/or other registrability reasons, and the applicant has several rounds of opportunity to attempt to overcome those.

The new OGP system provides a direct route to obtain standard patents in Hong Kong. Unlike the re-registration system, the OGP system does not require the applicant to file an earlier designated patent application in a designated patent office outside Hong Kong. Therefore, for those applicants who are not interested in acquiring patent protection in any of the designated patent offices (ie. China, United Kingdom and Europe), the OGP system potentially helps to reduce the time and costs for securing a standard patent in Hong Kong.

How we can help

Under the patent system in Hong Kong, an invention can be protected by a standard patent (O) under the OGP system or a standard patent (R) under the re-registration system, or otherwise a short-term patent. Please feel free to contact us should you have any questions on how we can be of assistance in respect of securing patent protection for your invention.

Arbitration, Separability and the Importance of the Seat

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In the recent judgment of *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, the UK Supreme Court was asked to determine which system of law applied to an arbitration clause in the absence of an express choice by the parties.

The result may surprise you and serves as a reminder that "boilerplate" really does matter.

In a judgment which split the English Supreme Court 3-2, it was held that despite the main contract being properly governed by Russian law, an entirely different law applied to determine the validity of clause 50 of the contract, namely, the arbitration agreement.

This article considers the Supreme Court's reasoning and concludes with a number of recommendations which parties should bear in mind when drafting dispute resolution clauses.

Background

In February 2016, a significant fire broke out at the recently constructed Berezovskaya power plant in Russia. The plant had been insured by Chubb Russia and its affiliates, who paid out approximately US$400 million and became subrogated to the owner's rights against its contractors. Chubb subsequently commenced proceedings against Enka, a sub-contractor who had responsibility for installation of the boiler and auxiliary equipment.

The construction contract (the "**Contract**") ran to some 500 pages and was executed in parallel English and Russian language, with the Russian version to prevail, however, it omitted to include an express choice of governing law.

Clause 50 of the Contract (the "**Arbitration Agreement**") provided for ICC arbitration, conducted in the English language, with the place of arbitration to be London, England, but also failed to specify a governing law.

Questions arose as to whether the dispute fell within the scope of the Arbitration Agreement.

Enka responded by seeking an anti-suit injunction from the Commercial Court in London to restrain Chubb from pursuing its claim, and thereby uphold the Arbitration Agreement.

Ultimately, if English law was applicable to the Arbitration Agreement it would be interpreted to have a wide scope, thereby rendering it more likely to be enforceable. If Russian law were applicable, there was a real risk that its scope would be narrowed such that Chubb's claims would fall outside of the Arbitration Agreement, allowing Chubb's claims to be determined in the Russian courts.

In the first instance, the High Court in London considered that Russian law was impliedly applicable to the Contract as a whole, hence the Russian courts were the appropriate forum to determine whether Chubb's claim fell within the Arbitration Agreement.

Enka also challenged jurisdiction in the Russian courts, seeking to have Chubb's claim dismissed to arbitration on the basis of article 148(5) of the Russian Arbitrazh Procedure Code, which gives effect to Russia's obligations under article II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "**New York Convention**"):

> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

However, in March 2020, the Russian court declined to refer Chubb's claim to arbitration. Instead, it determined the substantive dispute in Enka's favour. Chubb appealed.

Meanwhile, Enka appealed the decision of the High Court in London and, in April 2020, the English Court of Appeal found that English law should govern the Arbitration Agreement. An anti-suit injunction was accordingly granted in order to uphold the Arbitration Agreement and prevent the continuation of Chubb's claim in the Russian courts.

The Court of Appeal reasoned that the law of the matrix contract has "*little if anything to say about the [arbitration agreement] law choice because it is directed to a different and separate*

agreement."[1] This argument flows from the doctrine of separability, which states that an arbitration agreement which forms part of an underlying contract is nevertheless separable from the rest of the contract.

Chubb appealed to the Supreme Court.

The Principles

Under English and Hong Kong common law, a contract is governed by (i) the law expressly or impliedly chosen by the parties, or (ii) in the absence of such a choice, the law with which the contract is most closely connected.[2]

Under this second limb, there have historically been two broad schools of thought as regards how to deal with the (common) situation where an arbitration agreement does not specify its own governing law, as distinct from that of the matrix contract. At a high level these may be summarised as:

1) the law of the chosen seat of the arbitration should also generally govern an arbitration agreement which is to be performed there: *C v D* [2007] EWCA Civ 1282; or

2) the law that governs the matrix contract should also generally govern an arbitration agreement which forms part of that contract: *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia* SA [2012] EWCA Civ 638.

For the past eight years, the latter approach has gained in popularity.[3] However, in Enka, the Court of Appeal considered that unless there is an express choice of the law that is to govern the arbitration agreement, "*the general rule should be that the [arbitration agreement] law is the [law of the seat], as a matter of implied choice, subject only to any particular features of the case demonstrating powerful reasons to the contrary.*"[4] English law therefore applied.

The majority of the Supreme Court disagreed. According to Lord Hamblen and Lord Leggatt, the principle that an arbitration agreement is separable from the matrix contract needs to be seen as an expression of the doctrine that the parties' agreed procedure for resolving disputes should remain effective in circumstances that would otherwise render the substantive contract ineffective.[5] For that purpose, an arbitration agreement is indeed separate. However, to read an arbitration agreement as therefore not forming a part of the broader matrix contract at all is to take the separability principle too far.[6]

Accordingly, when considering which law has the closest and most real connection with the arbitration agreement, care should be taken not to give undue weight to the law of the seat as the place of performance of the arbitration agreement if the parties have in fact chosen the law applicable to the matrix contract.

The Supreme Court also noted the concept of *dépeçage*, by which different clauses of a contract may be governed by different laws, and accepted that an arbitration agreement may more readily than other clauses be governed by a different law as its obligations are of a fundamentally different nature to the substantive obligations in the matrix contract. However, the Supreme Court also recognised that applying different governing laws to the matrix contract and arbitration agreement has the potential to give rise to inconsistency and uncertainty, and that it is generally reasonable to assume that commercial parties would intend or expect their contract to be governed by a single system of law. This was therefore held to be the starting point: the law expressly or impliedly chosen by the parties to govern the matrix contract should also govern the arbitration agreement.

In this case, given the nationality of the parties (Russian and Turkish), the determinative language of the Contract (Russian), the place of performance of the substantive obligations under the Contract (Russia) and the currency of payment (Russian Roubles), this should have led to the application of Russian law to the Arbitration Agreement, but it did not.

The Exceptions

The Supreme Court reiterated that every case will turn on its specific facts and noted that there will be exceptions to the general rule above.

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[1] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] EWCA Civ 574, at 92 per Popplewell LJ
[2] *Bonython v Commonwealth of Australia* [1951] AC 201 at 219
[3] *Redfern & Hunter on International Arbitration,* 5th Ed (2009), at 3.12; *Russell on Arbitration*, 24th Ed (2015); Dicey, Morris & Collins, *The Conflict of Laws*, 15th Ed (2012) at 16-017.
[4] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] EWCA Civ 574, at 91 per Popplewell LJ
[5] The doctrine of separability is enshrined into legislation in the Arbitration Ordinance (Cap 609 of the laws of Hong Kong) at section 34(1), giving effect to Article 16 of the UNCITRAL Model Law, and in the Arbitration Act 1996 at section 7.
[6] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, at 62-63 per Lord Hamblen & Lord Leggatt

Amongst these exceptions is the validation principle, i.e. the principle that where possible, a contract should be interpreted so that it is valid rather than ineffective, as it cannot have been the intention of the parties to agree clauses which were absolutely null and void under the law applicable to them.[7]

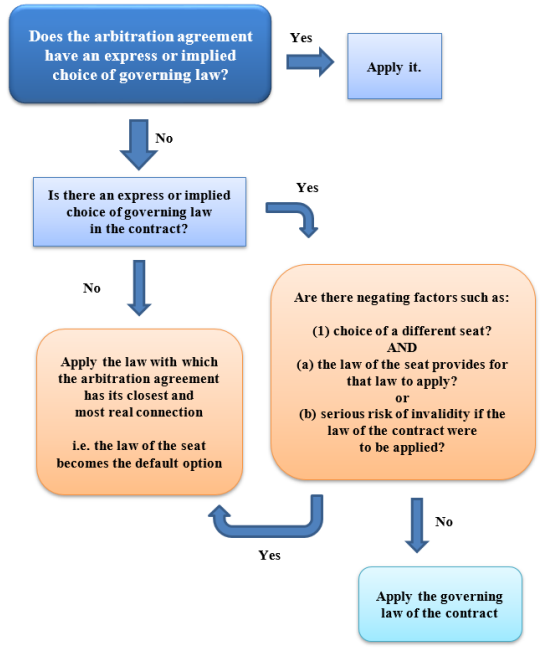
Accordingly, if there is a serious risk that the putative governing law of the matrix contract may render an arbitration agreement ineffective (or even significantly undermine it), the parties are deemed not to have intended that outcome.

In such a case where the law of the substantive contract may be displaced, the court reverts to determining the law with the closest and most real connection with the arbitration agreement. The Supreme Court acknowledged that in modern practice, hearings may be held in any location, including virtually, hence a choice of seat is now only theoretically the "place of performance", and may more appropriately be regarded as the parties' choice of the curial law.

In *Enka*, the Supreme Court ultimately held that English law was to apply. The parties' express choice of London as the seat of the arbitration, when coupled with a serious risk that if the arbitration agreement was governed by Russian law it would be ineffective, was sufficient to displace the general rule.

The Result

In practical terms, the law likely to apply to an arbitration agreement may now be determined as follows:



The position is similar in Singapore. In *BNA v BNB* [2019] SGCA 84, the Singapore Court of Appeal confirmed that an express choice of law in the matrix contract should be considered as the starting point, with the law of the seat only displacing the express choice in the matrix contract when it is combined with other factors.

In contrast, the Hong Kong courts have been slower to adopt a general presumption for the law of an arbitration agreement, but have shown approval for the reasoning in *Sulamérica* and the broader validation principle.

Most recently, the Honourable Madam Justice Mimmie Chan described the determination of the governing law of an arbitration agreement as being "*a question of construction, a matter of interpretation of the relevant clauses of the underlying contract, and of the arbitration agreement…* "[8]

In due course, the Hong Kong courts will undoubtedly be asked to consider its position again in light of the judgment in *Enka*.

Going Forward

It goes without saying that dispute resolution clauses should not be negotiated at the last minute, or inserted as "boiler plate" without further thought as to how such clauses interact with the substantive contract.

Especially careful consideration should be given to "staged" dispute resolution clauses if different laws are intended to apply to the parties' obligations prior to the arbitration phase, as these may otherwise fall within the ambit of the governing law of the arbitration agreement.

While it may well be appropriate to include an express choice of law, expert guidance should be sought in order to determine which law will best protect your position.

[7] *Hamlyn & Co v Talisker Distillery* [1894] UKHL 642 at 643 per Lord Herschell

[8] *X and Anor v. ZPRC & Anor* [2020] HKCFI 631 at 24; see also *A and Others v D* [2020] HKCFI 2887 at 33.

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- 仲裁、独立性及仲裁地的重要性。

我们希望本通讯为您提供有用的资料，并欢迎您对日后通讯的内容提出意见和建议。

如果您对本通讯有任何疑问，请参阅作者的联系方式。

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上市发行人持续上市的条件 – 业务运作及资产的充足水平

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背景

为打击造壳或养壳活动及借壳上市以减少投机性交易或市场操纵活动，在进行市场咨询后，香港联合交易所有限公司（「**联交所**」）修改了《联交所证券上市规则》（「**《主板规则》**」）和《联交所GEM证券上市规则》（「**《GEM规则》**」），包括《主板规则》第13.24条／《GEM规则》第17.26条，而这些修正案已于2019年10月1日正式生效。在2020年10月，联交所进一步更新了指引信GL106-19，以就第13.24条背后的目的及其一般应用提供指引。该指引亦适用于GEM发行人。

我们在下文列出了于应用第13.24条时须予以考虑的一些关键事项。

第13.24条

第13.24条向上市发行人施加了加强的持续上市义务，规定上市发行人经营的业务(不论由其直接或间接进行)须拥有足够的业务运作并且拥有相当价值的资产支持其营运，其证券才得以继续上市。与以往只须拥有足够的业务运作或资产的做法不同，拥有重大资产但没有足够业务运作的发行人并不符合第13.24条之规定。

在审视发行人的业务运作是否足够及资产是否有相当价值时，第13.24条一般不会将其自营证券交易及/或投资业务计算在内（经营银行业务的公司、保险公司或证券公司除外）。

联交所将第13.24条视为一项质量性的测试，并根据每个发行人的特定事实及情况对其作出评估，而并非为一项充足水平的量化准则。

第13.24条之应用

若发行人没有经营具有实质性及/或可行及可持续发展的业务，联交所有可能会质疑其是否适合继续上市。联交所尤其关注具有以下特点或情况的上市发行人。

- 极小量业务或低资产水平

  发行人若仅维持极低水平的业务运作及资产，亦无法产生足够的收入和利润，从而导致其录得连年的（而并非暂时性的）净亏损及营运现金流呈现负数，该发行人一般不会被视为拥有可行及可持续发展的业务。

  其他情况，包括发行人破产、出现财政困难从而影响业务经营或导致业务暂停营运，及/或失去主要营运附属公司，亦可能导致发行人只余下极小量业务而不符合第13.24条的规定。

  另见：上市决策 LD105-2017、LD115-2017、LD116-2017和LD118-2018。

- 并非具有实质的业务

  联交所注意到有一些发行人继续经营只为维持其上市地位，而非真正为发展相关业务，而主要从事放借贷及订单贸易的发行人特别令人关注。

  在评估发行人是否正在经营一项具有实质的业务时，联交所会审视该发行人业务的具体事实及情况，包括其业务营运模式、业务规模及往绩、资金来源、客源规模及类型以及内部监控系统等，当中亦会考虑到相关行业的惯例及标准。依赖数目不多的交易或客户、低设置及维护成本且进入门槛低的轻资产业务、不明确的收益基准等情况亦可能使人关注该业务是否具有实质性。

- 出售主营业务

  发行人须在出售或终止其主营业务(或其重要部份)后仍然维持可行及可持续发展的实质业务，否则该发行人将不符合第13.24条之规定。

  另见：上市决策 LD35-2012、LD88-2015、LD97-2016、LD98-2016 、LD99-2016和LD112-2017。

- 设立或收购新业务

  在某些情况下，发行人在将业务出售或缩减规模后，设立或收购可能与原有业务无关的新业务。若该新业务并非具有实质业务及/或业务规模有限，并只由数名欠缺管理专业知识的员工经营，该业务不太可能符合第13.24条的规定。

  另见：上市决策 LD105-2017、LD112-2017、LD115-2017、LD116-2017和LD118-2018。

上市发行人的一般责任

要证明符合第13.24条下的持续上市责任，发行人须对其业务事宜、经营状况及财务表现，在其财务业绩及报告及在根据《主板规则》及内幕消息条文作出的公告或其他披露内作出足够的披露。联交所将按该等披露就发行人是否符合第13.24条的规定持续地进行初步评估。

若联交所关注发行人是否符合第13.24条的规定，联交所可能会发信予发行人，列明其观察并要求发行人于指定时间内提供书面陈述以证明该发行人拥有可行及可持续发展并且具有实质的业务。

若干资料，包括但不限于业务目标、策略及计划、业务模式、营运规模、客源类型、主要业务利害关系人的角色及与其关系（例如：内部系统或监控）及与业内惯例作比较，以及董事会对业务前景的看法，辅以可信的利润预测（如有），需要包括在提交的书面陈述中，供联交所考虑。

若发行人未能释除联交所的的疑虑，联交所将通知发行人其不符合第13.24条规定的决定。发行人须于收到决定函后的下一个营业日开市前作出公告。此外，发行人亦应在公告中声明，其股份将于决定函日期起计七个营业日届满后暂停买卖（除非发行人申请复核该决定）。发行人应就停牌或其申请复核的决定刊发进一步的公告。就停牌而言，发行人必须按季度公布其发展情况。上市证券除被短暂停牌或停牌外，若联交所认为发行人在指定期限届满后仍未能符合第13.24条的规定，联交所可按《主板规则》所载的程序取消发行人证券的上市地位。

总括而言，发行人应注意上述第 13.24 条的持续性要求（拥有足够的业务运作并且拥有相当价值的资产支持其持续上市），因此发行人应持续进行内部合规检查，尤其是在收购或出售主要业务或资产时，并采取必要措施以确保第 13.24 条的要求得以满足。

香港专利制度改革 – 本地新设立的直接“原授专利”途径与既有的“再注册”途径并行

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概述

香港的专利制度受《专利条例》（第 514 章）及其附属法例所规管。

专利制度鼓励创新。符合批予专利的任何发明均须具有新颖性，包含创造性并能作工业应用，同时也不属于《专利条例》规定的被豁除的事项。当一项专利被批予后，专利拥有人会获得期限最长为20年的有限的专有权。本质上，就专利产品而言，专利拥有人有权排除未经同意的第三方在香港制造、使用、进口或屯积该专利产品或将该专利产品推出市场；另外，对于专利方法而言，专利拥有人有权排除未经同意的第三方在香港使用该方法或提供该方法予他人在香港使用。为获得上述专利权，专利拥有人必须披露相关发明的细节。

2019 年 12 月 19 日，香港的专利制度进行了改革。其中一项重大的改变是新推行的“原授专利”制度，允许标准专利申请直接在香港提交。该新制度为既有的“再注册”制度提供了另一种选择。因此，香港在专利制度改革后存在两类标准专利，即“再注册”制度及”原授专利”制度下的标准专利。

一项发明也可在香港获得第三类专利的保护，即短期专利。本文仅就上述两类标准专利展开论述。

“再注册”制度

既有的“再注册”制度在专利制度改革后得以保留。该制度下的标准专利被简称为”转录标准专利”。

在“再注册”制度下，任何在专利注册处提交的转录标准专利申请必须以一项相应指定专利申请为基础，而该相应指定专利申请必须在以下三个在香港以外的指定专利当局提交：

1) 中华人民共和国国家知识产权局；

2) 英国的知识产权当局；及

3) 欧洲专利局 (就指定英国的专利而言)。

在香港，转录标准专利申请的程序分为两个阶段：

1) 第一阶段 – 在有关指定专利当局所提出的指定专利申请发表之日后的 6 个月内向专利注册处提交“记录请求”。如该“记录请求”包含所有必要的资料及文件，并符合《专利条例》要求的形式上的规定，处长会将该“记录请求”的细节记入注册记录册内并发表有关请求；及

2) 第二阶段 – 在有关指定专利当局批予指定专利之日或记录请求在香港发表之日（两者以较迟者为准）后的 6 个月内向专利注册处提交”注册与批予请求”。如该“注册与批予请求”包含所有必要的资料及文件，并符合《专利条例》要求的形式上的规定，处长会批予并发表该转录标准专利。

香港专利注册处在上述两个阶段性程序均不会进行实质审查。转录标准专利纯粹是一个记录性制度。

一旦转录标准专利获得批予，而相关的续期费也如期缴纳，转录标准专利可独立地在香港享有为期最长 20 年的效力。该有效期从相应指定专利申请的提交之日起计。

原授专利

“原授专利”制度是一个在香港新实施的专利制度。该制度下的标准专利被简称为“原授标准专利”。

“原授专利”制度下，任何原授标准专利申请可直接在香港提交而申请人不需要在香港以外的指定专利当局提交较早的相应指定专利申请。

如原授标准专利申请包含所有必要的资料及文件，并符合《专利条例》要求的形式上的规定，处长将会发表该项申请。处长需要在该原授标准专利申请的提交日期或所声称的最早优先权日（如适用）后的 18 个月过后, 在切实可行的范围内尽快发表该原授标准专利申请。申请人亦可要求提早发表该项申请。

“原授专利”制度下的原授标准专利申请与“再注册”制度下的转录标准专利申请的一个不同之处是转录标准专利申请无须经过香港本地的实质审查，而原授标准专利申请必须经过香港专利注册处的实质审查才能被批予。原授标准专利申请人必须在其申请的提交日期或所声称之最早优先权日（如适用）后的 3 年内请求处长进行实质审查。

当收到实质审查请求后，处长应审查该原授专利申请是否符合《专利条例》规定的要求，尤其包括对相关发明的专利性做出判定，即该发明是否新颖，是否包含创造性并能作工业应用。如处长认为原授标准专利申请符合所有订

明的要求，处长将会批予并发表该原授标准专利。

与其他国家的“原授专利”制度相同，处长可以就现有技术及/或其他与可注册性有关的理由发出审查文件，而申请人将会有机会尝试解决审查文件所提出的问题。

新的“原授专利”制度提供了在香港获得标准专利的直接申请途径。与“再注册”制度不同，“原授专利”制度下的申请人无须向香港以外的指定专利当局提交较早的相应指定专利申请。因此，对于那些没有需要在指定专利当局（即中国，英国及欧洲）获得专利保护的申请人而言，“原授专利”制度可能可以减少在香港获得标准专利的时间及成本。

本所乐意为您提供协助

香港专利制度下，任何合资格发明均能通过“原授专利”制度下的原授标准专利，“再注册”制度下转录标准专利或短期专利而取得相关的专利保护。如果您对获得专利保护有任何疑问或需要任何协助，请随时与我们联系。

仲裁、独立性及仲裁地的重要性

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在最近 *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 一案的判决中，英国最高法院被请求就当事人未对仲裁条款的适用法律作出明示选择的情况下应适用哪种法律体系的问题作出裁决。

案件的结果可能令人惊讶，并且提醒我们「标准条款」的重要性。

英国最高法院以 3：2 的多数判决裁定尽管主合同受俄罗斯法管限，该合同第 50 条，即相关的仲裁协议，的适用法律则受完全不同。

本文将阐释最高法院的判决理由，并在结尾对合约方起草争议解决条款提出一些建议。

背景

2016 年 2 月，新建的俄罗斯 Berezovskaya 发电厂发生严重火灾。该发电厂由 Chubb Russia 及其附属公司提供保险，Chubb Russia 支付了约 4 亿美元的保险赔偿后，替代该发电厂的所有人取得向承建商的追索权。Chubb 随后向 Enka，即负责安装锅炉及辅助设备的次承建商，提起诉讼程序。

本案中的建设合同（以下简称「**合同**」）长达 500 多页，以英文及俄文并列起草签署，并以俄文版本为准。然而，合同未对其适用法律作出明示选择。

合同第 50 条（以下简称「**仲裁协议**」）规定了国际商会仲裁，仲裁语言为英语，仲裁地为英格兰伦敦，但同样未指明适用法律。

所产生的问题是，本案中的争议是否在仲裁协议的范围内。

Enka 便向伦敦商事法庭提出禁诉禁令申请 (anti-suit injunction)，以禁止 Chubb 在法庭继续其申索，从而维护仲裁协议的有效性。

倘若英国法律为仲裁协议的适用法律，仲裁协议的适用范围会更广泛并且更容易得到执行；另一方，倘若俄罗斯法为适用的法律，仲裁协议的范围很可能会较小导致 Chubb 的申索被排除在仲裁协议的范围之外，让 Chubb 的申索可以由俄罗斯法院来审理。

在案件的一审中，伦敦高等法院认为俄罗斯法默示适用于整个合同，因此俄罗斯法院才是裁定 Chubb 的申索是否在仲裁协议的范围内的适当地方。

Enka 同时对俄罗斯法院的管辖权提出质疑，并基于《俄罗斯仲裁程序法》（Russian Arbitrazh Enka

> 3. 当事人就诉讼事项订有本条所称之协定者，缔约国法院受理诉讼时应依当事人一造之请求，命当事人提交公断，但前述协定经法院认定无效、失效或不能实行者不再此限。

同时对俄罗斯法院的管辖权提出质疑，并基于《俄罗斯仲裁程序法》（Russian Arbitrazh Procedure Code）第 148(5)条请求驳回 Chubb 的申索并将其申索提交仲裁。该条款旨在实施俄罗斯于 1958 年《承认及执行外国仲裁裁决公约》（以下简称「**《纽约公约》**」）第 II(3)条下的义务：

然而，2020 年 3 月，俄罗斯法院拒绝将 Chubb 的申索提交仲裁，并且就案件的实体争议裁定 Enka 胜诉。其后，Chubb 提出上诉。

同时，Enka 就伦敦高等法院的判决提出了上诉。2020 年 4 月，英国上诉法院裁定仲裁协议的适用法律为英国法律。上诉法院因此批准禁诉禁令以维护仲裁协议，并禁止 Chubb 在俄罗斯法院继续其申索。

上诉法院的理据为主体合同的适用法律「*对仲裁协议的适用法律选择影响甚微（如有），因为仲裁协议为有别于且独立于主体合同的协议*」[1]。此观点衍生于独立性原则，按照该原则，虽然仲裁协议为基础合同的一部分，但仲裁协议仍然独立于该合同的其他部分。

Chubb 向英国最高法院提出上诉。

法律原则

根据英国及香港普通法，合同的适用法律为 (i) 由当事人通过明示或默示的方式选择的法律，或 (ii) 若果未有相关选择，便应为与合同有最密切联系的法律。[2]

在上述第二种情况下，就如何处理仲裁协议未就其自身（有别于主体合同）的适用法律作出规定的（常见）情况，过往的案例显示两大学派的理论，其可简要总结如下：

[1] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] EWCA Civ 574, at 92 per Popplewell LJ

[2] *Bonython v Commonwealth of Australia* [1951] AC 201 at 219

1) 一般而言，所选仲裁地的法律应同时适用于将于该地履行的仲裁协议：*C v D* [2007] EWCA Civ 1282；或

2) 一般而言，适用于主体合同的法律应同时适用于该合同所包含的仲裁协议：*Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia* SA [2012] EWCA Civ 638。

在过去八年中，后者变得越来越主流[3]。然而，在 Enka 一案中，上诉法院认为除非当事人以明示方式选择仲裁协议的适用法律，否则「*按照一般原则，作为当事人的默示选择，仲裁地的法律应为仲裁协议的适用法律，除非案件的特殊情形提供充分有力的理由支持作出相反结论的结果*。」[4]因此，上诉法院裁定英国法律为适用的法律。

最高法院多数法官对此持反对意见。Hamblen 大法官及 Leggatt 大法官认为，仲裁协议独立于主体合同的原则应被理解为：当使实体合同无效的情况发生时，当事人所同意的争议解决程序应继续有效。[5] 基于该目的，仲裁协议的确具有独立性。然而，因此而把仲裁协议说成其不构成主体合同的一部分将会是对独立性原则的过分应用。[6]

因此，在考虑什么法律与仲裁协议有最密切及最真实的联系时，若当事人实际上已选择主体合同的适用法律，，就应避免过分侧重仲裁地即仲裁协议履行地的法律。

最高法院亦提到*切割*（***dépeçage***）的概念，即合同中不同条款受不同适用法律所管辖的概念，并认可仲裁协议比起其他条款可能更容易被不同的适用法律所管辖，因其规定的义务与主体合同中的实体义务有着截然不同的性质。然而，最高法院也指出若适用于主体合同与仲裁协议的法律有所不同，这可能导致不一致性及不确定性，且假设商业上的合约方意图或期望其合同受统一的法律体系管限一般而言都很合理，因此，法庭认为应以当事人以明示或默示的方式所选择主体合同的适用法律为基点。

在本案中，当事人的国籍（俄罗斯及土耳其）、合同的决定性语言（俄文）、合同规定的实体义务的履行地（俄罗斯）以及付款货币（俄罗斯卢布），本应指向俄罗斯法为仲裁协议的适用法律，但事实并非如此。

例外情形

最高法院强调每宗案件的裁决都要视乎其具体案情，并指出上述一般原则会有例外情形。

有效性原则为上述例外情形中的一种。按照该原则，合同应被解释为有效而非无效（如可能），因当事人的本意不可能（按照相关适用的法律下）为达成完全无效的条款。[7]

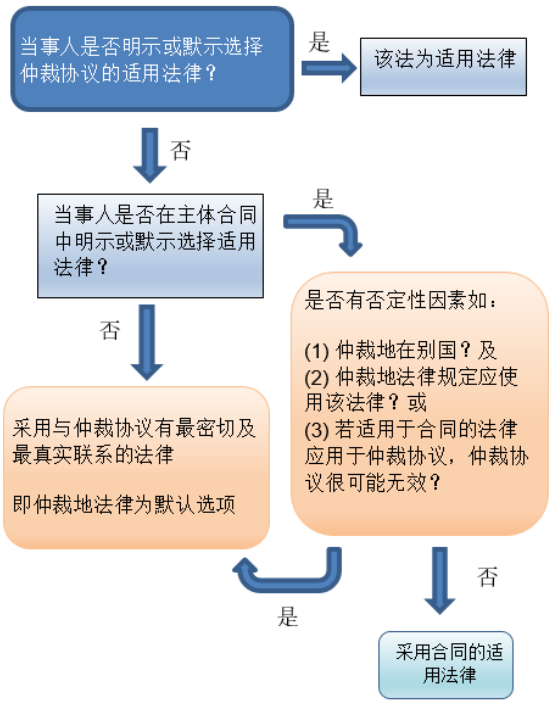
因此，若按照主体合同的推定适用法律应用于仲裁协议很可能导致仲裁协议无效（或甚至是效力大幅减弱），当事人将被视为未预期该结果。

若实体合同的适用法律可能不被考虑，法庭将转而考虑什么法律与仲裁协议有最密切及最真实的联系。最高法院承认在现代司法实践中，聆讯可以在任何地点展开，包括以虚拟形式展开，因此仲裁的地方的选择现仅为理论意义上的「履行地」，并可被更恰当地理解为当事人对程序法的选择。

在 *Enka* 一案中，最高法院最终裁定英国法律为仲裁协议适用的法律。当事人明确指定伦敦作为仲裁地，加上按照俄罗斯法仲裁协议很可能被判无效，所以这足以另法庭摒弃一般原则。

判决结果

实践中，仲裁协议的适用法律可以以下图表示的方法决定：



[3] *Redfern & Hunter on International Arbitration,* 5th Ed (2009), at 3.12; *Russell on Arbitration*, 24th Ed (2015); Dicey, Morris & Collins, *The Conflict of Laws*, 15th Ed (2012) at 16-017

[4] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] EWCA Civ 574, at 91 per Popplewell LJ

[5] 独立性原则已被纳入《仲裁条例》（香港法律第 609 章）第 34(1)条以实施《联合国国际贸易法委员会国际商事仲裁示范法》第 16 条，以及英国《1996 年仲裁法》第 7 条。

[6] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, at 62-63 per Lord Hamblen & Lord Leggatt

[7] *Hamlyn & Co v Talisker Distillery* [1894] UKHL 642 at 643 per Lord Herschell

新加坡采取类似的法律立场。在 *BNA v BNB* [2019] SGCA 84 一案中，新加坡上诉法院确认法庭应首先采用主体合同明示选择的适用法律为基点，仲裁地法律仅在结合其他因素时才能取代主体合同明示选择的适用法律。

相反，香港法庭在定下一个对仲裁协议适用法律的一般性推定上仍有滞后，但其对 *Sulamérica* 一案的判决理由及有效性原则表示认可。最近，Mimmie Chan 法官将裁定仲裁协议的适用法律的问题形容为「*一个有关释义的问题，有关解释基础合同的相关条款及仲裁协议的问题……*」[8]

毫无疑问，香港法院将会在适当时侯应邀依据 *Enka* 一案的判决对相关法律原则再次进行考虑。

启示与展望

不言而喻的是，当事人不应等到最后一刻才协商争议解决条款，或未经深入考量该等条款与主合同之间的关系就将其以「标准条款」写入合同。

若当事人希望其在仲裁阶段之前的义务被不同的适用法律所管辖，其应仔细考量「分阶段的」争议解决条款，否则该等义务可能落入仲裁协议的适用法律的管辖范围内。

在合同中明示选择适用法律为合宜的做法，但合约方应先寻求专业意见以决定什么地方的法律将能最大限度保护其利益。

[8] *X and Anor v. ZPRC & Anor* [2020] HKCFI 631 at 24；以及 *A and Others v D* [2020] HKCFI 2887 at 33。

铭德及有关办事处：

阿德莱德 奥克兰 北京 布里斯班 堪培拉 达尔文 黄金海岸 香港 伦敦 墨尔本 珀斯 上海 悉尼 乌兰巴托 惠灵顿