Litigation & Arbitration Group

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Arbitration case law update:

Supreme Court to tackle governing law of arbitration agreements in Enka v Chubb

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In an important case for English arbitration law, the Supreme Court will hear an appeal in July 2020 against the judgment of the Court of Appeal in Enka v Chubb [2020] EWCA Civ 574 regarding two key issues: (1) the correct approach as a matter of English law to determining the governing law of an arbitration agreement (particularly where the law of the main contract is different to the law of the seat of arbitration) and (2) the proper role of the court of the seat of arbitration in determining whether foreign proceedings give rise to a breach of an agreement to arbitrate.

In this briefing, we summarise the decisions of the High Court and Court of Appeal, and highlight the issues that the Supreme Court will have to consider. It is hoped that the Supreme Court will provide welcome clarity to an area of arbitral law that has, for some time, lacked certainty and consistency.

Background

The proceedings

The case arose from a fire at a power plant in Russia in February 2016. On 25 May 2019, Chubb (a Russian entity in the Chubb insurance group) brought court proceedings in Moscow against Enka (a Turkish engineering and construction business) in relation to Enka's installation of fuel oil pipelines, which Chubb contended caused the fire (the "**Russian Proceedings**"). Enka's services had been engaged in 2012 under a Russian law contract containing an arbitration agreement, which provided for the resolution of disputes under the ICC Rules and for London to be the seat of the arbitration.[1]

The Russian Proceedings were accepted by the Moscow Court on 3 September 2019. Enka subsequently filed a claim in the Commercial Court in London (the "**English Proceedings**") seeking: (i) a declaration that

[1] Enka was initially engaged by Energoproekt (a general contractor), which assigned its rights against Enka to Unipro. Unipro was insured by Chubb, and following payment by Chubb of 26.1 billion Roubles for the fire damages, Chubb became subrogated to Unipro's rights against Enka.

Chubb was bound by the arbitration agreement and that this agreement applied to the subject matter of the Russian Proceedings; and (ii) an injunction to prevent Chubb from pursuing the Russian Proceedings.

The High Court's decision

The trial of the English Proceedings came before the High Court on 11 December 2019 (before the merits of the Russian Proceedings had been decided). It was common ground that, if the arbitration agreement was governed by English law, then the Russian Proceedings were within the scope of the arbitration agreement and that an injunction should be granted unless there was a strong reason not to.[2] However, Chubb argued that Russian law was the governing law of both the main agreement and the arbitration agreement, and that the English Court should, as a matter of comity, leave it to the Moscow Court to determine whether the Russian Proceedings fell within the scope of the arbitration agreement.

Enka's primary case was that the choice of London as the seat of arbitration meant that, in the absence of an express choice, English law governed the arbitration agreement but, in the alternative, that if the proper law of the arbitration agreement was Russian law, the English Court (as the court of the seat of arbitration) should still decide that, as a matter of Russian law, the Russian Proceedings fell within the scope of the arbitration agreement.

The High Court dismissed Enka's claim and refused to grant the declaration or anti-suit injunction. On his own initiative and despite the arguments of both parties, the Judge declined to rule on the proper law of the arbitration agreement. Instead, he held on *forum non conveniens* grounds that all questions relating to the scope of the arbitration agreement, including the governing law of the arbitration agreement, should be left to the Moscow Court.

The Court of Appeal's decision

Enka appealed the High Court decision and the principal issues considered by the Court of Appeal were:

1. The role and scope of the powers of the court of the seat of the arbitration (the curial court) and the application of *forum non conveniens*; and
2. The proper law of the arbitration agreement.

Role of the curial court

The Court of Appeal held that the court of the seat of the arbitration (here, the English Court) was the appropriate court to grant an anti-suit injunction and no jurisdictional issues of *forum non conveniens* arose. It explained that, by choosing London as the seat of the arbitration, the parties chose to submit to the supervisory jurisdiction of the English Court (the curial jurisdiction), which included the power to grant anti-suit injunctions. The Court of Appeal emphasised the importance of respecting and enforcing party autonomy, "*which is fundamental to arbitration agreements and which it is the primary function of the courts to respect and uphold*",[3] and found that the power of the curial court to grant anti-suit injunctions to "*protect and enforce the integrity of the arbitration agreement*" was well supported by English authority.[4]

The Court noted that even if the proper law of the arbitration agreement was Russian, it would be "*illogical and impermissible*" for the English Court (as the curial court) to cede to the Moscow Court the issues of (i) whether the Russian Proceedings breached the arbitration agreement and (ii) if so, whether anti-suit relief should be granted.[5] To do so would be "*no less a failure to respect the parties' bargain in choosing England*

[2] In accordance with principles set out in The "Angelic Grace" [1995] 1 Lloyd's Rep 254.
[3] Enka v Chubb [2020] EWCA Civ 574 at [46].
[4] Enka at [53]. Including by West Tankers Inc. v RAS Reiunione Adriatica di Sicurta SpA [2007] 1 Lloyd's Rep 391 per Lord Hoffman at [21].
[5] Enka at [64].

as the seat" than failing to consider the proper law of the arbitration agreement at all.[6] The Court of Appeal stated that, where the determination of the scope of the arbitration agreement involved deciding Russian law, the English Court was "*required*" and "*well equipped*" to do so.[7]

Proper law of the arbitration agreement

As is well known, the principle of 'separability' means that the arbitration agreement is treated as a separate contract to the main contract in which it appears.[8] As a result, it is possible for the arbitration agreement to be governed by a different law to that which governs the main contract. However, in the absence of an express choice of law within the arbitration agreement itself, it may not be clear what the parties intended. Indeed, prior to Enka, the state of the English authorities in relation to determining the proper law of the arbitration agreement, and in particular the relative weight to be given to the law of the seat and the law of the main agreement (if different) in making that determination, was far from clear.

The Court of Appeal in Enka sought to resolve this uncertainty. After an extensive review of the case law, the Court of Appeal summarised the applicable principles as follows:[9]

1. A three-stage test applies: (i) is there an express choice of law? (ii) if not, is there an implied choice of law? (iii) if not, what system of law does the arbitration agreement have its "*closest and most real connection*" to?[10]

2. Whether an express choice of law in the main agreement amounts to an **express choice** of law in the arbitration agreement is a matter of construction, applying the "*principles of construction of the main contract law if different from English law*".[11]

3. In all other cases there is a strong presumption that the parties **impliedly chose** the law of the seat as the governing law of the arbitration agreement. This presumption may be rebutted by "*powerful countervailing factors in the relationship between the parties or the circumstances of the case.*"[12]

In Enka, while it was undisputed that the law governing the main contract was Russian law, this was not as result of the parties' express choice. Nor was there an express choice of law in respect of the arbitration agreement. Therefore, the Court of Appeal's analysis focussed on the parties' implied choice. In that regard, the Court of Appeal identified the following considerations that support the presumption that the law of the seat should apply.

1. It follows from the doctrine of separability that there is "*no principled basis for treating the main contract law as a significant source of guidance*" for the proper law of the arbitration agreement.[13]

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[6] Ibid.
[7] Ibid at [63].
[8] See section 7 of the Arbitration Act 1996.
[9] Enka at [105].
[10] Ibid. This flows Sulamerica Cia Nacional de Seguros SA v Enesa Engelharia SA [2013] 1 WLR 102 per Moore-Bick LJ at [25].
[11] Enka at [105]. We note for completeness that this aspect of the Court of Appeal's guidance, which flows from the Court of Appeal's previous judgment in Kabab-Ji SAL v Kout Food Group [2020] 1 Lloyd's rep 269 (summarised in our alert here), is potentially difficult to reconcile with the doctrine of separability – as they are separate contracts, the court should arguably only apply the laws of construction of the arbitration agreement, and not the laws of construction of the main contract. It would therefore be helpful for the Supreme Court to clarify how these principles marry.
[12] Enka at [105].
[13] Ibid at [92]. As noted above, it is arguably difficult to reconcile this with the guidance (following the decision in Kabab-Ji) that the courts should first consider whether the main contract can be interpreted as an express agreement that the law of the main contract shall extend to the arbitration agreement using the principles of construction under the law of the main contract.

While the Court of Appeal did not suggest that the arbitration agreement should be isolated from the main agreement for all purposes,[14] it held that there were good reasons to do so for the purpose of determining the law of the arbitration agreement where the parties have chosen a different curial law from the law of the main agreement, given the close relationship between the curial law and the law governing the arbitration agreement.

2. The overlap between the curial law and the law of the arbitration agreement "*strongly suggests that they should usually be the same*".[15] As the Court of Appeal put it: "*one would not expect businessmen to choose two different systems of law to apply to their arbitration package*".[16]

Applying the general presumption that the governing law of the arbitration agreement is the same as the curial law, and finding no countervailing factors, the Court of Appeal held that the proper law of the arbitration agreement was English law (i.e. because the seat of arbitration was London). As a result, it granted the anti-suit injunction (reversing the High Court's decision).

Clarity: a task for the Supreme Court

The Supreme Court is listed to hear Chubb's appeal at the end of July 2020. Its decision will likely become the leading authority on how the English Court should determine the law governing arbitration agreements, and will hopefully confirm the proper role of the curial court in relation to the enforcement of the parties' agreement to arbitrate.

[14] And noted that section 7 of the Arbitration Act 1996 confined the doctrine to the existence, validity and effectiveness of the arbitration agreement.
[15] Enka at [96].
[16] Ibid at [99].

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