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The primacy of expectation and clarity

The English Court of Appeal clarifies the rules relating to *forum conveniens* and the choice of law in relation to international arbitration agreements

In *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] EWCA Civ 574 (*Enka vs Chubb*), the English Court of Appeal recently ruled on issues relating to *forum conveniens* and the choice of law in relation to arbitration agreements.

The facts

Enka was a subcontractor for construction works performed during the construction of a power plant in Russia. Enka's subcontractor contract, concluded in 2012 (main contract), was with CJSC Energoproect (CJSC), the general contractor for the design and construction of the power plant. The main contract was subject to an arbitration agreement that stipulated London as the seat of the arbitration. Neither the main contract, nor the arbitration agreement, expressly stipulated the applicable law.

In 2014, CJSC assigned all rights and obligations against Enka to the owner of the power plant, EO.N/Unipro. EO.N/Unipro insured the power plant with the Russian branch of global insurance company Chubb (Chubb Russia). In 2016, a fire all but destroyed the power plant. Chubb Russia paid out approx. US$400 million against the insurance claim, becoming subrogated to any rights EO.N/Unipro may have had as a result of the fire, including against Enka. In 2017, Chubb Russia alleged that Enka was responsible for the fire, issuing a Notice of Low Quality of Performance of the Work. In 2019, Chubb Russia commenced proceedings in the Moscow Arbitrazh Court.

Enka commenced its own proceedings in the Commercial Court in London. It sought a declaration that any dispute would have to be arbitrated in London in accordance with the arbitration agreement and sought the granting of an anti-suit injunction against Chubb Russia, restraining the insurer from proceeding in the Moscow Arbitrazh Court.

The issues

Relevantly, the Commercial Court considered two issues, including, first, whether the Commercial Court could or should grant an anti-suit injunction against Chubb Russia, and second, what the proper law governing the arbitration agreement was.

The decision

At first instance, the Commercial Court declined jurisdiction, and refused to grant the anti-suit injunction, finding that the Moscow Arbitrazh Court was the more convenient forum to deal with questions concerning the arbitration agreement and its relationship with the proceedings on foot in Moscow. The judge also declined to find on the question of the applicable law, even though he suggested that it was likely that Russian law would apply. The Court of Appeal took a very different view.

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On forum conveniens

In relation to the first issue, the Court of Appeal held that the "English court as the court at the seat of the arbitration is necessarily the appropriate court" and that any questions concerning the *forum conveniens* do not arise [42]. The Court of Appeal grounded this finding in party autonomy: the parties chose arbitration seated in London and, with that, submitted to the jurisdiction of the court at that specific seat as well as to the curial law that applies [46].

The Court of Appeal endorsed Lord Mance's extra-curial observation that anti-suit injunctions are a central feature of the English curial law, finding that such injunctive relief exists "to protect and enforce the integrity of the arbitration agreement" [53]. If ceded to a foreign court, the risk of "particularly inimical" parallel proceedings grows – the very risk the parties sought to exclude by opting for arbitration [55]. Thus, when asked to grant an anti-suit injunction in relation to an actual or putative arbitration that has its seat in London, the court has merely two relevant questions to address and answer: are the foreign proceedings in breach of the arbitration clause; and, if so, should the anti-suit injunction be granted "as a matter of discretion" [64]. *Forum conveniens* does not enter this inquiry.

On the applicable law

In relation to the issue of the law applicable to the arbitration agreement, the Court of Appeal surveyed the private international or conflict of laws rules applicable under English law, noting the bifurcation of inquiries that apply to the main contract and to the Arbitration Agreement.

The latter, so the Court of Appeal, were extrapolated in *Sulamerica Cia Nacional de Seguros SA v Enesa Engelharia* SA [2013] 1 WLR 102 (Sulamerica). In this case, the court held (at paras [9] and [26]) that there are three steps to the inquiry: first, did the parties make an express choice?; second, can a choice be implied?; and, third, which is the legal system to which the agreement has the closest and most real connection? After considering how subsequent cases have applied these inquiries, and lamenting the "unsatisfactory state of the law" [85] which requires "some order and clarity" [89], the Court of Appeal extrapolated basic principles applicable to determining the proper law of an international arbitration agreement [105].

Starting with the basic proposition that the proper law of an international arbitration agreement must be determined by applying the three tiered inquiry developed in *Sulamerica*, the Court of Appeal held that "an express choice of law in the main contract […] may amount to an express choice of the" proper law of the arbitration agreement, depending on the "construction of the whole contract, including the arbitration agreement, applying the principles of construction of the main contract law if different from English law." [105 (2)]. Where there is no such express choice, the Court of Appeal found a "strong presumption that the parties have impliedly chosen the curial law", i.e. the law of the seat of the arbitration, as the proper law. This strong presumption may only "yield to another system of law governing the arbitration agreement where there are powerful countervailing factors in the relationship between the parties or the circumstances of the case" [105 (3)].

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In relation to Enka, the Court of Appeal held that in the absence of express choice, the proper law needed to be implied, with the selection of the seat of arbitration, and the absence of powerful countervailing factors, meaning that the curial law of the seat chosen by the parties, i.e. London, applies.

By seeking to pursue the claim through the Moscow Arbitrazh Court, as opposed to through arbitration in London, Chubb Russia breached the arbitration agreement.

Relevance of the case

With its decision in *Enka vs Chubb*, the Court of Appeal exhibited being guided by several important basic principles.

First, the case is a strong confirmation of the principle of party autonomy in international commercial arbitration. Its approach to the choice of law, and the short shrift it gave to *forum conveniens* considerations when determining the role of an English court at the chosen seat of an arbitration, are driven by the supremacy of the parties' choices. This is further highlighted by the Court of Appeal's repeated reference to the importance of certainty and predictability in international commercial dealings.

Second, the decision in Enka is a robust endorsement of the role of English courts as supervisory courts at the seat of the arbitration as well as the importance of the curial law, i.e. the law applicable at the seat of the arbitration.

Third, in line with longstanding doctrine, the Court of Appeal once more confirmed the severability of the main contract and the arbitration agreement. While it seems possible to discern the Court of Appeal's overall preference for an alignment of the law applicable to both, it also stated that there was "nothing conceptually problematic" about the application of different laws to the two agreements. This is good news for parties who, for example, wish to choose non-state law instruments, general principles and trade usages as the proper law of their contract.

Finally, the Court of Appeal's meticulous analysis of the private international law or conflict of laws rules used to determine the proper law of an arbitration agreement are much welcome indeed.