UK Supreme Court Sets Out Correct Approach to Determining Law Governing an Arbitration Agreement

14 October 2020

In *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb & Ors*, the UK Supreme Court held that where an arbitration agreement does not specify a governing law, the law chosen by the parties to govern the main contract will ordinarily also govern the arbitration agreement. Where the parties also have not chosen a law to govern the main contract, the court must determine the law with which the arbitration agreement is most closely connected. By a majority (3-2), the Court held that, as a general rule, this will be the law of the jurisdiction in which the arbitration is seated.

Background. In 2012, the respondent ("Enka") entered into a subcontract with CJSC Energoproekt to undertake construction works on the Berezovskaya power plant in Russia (the "Contract"). The Contract's dispute resolution clause provided for arbitration seated in London under the ICC Rules, but it had no governing law clause. In 2014, CJSC Energoproekt assigned its rights under the Contract to the owner of the power plant, PJSC Unipro. A major fire caused damage at the Berezovskaya plant in February 2016. PJSC Unipro recovered approximately US$ 400 million from its insurer, the appellant ("Chubb Russia"), who in turn subrogated into PJSC Unipro's rights to claim under the Contract. Chubb Russia commenced Russian court proceedings against Enka in 2019, alleging that the fire was caused by defects in Enka's work.

Enka applied to the English court for: (i) a declaration that Chubb Russia was bound by the arbitration agreement in the Contract and (ii) an anti-suit injunction to prevent Chubb Russia from pursuing its claims before the Russian courts.

High Court. At first instance, Baker J dismissed Enka's application on the basis that the English court lacked jurisdiction on *forum non conveniens* grounds. The judge declined to determine the governing law of the arbitration agreement, but noted that it was "strongly arguable" that Russian law applied.

The Court of Appeal. As we discussed at the time, in May 2020, the Court of Appeal (Popplewell, Flaux and Males LJJ) unanimously allowed Enka's appeal and held that English law governed the arbitration agreement. Confirming its supervisory jurisdiction, the Court also granted the anti-suit injunction. The Court held that, under English law,

the parties' choice of seat gives rise to a presumption that the curial law governs the validity and scope of the arbitration agreement. The Court also held that the separability of the arbitration agreement means that a choice-of-law provision in the main contract does not automatically extend to the arbitration agreement.

The Supreme Court. The Supreme Court disagreed with the Court of Appeal's approach but upheld its decision and dismissed Chubb Russia's appeal by a majority (with Lords Sales and Burrows dissenting).

The Court found that the separability principle does not preclude a choice-of-law provision in the main contract from applying to the arbitration agreement. On a plain reading, a governing law provision in the main contract applies to all clauses in the agreement, including the arbitration clause.

Determining the law governing the arbitration agreement. The Supreme Court identified the following key principles for determining the law governing the arbitration agreement:

- When the English court is asked to determine which law governs an arbitration agreement, it should apply the English law rules of contractual interpretation, as the law of the forum, to determine whether the parties have expressly or impliedly agreed upon a particular law.

- Where the parties have not specified the law governing the arbitration agreement itself, a choice of governing law for the main contract will generally apply to the arbitration agreement. This general rule encourages legal certainty, consistency and coherence, while avoiding complexity and artificiality.

- The choice of a different jurisdiction as the seat of the arbitration is not, without more, sufficient to negate the inference that the choice of law for the main contract was intended to apply to the arbitration agreement.

- However, this inference may be negated, implying that the arbitration agreement should be governed by the law of the seat, if: (a) the law of the seat provides that, where an arbitration is seated in that jurisdiction, the arbitration agreement will be governed by its law; or (b) there is a "serious risk" that the arbitration agreement would be "significantly undermined" if governed by the same law as the main contract. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.

- In the absence of an express or implied choice of law governing the arbitration agreement or main contract, the applicable law will be the law to which the

arbitration agreement is "most closely connected". As a rule, this will ordinarily be the law of the seat, even if that differs from the law found to govern the main contract.

The law "most closely connected" to the arbitration agreement. The Supreme Court gave three reasons why—in the absence of any choice-of-law provision in the arbitration agreement or the main contract—the law of the seat is ordinarily the law most closely connected to the arbitration agreement.

- **The place of performance**. The place of contractual performance is a factor to which English law attaches significant weight for choice-of-law purposes. The seat of the arbitration is the place of performance of an arbitration agreement (legally if not physically). An arbitration agreement has its own subject matter and purpose—to govern the arbitral process—which is distinct from that of the main contract. This is supported by the fact that parties frequently choose an arbitral seat that is wholly unconnected to the place where their substantive obligations are to be performed.

- **Consistency with international law and legislative policy**. The uniform conflict-of-law rules under the 1958 New York Convention, as well as an extensive body of academic commentary on the topic, support the conclusion that the law of the seat should apply to the arbitration agreement absent a contrary choice-of-law in the arbitration agreement itself or the main contract. Concluding otherwise would lead to inconsistent and illogical results.

- **Giving effect to commercial purpose**. Applying the law of the seat as a default rule is likely to uphold contracting parties' reasonable expectations, and, in most cases, provides a neutral law which is likely to be supportive of arbitration.

The anti-suit injunction and *forum (non) conveniens*. Dismissing the appeal, the Supreme Court emphasised that "[a] promise to arbitrate is also a promise not to litigate". A well-recognised feature of the supervisory jurisdiction of the English courts is the grant of injunctive relief to restrain parties from breaching their obligations under the arbitration agreement (e.g. to stop them commencing or pursuing litigation in another jurisdiction). Agreeing with the Court of Appeal, the Court held unanimously that it is irrelevant whether the arbitration agreement was governed by English law for this purpose—what matters is that the parties have chosen to seat their arbitration in England. Considerations of *forum (non) conveniens* or comity play no role.

The outcome of the appeal. The majority (Lords Hamblen and Leggatt, with whom Lord Kerr agreed) found that the parties had not agreed on a governing law in the Contract, and that no choice of law could reasonably be implied either. As a result, the

majority held that the law governing the arbitration agreement was the law most closely connected to it, being the law of the seat, i.e. English law.

The minority (Lords Burrows and Sales) agreed with the majority that, where the parties have expressly or impliedly chosen the law governing the main contract, this choice ordinarily extends to the arbitration agreement. However, they dissented on what the default position should be in the absence of such choice. They considered that the law with which the main contract is most closely connected should govern the arbitration agreement, as—in their view—this is the law with which the arbitration agreement is also most closely connected. The minority's view was that the Contract was "most closely connected" to Russian law, and that the arbitration agreement ought to be governed by Russian law. As such, Chubb Russia's appeal ought to have been allowed and the question of whether there had been a breach of the arbitration agreement so as to justify the grant of an anti-suit injunction remitted to the Commercial Court.

Comment. The Supreme Court's judgment brings welcome guidance and clarity in an important area that was becoming fraught with uncertainty. In re-affirming the Court of Appeal's decision to grant an anti-suit injunction in Enka's favour, the Court has also emphasised the commitment of English law to protect and enforce parties' arbitration agreements.

However, the dissents within the Supreme Court, and the varying decisions issued by the English courts in this dispute, demonstrate the complex issues and uncertainty that can arise when parties fail to include an express choice of governing law in their contract. We would strongly encourage parties to ensure that they include an express choice of law in their arbitration agreements, as well as a well-drafted governing law clause in the main contract, to avoid any need for costly satellite litigation over these issues in any disputes that arise.

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Please do not hesitate to contact us with any questions.

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