English Court Clarifies Law of Arbitration Agreement and Availability of Anti-Suit Relief

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A recent decision of the English Court of Appeal in *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] EWCA Civ 574 has confirmed that the English court always has jurisdiction to determine whether an anti-suit injunction should be granted in support of an English-seated arbitration, even if such determination requires consideration of the law of another jurisdiction. The Court of Appeal also clarified the correct approach to determine the law of the arbitration agreement, applying a presumption that parties will have impliedly chosen the law of the seat as the law of the arbitration agreement where no express choice of another law has been made.

Background. The claimant, Enka Insaat Ve Sanayi AS ("Enka"), entered into a subcontract with CJSC Energoproekt for certain works relating to the construction of the Berezovskaya power plant in Russia. The subcontract contained an arbitration agreement requiring all disputes arising from or in connection with the subcontract to be referred to international arbitration seated in London and conducted under the ICC Rules. The subcontract contained no express choice of law either for the main contract or for the arbitration agreement that it contained.

In 2014, CJSC Energoproekt novated all of its rights and obligations under the subcontract to the owner of the power plant, PJSC Unipro ("Unipro"). In February 2016 a fire at the power plant caused significant damage. Unipro recovered payments of 21.6 billion Roubles with respect to the damage under its insurance policy with the first defendant, OOO "Insurance Company Chubb" ("Chubb Russia"). Chubb Russia, having become subrogated to Unipro's rights under the subcontract, began writing to Enka to assert that the fire had been caused by defects attributable to low-quality performance of works for which it alleged Enka was responsible. Enka did not respond to Chubb Russia, communicating instead with Unipro and rejecting that it was responsible for the scope of relevant works.

Despite the arbitration agreement, in May 2019 Chubb Russia commenced proceedings in the Moscow Arbitrazh Court against Enka and 10 co-defendants (the "Russian Proceedings"). In response, Enka issued an Arbitration Claim Form in the Commercial Court in London seeking a declaration that Chubb Russia was bound by the arbitration

agreement in the subcontract, and an anti-suit injunction restraining Chubb Russia from continuing the Russian Proceedings.

The issues to be determined by the court included:

- Was the proper law of the arbitration agreement in the subcontract English law or Russian law?
- Can and should anti-suit injunctive relief be granted against Chubb Russia?
- Is the proper law of the arbitration agreement relevant to the English Court's jurisdiction to grant an anti-suit injunction against Chubb Russia, and if so how?

The trial judge, Baker J., declined to reach a decision on the proper law of the arbitration agreement, but indicated that it was "strongly arguable" that it should be Russian law. He dismissed Enka's application, stating that the English court did not have jurisdiction to determine it on *forum non conveniens* grounds, since all questions of the scope of the arbitration agreement and its applicability to the Russian Proceedings could more appropriately be determined by the Moscow Arbitrazh Court.

Appeal. Enka appealed the decision, arguing it was wrong in principle for the judge to have declined jurisdiction over the application, because any questions as to the appropriate forum for the application should automatically be answered in favour of the English Court as the court of the arbitral seat chosen by the parties. Enka also submitted that English law was the proper law of the arbitration agreement and that there was no strong reason for anti-suit or declaratory relief to be refused.

The jurisdiction of the curial court. The Court of Appeal upheld Enka's appeal in full. Popplewell LJ, with whom Flaux and Males LLJ agreed, held that the trial judge's decision that the court had no jurisdiction on *forum non conveniens* grounds was wrong in principle, confirming that the "English court as the court of the seat of the arbitration is necessarily an appropriate court to grant an anti-suit injunction and questions of forum conveniens do not arise". He continued to provide a detailed examination of authorities in support of his finding, highlighting that the anti-suit jurisdiction is a vital power of the court of the seat of the arbitration to protect and enforce the integrity of the arbitration agreement, and to give effect to "the parties' legitimate expectations of certainty and business efficiency arising from their agreement to arbitrate and choice of seat".

Popplewell LJ further emphasised that it did not matter that the law of the arbitration agreement in this case was potentially Russian law (although he went on to find that it was not, as explained below). The English court, as the court of the seat, was required to

exercise its supervisory jurisdiction irrespective of the fact that doing so would require the court to consider and resolve issues of foreign law, in this case Russian law.

The law of the arbitration agreement. Popplewell LJ continued to determine that the arbitration agreement in the subcontract was, in any event, governed by English law. In doing so, he provided guidance on the correct approach to be taken when determining the law of an arbitration agreement, acknowledging that "the current state of the authorities does no credit to English commercial law, which seeks to serve the business community by providing certainty".

The judge held that the correct starting position was to apply the three-stage test previously articulated in *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* [2012] EWCA Civ 638. That requires consideration (i) first, whether the parties have made an express choice of law for the arbitration agreement; (ii) if not, whether there has been an implied choice of law; and (iii) if not, with what system of law does the arbitration agreement have the closest and most real connection?

Popplewell LJ then added that, where the main contract in which the arbitration agreement is found contains an express choice of law, it may also indicate an express choice of law for the arbitration agreement. However, this will be a matter of the correct interpretation of the contract as a whole, applying the law of the main contract as required.

In circumstances where no express choice of law is made in the main contract, the judge held that there is a strong presumption that the parties have impliedly chosen the law of the seat of arbitration as the law of the arbitration agreement, describing this as the "general rule" except where there were "powerful countervailing factors in the relationship between the parties or the circumstances of the case" suggesting otherwise.

Popplewell LJ noted that the subcontract contained no express choice of law for either the subcontract itself or the arbitration agreement it contained. Accordingly, the "strong presumption" applied and there were no relevant factors in this case to displace it. The governing law of the arbitration agreement was therefore English law.

Comment. With this judgment, the Court of Appeal has confirmed that the English courts will always have jurisdiction to hear any applications for anti-suit injunctions in support of an arbitration seated in England and Wales. In combination with the Supreme Court's 2013 decision in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 WLR 1889, which confirmed that anti-suit relief is available from the English court to restrain proceedings brought in breach of an arbitration agreement even where no arbitration has been commenced or is even

intended, the judgment confirms the extensive powers available to the English courts to enforce parties' arbitration agreements where London is chosen as a seat.

The further clarification given on the correct approach to determining the law applicable to the arbitration agreement is to be welcomed, and helps to resolve a degree of uncertainty that the Court of Appeal itself acknowledged may have resulted from other recent decisions.

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Please do not hesitate to contact us with any questions.

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