ENGLISH SUPREME COURT RULES ON THE PROPER LAW OF THE ARBITRATION AGREEMENT

by Eleanor Scogings

On 9 October 2020, the English Supreme Court (the "**Court**") in Enka Insaat Ve Sanayi AS ("**Enka**") v OOO Insurance Company Chubb ("**Chubb**")[1] clarified the applicable principles for determining the proper law of an arbitration agreement. The contract in question did not contain a choice of law governing the contract or the arbitration agreement, and the Court held, by majority,[2] that the validity and scope of the arbitration agreement was governed by English law, the law of the seat of the arbitration, being the law most closely connected to the dispute resolution clause. Applying English law, the Court held that the arbitration agreement was valid, and the dispute fell within its scope. Consequently, the anti-suit injunction granted by the Court of Appeal to restrain Chubb from proceeding against Enka in the Russian courts was properly granted.

While on the facts of this case the applicable law of the arbitration agreement was the law of the seat, the majority confirmed that generally, where parties have not specified the law applicable to the arbitration agreement, but have chosen the law to govern the underlying contract, it is this choice of law that governs the arbitration agreement, even if there is a different choice of seat. Accordingly, while the Court ultimately reached the same conclusion as the Court of Appeal, the Court departed from the Court of Appeal's finding that there was a strong presumption of an implied choice that the law of the seat governs the arbitration agreement.

Why is this relevant? The law governing the arbitration agreement governs its scope and validity. The applicable law of the arbitration agreement therefore has wide ranging consequences on the jurisdiction of the tribunal to determine the dispute. It can also impact whether

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[1] [2020] UKSC 38

[2] Lord Hamblen, Lord Leggatt and Lord Kerr.

interim measures, such as anti-suit injunctions, are granted. As was the case here, there can be different possible applicable laws with different outcomes. In this case if English law had applied, the scope of the arbitration agreement would have encompassed claims in contract and tort. If Russian law had applied, the arbitration agreement may have been interpreted as applying only to contractual claims and not the issue of joint tortious liability. Accordingly, if Russian law was the applicable law of the arbitration agreement, Chubb's claims before the Russian court may not have fallen within the scope of the arbitration agreement. Moreover, in determining whether to grant the interim relief, the question of which law governed the arbitration agreement was critical.

Background facts

Enka was engaged by CJSC Energoproekt ("**Energoproekt**"), a Russian company, as one of many sub-contractors for the design and construction of a power plant. Enka and Energoproekt concluded a construction contract (the "**Contract**") which contained an arbitration agreement that specified London as the seat of arbitration. The Contract did not contain an express governing law clause for the contract or the arbitration agreement. Energoproekt assigned its rights and obligations to PJSC Unipro ("**Unipro**"), the owner of the power plant.

On 1 February 2016 the power plant was severely damaged by fire. Chubb had insured Unipro against such damage. After the fire, Chubb paid 26.1 billion roubles to Unipro under the insurance policy and thereby became subrogated to any rights of Unipro to claim compensation from third parties for the damage caused by the fire. Consequently, Chubb commenced proceedings in the Moscow Arbitrazh Court against Enka and others, who were jointly liable for the damage caused by the fire. Enka filed an application in the Russian proceedings to have Chubb's claims dismissed and asserted that the claim fell within the scope of the arbitration agreement in the Contract. On 18 March 2020 the Moscow Arbitrazh Court refused to grant Enka's application to refer the claim to arbitration and dismissed Chubb's claims. Both Enka and Chubb have appealed this decision, respectively.

On 16 September 2019, Enka filed an arbitration claim in the English Commercial Court in London seeking an anti-suit injunction to restrain

Chubb from proceeding with the Russian proceedings on the ground that it was in breach of the arbitration agreement in the Contract. On 15 October 2019, Carr J refused to grant the injunction but directed an expedited trial. On 20 December 2019, the English Commercial Court dismissed Enka's claims and considered that the appropriate forum to decide on whether Chubb's claims fell within the scope of the arbitration agreement was the Moscow Arbitrazh Court. Enka appealed, and on 29 April 2020 the Court of Appeal allowed the appeal and issued an anti-suit injunction restraining Chubb from continuing the Russian proceedings. Chubb applied for permission to appeal the Court of Appeal's decision, and on 5 June 2020, the Supreme Court granted the appeal and stayed the anti-suit injunction pending the outcome of the appeal. In parallel, on 11 March 2020, Enka commenced arbitration proceedings.

Decision: the proper law of the arbitration agreement

The majority considered that there was no choice of governing law (express or implied) by the parties as to the contract or the arbitration agreement. The references to Russian law in the Contract did not amount to an implied choice of law to govern the arbitration agreement. Rather, the obvious inference from the omission of a governing law clause was that the parties had not agreed to a choice of governing law.

Applying the principles of the Rome I Regulation[3], the Court determined that the governing law of the Contract was Russian law. However, as there was no choice by the parties as to governing law, in determining the proper law of the arbitration agreement, the Court considered the system of law being the most closely connected to the dispute resolution clause, which it held was the seat. The seat is the place where the arbitration agreement is to be performed. In addition, applying the law of the seat accords with the New York Convention which requires the court to uphold the arbitration agreement, unless it is "null and void, inoperative or incapable of being performed"[4] and it is widely accepted that the same conflict rules are to be applied as with

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[3] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008.

[4] Article II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

respect to enforcement. Similarly, applying the law of the seat would likely uphold the reasonable expectations of the parties in circumstances where they had not chosen a law to govern the contract. Accordingly, the majority concluded that the arbitration agreement was governed by English law, the law of the seat of the arbitration agreement.

The test: the proper law of the arbitration agreement

The Court clarified that at least three systems of national law are involved in an arbitration. First, the law governing the substance of the dispute, which is generally the governing law of the contract from which the dispute has arisen. Second, the law governing the arbitration agreement. Third, the law governing the arbitration process, which is generally the law of the seat.

With respect to the law governing the arbitration agreement, the Court clarified the applicable test and set out the following principles:

1. The law applicable to the arbitration agreement may not be the same law applicable to the other parts of the contract.
2. The law applicable to the arbitration agreement will be a) the law chosen (expressly or impliedly) by the parties or b) in the absence of such choice, the system of law being the most closely connected to the dispute resolution clause.
3. A court or tribunal is to construe the arbitration agreement and contract as a whole applying rules of English law contractual interpretation (as the law of the forum) to determine whether the parties have agreed on the law governing the arbitration agreement.
4. Where the law applicable to the arbitration agreement is not specified, "a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract".[5]
5. The choice of a seat of arbitration, without more, is not sufficient to negate the inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.

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[5] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, para. 170.

6. The inference or general principle may, however, be negated. Additional factors such as the existence of a serious risk that if governed by the same law as the contract, the arbitration agreement would be ineffective would imply that the arbitration agreement was intended to be governed by the law of the seat. Similarly, if there is a provision of law at the seat that indicates that where the arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law, the law of the seat may govern the arbitration agreement.
7. Where there is no express choice of law of the contract, a clause providing for arbitration in a particular place will not by itself justify an inference that the contract or the arbitration agreement is intended to be governed by the law of that place.
8. If the parties have not chosen a governing law of their contract, the arbitration agreement is governed by the law with which it is most closely connected – which will generally be the seat of the arbitration, even if this differs from the law applicable to the parties' substantive obligations.
9. The fact that the dispute resolution clause is multi-tiered and requires the parties to resolve the dispute through mediation or other procedure before referring it to arbitration, will not generally provide a reason to displace the law of the seat of arbitration as the law applicable to the arbitration agreement by default, in the absence of a choice of law to govern it.

Why should a choice of law in the underlying contract apply to the arbitration agreement?

The Court set out several considerations for the general rule that a choice of law in the underlying contract applies to the arbitration agreement. These include:

- **Certainty**. Parties can be assured that an agreement as to the governing law of their contract will be an effective choice in relation to their contractual rights and obligations and will apply to all their disputes.
- **Consistency**. The same law governs all the parties' rights and obligations and it would be inconsistent to have closely related issues such as the proper approach to the interpretation of their

bargain to be governed by different systems of law depending on whether it relates to the main contract or the arbitration agreement.

- **Reduced complexity**. For example, having two different systems of law apply to the arbitration agreement and the underlying contract may cause unnecessary complexity where the arbitration agreement sits within a multi-tiered arbitration clause. Difficult questions would arise regarding whether the requirement to negotiate or mediate is governed by the law applicable to the arbitration agreement or the law applicable to the underlying contract. Such complexity is diminished if the law of the arbitration agreement mirrors the law chosen to govern governing all other provisions of the contract.
- **Avoid artificiality.** Commercial parties are generally not aware of the legal doctrine of separability. Reasonable commercial parties would expect all clauses within the contract to be governed by the same law. It does not follow from the doctrine of separability that an arbitration agreement is to be regarded as a different and separate contract from the rest of the contract.
- **Coherence**. Choice of law or choice of court clauses are generally presumed to be governed by the law of the contract of which they form part.

Analysis

The Court's decision provides welcomed clarity on the proper approach to determining the law governing the arbitration agreement where there is no express provision. The general principle that the governing law chosen for the underlying contract will also amount to a choice of governing law for the arbitration agreement, is likely to accord with the reasonable expectations of the parties. When concluding a contract, it is likely that the parties intend the governing law clause to apply to all the clauses in the contract, including the arbitration agreement. The fact that the parties have agreed a different seat will not, without more, be enough to rebut the general principle.

The Court does, however, leave it open for the parties to debate whether one of the exceptions applies to the general rule. For example, if there is a serious risk that the arbitration agreement would be invalid if

governed by the same law as the underlying contract, then this may imply that the arbitration agreement was intended to be governed by the law of the seat (which may render the arbitration agreement effective). This approach is to be welcomed and reinforces the English courts' pro-arbitration approach.

Not every contract, however, has a governing law clause. As in this case, the arbitration agreement is then governed by the law with which it is most closely connected – which will generally be the seat of the arbitration. Parties can, however, avoid costly debates on this issue. Careful consideration should be given to expressly stipulate the law governing the contract and the law governing the arbitration agreement. An express proper law clause in the arbitration agreement will be determinative. Legal advice on this issue should be sought at the outset since, as demonstrated by this case, it can impact future arbitration proceedings.

It is nevertheless noteworthy that the Court did not reach a unanimous decision. Lord Burrows dissented and Lord Sales agreed. Lord Burrows and Lord Sales considered that the parties had impliedly chosen Russian law as the governing law of the contract including the arbitration agreement including because of the many references in the main contract to Russian law. The majority, however, considered that the fact the Contract did not include a governing law clause highlighted that the parties had not agreed or made a choice on the governing law of the arbitration agreement and thus the law of the seat was the applicable law of the arbitration agreement, the law with which it is most closely connected. Going forward, the reasoning of the majority is likely to be determinative.

The majority's reasoning that the general principle will create more certainty, consistency and reduce complexity is particularly significant with respect to multi-tier dispute resolution clauses. The general principle helps to avoid difficult questions concerning the applicable law of an obligation to mediate or negotiate before referring the dispute to arbitration. Rather, the majority considered that it is usually reasonable to expect that the law which determines the validity and scope of the arbitration agreement will also apply to the whole of the dispute resolution clause.

Finally, the decision highlights the robust and pro-arbitration approach of the English courts in granting anti-suit injunctions and highlights the attractiveness of choosing London as the seat of arbitration.

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