ENKA V CHUBB:

ARBITRATION AGREEMENTS, GOVERNING LAW, AND PARTY CHOICE

A Case Note from the 2TG Commercial Group

October 2020

Introduction

1. On Friday, 9 October 2020, the Supreme Court handed down judgment in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 ("*Enka v Chubb*"), which concerns how an English Court will approach determining the applicable law of an arbitration agreement.

2. The Supreme Court, despite a 3:2 divide between the Justices, has given clear guidance on this important issue. The judgment is essential reading for all practitioners handling disputes regarding arbitration agreements and applicable law. It is particularly relevant to arbitration agreements that have an international character, for example, where the place for performance of the main contract and the seat of the arbitration are different.

The Facts

3. The Respondent ("Enka") carried out an engineering business. The Appellant ("Chubb Russia") was part of the well-known insurance group. Chubb Russia brought a claim on 25 May 2019 against Enka and others in Moscow seeking damages in relation to a fire at the Berezovskaya power plant in Russia ("the Moscow Claim"). The Moscow Claim arose from Chubb Russia insuring the owner ("the Owner") of the power plant against damage. The Owner had entered into a contract with another company ("the Head-Contractor") in relation to construction work to be carried out at the power plant; the Head-Contractor engaged Enka as a sub-contractor.

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4. The contract made between the Head-Contractor and Enka ("the Construction Contract") included an agreement, in amongst the near 500 pages of contractual documentation, to arbitrate. Importantly, clause 50.1 stated "*the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce…the place of arbitration shall be London, England*".

Proceedings

5. Enka issued an Arbitration Claim Form in the Commercial Court, London, seeking a declaration that Chubb Russia was bound by the arbitration agreement and an anti-suit injunction restraining Chubb Russia from continuing the Moscow Claim. Enka also filed a motion with the Moscow Court seeking dismissal of the Moscow Claim pursuant to the arbitration agreement. It was acknowledged that the Construction Contract itself was governed by Russian law (SC Judgment, [161]). However, because arbitration agreements are severable from the contracts they are related to (or even contained in), there remained the question of what law governed the arbitration agreement. It was agreed by the parties that if English law governed the arbitration agreement then an anti-suit injunction was appropriate unless there were strong reasons not to order the same. There was a disagreement about what the position would be if Russian law governed the arbitration agreement; Enka said it would be irrelevant and the English Courts would still able to grant an anti-suit injunction, whereas Chubb Russia said in such a situation the Russian Courts were best placed to determine the issues.

6. Enka contended that the arbitration agreement was governed by English law. Chubb Russia argued that the arbitration agreement was governed by Russian law.

The Issue

7. The issue was neatly summarised in the Supreme Court judgment:

> "*1. Where an international commercial contract contains an agreement to resolve disputes by arbitration, at least three systems of national law are engaged when a dispute occurs. They are: the law governing the substance of the dispute; and the law governing the agreement to arbitrate; and the law governing the arbitration process.*
>
> *…*
>
> *2. The central issue on this appeal concerns which system of national law governs the validity and scope of the arbitration agreement when the law applicable to the contract containing it differs from the law of the seat of the arbitration*".

Commercial Court and Court of Appeal

8. The English claim was initially heard by Baker J, who dismissed Enka's case. Baker J declined to reach a decision on the applicable law of the arbitration agreement and instead decided the matter on *forum non conveniens* grounds: [2019] EWHC 3568 (Comm).

9. The Court of Appeal ([2020] EWCA Civ 574) held that Baker J's approach was wrong in principle. Given that the English Courts were the Courts of the seat, the English Courts were said to be the right Courts to determine whether to grant an anti-suit injunction. Where there was no express choice of law for the arbitration

agreement, the Court of Appeal found that there was a:

> "*strong presumption that the parties have impliedly chosen the curial law as the [arbitration agreement] law. This is the general rule, but may 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*" (CA Judgment, [105](3)).

The Supreme Court

Majority

10. Lords Hamblen and Leggatt gave the majority judgment, with which Lord Kerr agreed. In short, it was said that because Rome I does not apply to arbitration agreements, English Courts must decide which system of law governs the arbitration agreement by applying the common law rules for determining the law governing contractual obligations. Those rules are that a contract is governed by "*(i) the law expressly or impliedly chosen by the parties; or (ii) in the absence of such choice, the law with which it is most closely connected*" (SC Judgment, [27]). When deciding whether or not the parties had chosen, expressly or impliedly, the applicable law for the arbitration agreement, the Court had to use the principles of contractual interpretation available in English law as the law of the forum (SC Judgment, [33]).

11. Given that an express choice of jurisdiction does not, in and of itself, give rise to an implied choice of law (see *Star Shipping AS v China Shipping Foreign Trade Transportation Corpn (The Texas Star)* [193] 2 Lloyd's Rep 445, 451-2 (per Steyn LJ)), it was held that the Court of Appeal was wrong to find that in choosing the arbitral seat there was a "*strong presumption*" that the law of that seat was intended to apply to the arbitration agreement.

12. Laying down a general proposition, the majority held that where the parties have not specified the law applicable to the arbitration agreement, but there has been a choice of law as to the main contract, that choice would, "*in the absence of good reason to the contrary*", also apply to the arbitration agreement (SC Judgment, [43]). This is said to provide certainty, coherence, and consistency, whilst also avoiding unnecessary complexities and artificialities (SC Judgment, [53]).

13. If there was no choice of law as to either the main contract or the arbitration agreement, then how does a Court determine the law of the arbitration agreement? In such a situation, "*the court must…determine, objectively and irrespective of the parties' intention, with which system of law the arbitration agreement has its closest connection*" (SC Judgment, [118]). This is analytically different from identifying an implied or express choice of law; it is instead a pure question of law. As a general rule, it was held that the law with which the arbitration agreement is most closely connected is the law of the seat of the arbitration (SC Judgment, [119]). Such a general rule was said to have several benefits, including certainty and giving effect to commercial purpose (SC Judgment, [120] – [144]). As such, English law applied to the arbitration agreement as the same was the law with which the arbitration agreement was most closely connected (SC Judgment, [156]).

14. Applying the foregoing general principles, the majority held that the Construction Contract contained no express or implied choice of law. As such, the arbitration agreement was governed by English law given England was the arbitral seat (SC Judgment, [171]) and an anti-

suit injunction was appropriate (SC Judgment, [186]).

15. Even though it was unnecessary to decide the point, the majority went further and examined what the position would be if Russian law had applied to the arbitration agreement. Chubb Russia's argument was that considerations of comity made it appropriate to defer to the Russian Courts as a matter of discretion if Russian law applied. Whilst the majority accepted that the granting of an anti-suit injunction is always a matter of discretion and there may be circumstances when it is appropriate to await a foreign Court's judgment (SC Judgment, [183]), where the issue is merely whether an arbitration agreement has been breached, any considerations of deference to the foreign court:

> "*should generally give way to the importance of upholding the parties' bargain and restraining a party to an arbitration agreement from doing something it has promised not to do…the principles governing the grant of an anti-suit injunction in support of an arbitration agreement with an English seat do not differ according to whether the arbitration agreement is governed by English law or foreign law*" (SC Judgment, [183] – [184]).

16. Therefore, had the arbitration agreement been governed by Russian law then the English Court would have had to determine whether, pursuant to Russian law, the arbitration agreement was valid and the Moscow Claim fell within the scope of the same. If the arbitration agreement was valid and the Moscow Claim fell within its scope, then it would "*in any event have been appropriate to grant an anti-suit injunction*" (SC Judgment, [185]).

Minority

17. Lords Burrows and Sales wrote dissenting judgments. Whilst they agreed that, where the main contract includes a provision stating the applicable law of that contract, the ordinary effect will be that the same governs the arbitration agreement, they disagreed about the situation where the main contract had no express or implied choice of law. Their view was that there is a general rule that the applicable law of the main contract is also the applicable law of the arbitration agreement, as the law of the main contract is the system of law with which the arbitration agreement has its closest connection (SC Judgment, [255]).

Practical Tips

18. Despite the 3:2 divide between the Justices, the case has provided certainty regarding the English Courts' approach to determining the applicable law of arbitration agreements.

19. As this case demonstrates, international contracts and international commercial arbitrations often engage a number of different systems of law. Care should be taken in advance to ensure the parties' wishes as to applicable law is clarified and made certain.

20. To achieve clarity and certainty:
    (i) The parties should make an express choice of law to govern the contract (including the arbitration agreement). For example, "*This Agreement is to be governed by and construed in accordance with the laws of [a named country]*". For maximum certainty, such a clause should be both in the main contract and in the section providing for the arbitration agreement.

    (ii) If the parties have not made an express choice of law to govern the contract (including the arbitration agreement), the parties can still make an express

choice of law to govern the arbitration agreement. That express choice of law can be different from the law of the contract and/or the law of the seat of the arbitration. Party autonomy, post-*Enka v Chubb*, is still key; what matters is expressing the parties' wishes so as to avoid falling back on default rules of law.

21. Whether there has been a choice of law to govern the arbitration agreement is governed by the law of the forum; in *Enka v Chubb* English law was the law of the seat of the arbitration and so determined how the Court should approach contractual interpretation (SC Judgment, [27] - [34], [170(iii)]).

22. Care should be taken over the seat of any arbitration. If the seat is England and the English Courts cannot find an express or implicit choice of law within the main contract or arbitration agreement, then, as a default position, they will apply English law to the arbitration agreement. Parties should be aware of such a general rule when choosing an arbitral seat.

23. Finally, *Enka v Chubb* is a testament to the speed and efficiency of English Court proceedings. As Lords Hamblen and Leggatt said:

> *"24. It is a striking feature of the English proceedings that the trial, the appeal to the Court of Appeal and the appeal to the Supreme Court have all been heard in just over seven months. This is a vivid demonstration of the speed with which the English courts can act when the urgency of a matter requires it."*

This is clearly a point that commercial parties will wish to keep in mind when choosing arbitral seats and/or jurisdiction.

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Disclaimer

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