Court of Appeal clarifies principles for determining law of arbitration agreement

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Introduction

In *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"*, the Court of Appeal granted an anti-suit injunction restraining the defendants from pursuing Russian court proceedings in breach of a London arbitration clause.(1) In reaching this decision, the Court of Appeal clarified the principles for ascertaining the law governing an arbitration agreement (the AA law) where the contract does not contain an express choice of the such law. In a departure from *Sulamerica v Enesa*,(2) the court held that the general rule is that parties are taken to have impliedly chosen the law of the seat to govern the arbitration agreement, and that the law governing the main contract has little bearing on the AA law.

Background

It is well established that an arbitration agreement within a contract may be governed by a law which is different from the governing law of the main contract (the main contract law).

The determination of the main contract law is governed by the choice of law rules in the EU Rome I Regulation (593/2008). However, since arbitration agreements are expressly excluded from the regulation's scope, the AA law must be determined by traditional common law choice-of-law rules. Before *Enka*, the leading authority, *Sulamerica*, set out a three-stage test:

- Have the parties made an express choice of the AA law?
- If not, have they made an implied choice of the AA law?
- If not, with what system of law does the arbitration agreement have the closest and most real connection?

The application of the three-stage test is not always straightforward. The difficulty arises when parties have not made an express choice of the AA law (which is often the case) and the particular circumstances of the case point to different laws as the potential AA law – either as a matter of implied choice or the law with the closest and most real connection. A prime example is when the main contract is governed by one system of law but the arbitration agreement provides for arbitration seated in a different jurisdiction.

In *Sulamerica* it was held that, in the absence of any indication to the contrary, the AA law would usually follow the main contract law.(3) However, the court also acknowledged that the law of the seat (the 'curial law') may constitute such an "indication to the contrary", although how much significance should be attached to the curial law depends on the circumstances of the case. The choice of the AA law in *Sulamerica* was ultimately resolved in favour of the law of the seat.

Facts

The claimant, Enka, was a Turkish engineering company with substantial operations in Russia. The defendants were entities within the Chubb group of insurers.

The dispute arose with regard to the construction of a power plant in Moscow. Unipro, the owner of the plant, engaged Energoproekt as a general contractor, which in turn engaged Enka as a subcontractor to provide building works in relation to the boiler and auxiliary equipment installation. The contract between Energoproekt and Enka was silent as to the law governing the

main contract and contained the following arbitration agreement at Clause 50.1:

> *If the matter is not resolved within twenty (20) calendar days after the date of the notice referring the matter to appropriate higher management or such later date as may be unanimously agreed upon, the Dispute shall be referred to international arbitration as follows:*
>
> - *the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,*
> - *the Dispute shall be settled by three arbitrators appointed in accordance with these Rules,*
> - *the arbitration shall be conducted in the English language, and*
> - *the place of arbitration shall be* ***London, England****.* (Emphasis added.)

Energoproekt subsequently assigned Unipro all rights against Enka resulting from the contract. The assignment agreement provided that any disputes between Unipro and Enka would be resolved by arbitration in accordance with Clause 50.1 of the contract.

In February 2016 a fire occurred at the power plant. Chubb Russia, Unipro's insurer and the first defendant in this case, made payments to Unipro under the insurance policy and so became subrogated to any rights that Unipro had against Enka for liability for the fire.

Chubb Russia alleged that the fire had been caused by the poor quality of Enka's works and demanded that Enka pay for the losses. Enka asserted that it bore no responsibility for the fire.

In May 2019 Chubb Russia commenced proceedings against Enka (and 10 other parties) in a Moscow court, claiming damages for the fire which Chubb Russia alleged had been caused by the poor quality of Enka's works (the Moscow claim). Enka asserted that Chubb Russia had brought the Moscow claim in breach of the arbitration agreement at Clause 50.1 of the contract.

In September 2019 the Moscow court accepted Chubb Russia's claim to be dealt with as filed. Enka subsequently issued a claim in the Commercial Court in London, seeking:

- a declaration that Chubb Russia was bound by the arbitration agreement at Clause 50.1 of the contract; and
- an anti-suit injunction restraining Chubb Russia from continuing the Moscow claim.

Decisions

First-instance decision

At first instance Justice Andrew Baker dismissed Enka's claim. As regards the choice of the AA law, he held that the choice of London as a seat in Clause 50.1 did not indicate a choice of English law as the AA law. In reaching this decision, he relied on the parties' choice of the International Chamber of Commerce (ICC) Arbitration Rules to govern the arbitral procedure. He held that the delocalised nature of ICC arbitration and the powers of the ICC court made it difficult to argue that the parties had intended to ask the English courts for assistance in the arbitral procedure. While the judge ultimately did not determine the AA law, he held that it was arguable that this was Russian law. He then held that it would be more appropriate for the Russian courts to determine whether the Moscow claim fell within the arbitration agreement's scope. On this ground, he rejected Enka's application for an anti-suit injunction.

Court of Appeal decision

The Court of Appeal overturned the first-instance decision. Significantly, the court held that the AA law in question was English law, even though this point was not ultimately determinative of the appeal.

In reaching this decision, the court confirmed that the applicable test to determine the AA law (and thereby the arbitration agreement's validity and scope) was the three-stage test under the English common law conflict of laws rules applied in *Sulamerica.* However, it clarified the relative weight to be attached in establishing the AA law to the main contract law and the curial law when they differ. It held that the following principles apply.

First, the court should consider whether there is an express choice of the AA law. This depends on a construction of the entire contract in accordance with the principles of interpretation under the main contract law. The court noted that an express choice of the AA law would usually be found where there is an express choice of main contract law. However, whether that express choice of main contract law also extends to a choice of AA law is a matter of construction in individual cases.

Second, where there is no express choice of the AA law, the general rule is that parties impliedly chose the curial law to govern the arbitration agreement. Importantly, and in a marked departure from *Sulamerica*, little significance should be attached to the main contract law. The court justified

this position by reference to the doctrine of separability. It acknowledged that the doctrine is a fiction created to ensure that parties' chosen dispute resolution mechanism (ie, arbitration) remains effective even if the underlying agreement is declared invalid, rather than to insulate the arbitration agreement for all purposes. Nevertheless, since the doctrine of separability severs the arbitration agreement for purposes of determining its validity, effectiveness and existence – which are issues closely relating to and usually governed by the AA law – the court held that the doctrine should similarly sever the arbitration agreement from the main contract for the purpose of determining the AA law.

Moreover, the court held that the overlap between the curial law's scope and that of the AA law suggests that reasonable businesspersons expect them to be the same law. The court pointed to numerous provisions under the Arbitration Act 1996 as proof that when parties choose England as the seat of arbitration, the curial law empowers the curial court to determine the substantive rights of the parties under the arbitration agreement. In light of this, the court affirmed Justice Toulson's decision in *XL Insurance v Owens Corning* that the curial law, as opposed to the main contract law, is more closely connected to the arbitration agreement.(4) Therefore, it is more likely that a reasonable businessperson would choose the same law to govern both the AA law and the curial law.

Third, only powerful countervailing factors could displace the general rule that the parties had impliedly chosen the curial law to govern the arbitration agreement. The court did not elaborate on what these "powerful countervailing factors" entail, but the main contract law being different from the curial law is not one such factor.

In this case, the court held that the main contract was governed by Russian law, although not by express choice. In any case, there was no express choice of Russian law as the AA law. Therefore, the law of the seat, English law, was held to govern the arbitration agreement.

As a result, the Moscow claim fell within the scope of Clause 50.1 of the contract. The court found that the Moscow claim had been brought in breach of an arbitration agreement and exercised its discretion to grant an anti-suit injunction in Enka's favour.

Comment

The Court of Appeal's decision has clarified the principles that the courts should apply to determine the AA law in cases where there is no express choice and the main contract law differs from the curial law. This is good news not only for international arbitration users but also for London as one of the world's most popular seats.

The Court of Appeal's decision that the curial law prevails over the main contract law to determine the AA law in the absence of an express choice is both logical and desirable for the effectiveness of arbitration agreements.

Although clarity is certainly desirable, the Court of Appeal repeatedly referred to the reasonable expectations of businesspersons to validate the position taken. However, where the negotiation of the arbitration clause takes place last minute, it is difficult to confidently say that reasonable expectations are necessarily for the AA law to follow the curial law, as opposed to that of the underlying contract. If anything, the facts and ultimate decision in *Enka* should be a powerful reminder that an arbitration agreement should not be negotiated last minute and instead requires attentive drafting. Failing to draft with sufficient clarity may give rise to lengthy and costly proceedings on procedural issues before any dispute on the merits can be heard.

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Endnotes

(1) [2020] EWCA Civ 574.

(2) *Sulamerica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102.

(3) *Ibid*.

(4) *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530.

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