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English courts' willingness to grant anti-suit injunctions in support of foreign-seated arbitration

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Introduction

In *G v R*,[(1)] the Commercial Court rejected an application for final anti-suit relief regarding Russian court proceedings that had been commenced in breach of an arbitration agreement providing for arbitration seated in Paris. Applying the established principles for determining the governing law of an arbitration agreement, the Court held that the agreement was governed by French law.

The Court found that, just because the remedy of an anti-suit injunction was only available in England and not France, it did not follow that England was the only forum in which substantial justice could be done, or that substantial justice could not be done in France. Although, in this case the Court declined to grant an antisuit injunction in favour of a foreign-seated arbitration, other recent cases have shown the English courts' willingness to do so.

Background

Section 37 of the Senior Courts Act 1981 permits the court to grant an anti-suit injunction to prevent a party from issuing proceedings in a foreign jurisdiction in breach of the terms of an arbitration agreement, where it is just or convenient to do so.

For an English Court to grant an anti-suit injunction, it must have personal jurisdiction over the defendant. One gateway for jurisdiction is where an agreement is governed by English law.

It is well established that an arbitration agreement within a contract may be governed by a law that is different from the law governing the main contract itself. Arbitration agreements that do not specify the applicable governing law can lead to disputes as to the proper governing law, particularly in cases where the law governing the main contract is different to the law of the seat of the arbitration.

In 2020, the Supreme Court confirmed the principles for determining the governing law of an arbitration agreement in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb*:[(2)]

- The court will consider first whether there was an express choice of law governing the arbitration agreement. This is ascertained by construing the arbitration agreement and the main contract containing it as a whole, applying the ordinary principles of contractual interpretation of English law.
- The court will consider second whether there was an implied choice of governing law. Where there is a choice of law for the main contract, the parties are deemed to have made an implied choice of the same law to govern the arbitration agreement, unless there is good reason to find otherwise. One reason would be if the law of the seat indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by the same law.
- In the absence of any express or implied choice of governing law of the arbitration agreement, the court must decide with which system of law the arbitration agreement is most closely connected, irrespective of the intentions of the parties. The default rule is that the law most closely connected with the arbitration agreement will almost always be the law of the seat of the arbitration (for further information, see "Supreme Court clarifies principles for determining law of arbitration agreement").

Facts

In September 2023, the claimant, a German company (G), sought an anti-suit injunction against the defendant, a company incorporated in the Russian Federation (R), restraining R from pursuing Russian court proceedings commenced in breach of an arbitration agreement contained in a contract which was expressly governed by English law.

The arbitration agreement specified that:

> *All disputes arising out of or in connection with the bond which cannot be resolved amicably, shall be finally settled under the rules of arbitration of the International Chamber of Commerce, the ICC, by one or more arbitrators appointed, in accordance with the said ICC's rules. The place of arbitration shall be Paris and the language to be used in the arbitral proceedings shall be English.*

Although the arbitration agreement specified that the seat of the arbitration would be Paris, it was silent as to the law governing the arbitration agreement itself.

R challenged the jurisdiction of the English courts – in particular, G's contention that the claim was made in respect of an arbitration agreement governed by English law.

It was common ground between the parties that the French courts would, consistent with established French case law, regard the arbitration agreement as being subject to French substantive rules applicable to international arbitration.

Arguments relating to granting of injunction

G argued that, in *Enka,* the Supreme Court had in mind only a statutory provision of the seat (as opposed to case law) when referring to the exception to parties being deemed to have chosen by implication the law of the main contract as the law of the arbitration agreement. French law did not contain any statutory statement of the principle relied on by R. G argued that taking a broader approach to that referenced by the Supreme Court might lead to uncertainty.

G also argued that the English court was the most appropriate forum for the claim on the basis that:

- anti-suit injunctions are not available in France and the alternative remedy of damages would be difficult to enforce in Russia;
- the availability of an anti-suit injunction was a legitimate judicial advantage that G was entitled to exercise and the English courts have their own judicial interest to protect, namely, that contracting parties should be held to their bargain; and
- substantial justice could only be done in England and could not be done elsewhere.

R argued that the arbitration agreement was governed by French law under proper application of the principles set out in *Enka.* French law would regard the arbitration agreement as being subject to French substantive rules applicable to international arbitration, which displaced the assumption that the arbitration agreement was governed by English law. The English courts, therefore, lacked jurisdiction.

R also argued that the English court was not the appropriate forum for the claim. The courts of the seat of the arbitration (ie, those in France) were the natural forum to hear claims concerning a breach of the arbitration agreement.

Decision

Governing law of arbitration agreement

Sir Nigel Teare, sitting as a judge of the High Court, found that the applicable law to the arbitration agreement was French law. Applying the *Enka* principles, he held that the choice of a French seat displaced the assumption that the choice of English law as the governing law of the main contract would amount to an implied choice of governing law of the arbitration agreement. The judge agreed that French law would not regard the parties' choice of English law to govern the main contract as amounting to a choice of governing law of the arbitration agreement but would instead regard the arbitration agreement as governed by the substantive rules of international arbitration that the French courts had developed. The judge accepted that the Supreme Court in *Enka* had discussed this point in the context of statutory provisions under the law of the seat and that arguments before him had been founded in provisions of French case law. It did not follow, however, that the guidance given by the court of the seat had no application in the current case given that the content of that guidance was "clear and not in dispute".

This, the judge concluded, meant that by their choice of a French seat, the parties could fairly be assumed to have been aware of the aspect of French law and intended that the arbitration would be governed by those principles.

Whether England was proper forum

The judge noted that the proper forum is where the case may be more suitably tried for the interests of all the parties and the ends of justice, emphasising that the appropriateness of England as a proper forum must be shown clearly and distinctly.

The judge dismissed G's arguments on forum, finding that just because the remedy of an anti-suit injunction was only available in England, it did not follow that England was the only forum in which substantial justice could be done. Similarly, it did not follow that substantial justice could not be done in France because the French courts did not provide that remedy or might only offer less advantageous remedies. An arbitral tribunal seated in Paris would seek to enforce the parties' bargain as would an English court. The position alleged to exist in Russia did not change that position.

Comment

Although in *G v R* the Commercial Court declined to grant an antisuit injunction in support of foreign-seated arbitration, other recent judgments based on similar facts have been decided differently.

In *Deutsche Bank v RusChemAlliance LLC*,[(3)] the Court of Appeal referred to the *Enka* principles and decided that the arbitration agreement in a contract governed by English law and providing for arbitration seated in Paris was governed by English law. The Court went on to grant an anti-suit injunction in respect of Russian court proceedings. In deciding to grant the anti-suit injunction, the court noted that the arbitration agreement gave rise to rights under English law and that anti-suit injunctions were not available from the French courts, although those courts would recognise an English anti-suit injunction. In *G v R*, the judge cited the Court of Appeal's decision (anonymised as *SQD*) but noted that it was an ex parte appeal decided without the benefit of submissions from the defendant. This, the judge found, meant that the Court of Appeal's decision could provide only limited assistance.

In *Commerzbank AG v Ruschemalliance LLC*,[(4)] the Commercial Court granted an anti-suit injunction in respect of Russian court proceedings brought in breach of an agreement providing for Paris-seated arbitration. In this case, the Court also referred to the *Enka* principles and went on to find that the arbitration agreement was governed by English law. The fact that the arbitration agreement provided for a foreign seat did not prevent the court from issuing an anti-suit injunction. The Court held that the negative promise in the arbitration agreement not to bring proceedings in a foreign jurisdiction gave rise to rights under English law and neither the French courts nor another forum provided a route to remedy.

These recent judgments indicate the scope for inconsistent application of the *Enka* principles for determining the governing law of arbitration agreements. Notably, the Law Commission's recent Arbitration Bill that is set to be laid before the UK Parliament in the coming months would reverse the rule in *Enka* for arbitration agreements entered into after the commencement of a new Arbitration Act. For those agreements, the absence of an express choice of the governing law of the arbitration agreement would mean that the law of the seat shall apply. The recent decisions provide some comfort however that the English courts will in certain circumstances grant anti-suit injunctions in support of foreign seated arbitrations.

For further information on this topic please contact Marie Berard or Zachariah Bufton at Clifford Chance LLP by telephone (+44 20 7006 1000) or email (marie.berard@cliffordchance.com or zachariah.bufton@cliffordchance.com). The Clifford Chance LLP website can be

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Endnotes

(1) [2023] EWHC 2365 (Comm).

(2) [2020] UKSC 38.

(3) [2023] EWCA Civ 1144.

(4) [2023] EWHC 2510 (Comm).