Kluwer Arbitration Blog

Hold on to Your Seats, Again! Another Step to Validation in Enka v Chubb Russia?

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In the recent ruling of 29 April 2020, the England and Wales Court of Appeal, departing from *Sulamérica,* has held the seat of arbitration as an implied choice of the law of the arbitration agreement in cases where parties expressly chose the law applicable to the main contract and the seat of arbitration under a different law.

Background

The appeal in *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors [2020] EWCA Civ 574* (*Enka*), was filed against the decision of 20 December 2019 of the High Court not to grant anti-suit injunction against Chubb Russia, alleged to be in breach of a London arbitration clause by bringing court proceedings in Russia against Enka. The decision was based on the fact that all questions of the scope of the arbitration agreement and its applicability to the Moscow claim were more appropriately to be determined in the Russian proceedings.

The appeal was allowed, with a further order to be issued preventing Chubb Russia from exercising its Russian appeal rights to seek to overturn the decision of the Moscow court against it on the merits, that was issued pending the hearing of the appeal.

Court of Appeal decision

The Court of Appeal decided that the English court, as the court of the seat of arbitration (the curial law), is the appropriate court to grant anti-suit injunctions, as this reflects parties' choice when selecting the seat of arbitration.

Having decided on this point, the Court turned to the submission in the alternative by Chubb Russia, that the Court should decide what the proper law of the arbitration agreement is and having determined it to be Russian law, defer to the Moscow court as a matter of discretion in relation to the grant of discretionary relief. The Court disagreed with Chubb Russia, as once it was decided that the English court, as the court of the seat, has the power to determine whether an anti-suit injunction should be granted, the same court must determine whether the foreign proceedings are in breach of the arbitration agreement and, if so, whether relief should be granted. The Court

established that the arbitration agreement is governed by the English law. Under English law there is a wider approach to what amounts to a dispute falling within an arbitration clause, hence the Moscow claim was brought and pursued by Chubb Russia in breach of the arbitration agreement.

Proper law of the arbitration agreement

Analyzing the established three stage test, the Court concluded that as a matter of principle, to determine the applicable law of the arbitration agreement where the seat is different than the law of the main contract:

- the question can be answered at the first stage, if exceptionally there is an express choice of the law of the arbitration agreement. In addition, where there is an express choice of law in the main contract it may amount to an express choice of the law of the arbitration agreement, depending on the construction of the whole contract (*Kabab-Ji*);
- in all other cases where there is an arbitration clause with a different curial law, and as a general rule, there is a strong presumption that the parties have impliedly chosen the curial law as the law of the arbitration agreement, subject to any powerful countervailing factors in the relationship between the parties or the circumstances of the case (*e.g*. if the arbitration agreement would be invalid under the law of the seat).

In doing so, LJ Popplewell relied (a) on the doctrine of separability (*Kabab-Ji* cases and those not recognizing separability aside) that should be applied also for the purpose of assessing the validity, existence and effectiveness of the arbitration agreement where parties included an arbitration clause with a different seat; (b) on the overlap between the scope of the curial law and that of the arbitration agreement law, as the curial court is empowered to determine aspects of the substantive rights of the parties under their arbitration agreement by reference to the curial law. The analysis was viewed as a matter of implied choice at stage two rather than by application of the closest and most real connection test at stage three.

Comment

The analysis of **the first stage – the express choice** – confirmed the recent decision in *Kabab-Ji*, discussed previously on the blog, where the court decided that the arbitration agreement is governed by English law of the main contract, because articles 1 and 15 provide for an express choice of English law to govern the arbitration agreement, while emphasizing that governing law clauses do not necessarily cover the arbitration agreement but that one did because of the correct construction of the terms of articles 1 and 15 of the contract taken together (*Kabab-Ji*, at [62], in essence “This Agreement” clauses).

The court in *Kabab-Ji* relied also on *Arsanovia*, where the main contracts were governed by Indian law with London-seated arbitration clause. In this case, the court endorsed the arguments of the claimants that this is an implied choice of law, but noted that a case for an express choice might have been available as “[w]hen the parties expressly chose that “This Agreement” should be governed by and construed in accordance with the laws of India, they might be thought to have meant that Indian law should govern and determine the construction of all the clauses in the agreement which they signed including the arbitration agreement. Express terms do not stipulate

only what is absolutely and unambiguously explicit, and it seems to me strongly arguable that that is the ordinary and natural meaning of the parties' express words." (at [22]).

With regard to **the second stage – the implied choice** – admitting from the outset that the line between the search for the implied intention of the parties and the search of the system of law with which the contract has its closest and most real connections is a fine one, which has been frequently blurred in the English jurisprudence (at [70]), the Court of Appeal departed from *Sulamérica* in that it analysed the choice for the seat as an implied choice of the law of the arbitration agreement.

The approach of the English courts seems to have moved back and forth in the last decades on this point:

- an initial approach was that where parties have made an express choice of law of the main contract the arbitration agreement will normally be governed by it: e.g. *Sonatrach Petroleum Corporation (BVI) v Ferrell International Ltd [2001] EWHC 481 (Comm) (4 October 2001)* (at [32]), with no separate inquiry at the second and the third stage, as a choice was implied by reference to the body of law with which the arbitration agreement has its closest and most real connection; *Svenska Petroleum Exploration AB V Lithuania [2005] EWHC 2437 (Comm)* (at [76]);
- a second approach was that there is an implied choice for the law of the seat (*XL Insurance Limited v Owens Corning [2001]*, *C v D, [2007] EWCA Civ 1282* (at [22-26]), *Abuja International Hotels Ltd v Meridien SAS [2012] EWHC 87 (Comm)* (at [20-24], although in *C v D* and in *Abuja* an implied choice was derived from the analysis of the closest and most real connection, with no separate inquiry at the second and third stage;
- *Sulamérica* was the first to separately undertake the three stage analysis and decided that since there is no express or implied choice, at the third stage the arbitration agreement has the closest and most real connection to the seat; at the second stage, the court established that as a principle, there is an implied choice of law governing the arbitration agreement for the law governing the main contract, absent other factors (such as choosing another country as the seat and for reason of avoiding unenforceability of the arbitration agreement, as the court found in *Sulamérica*, citing also *XL* for the later reason), the seat alone not being sufficient to rebut the presumption (at [26]); *Arsanovia* followed suit (at [21]);
- in *Enka*, the approach of the implied choice is in favour of the seat, at the second stage.

The reliance of the Court of appeal in *Enka* on *XL* and *C v D* to conclude that the general rule should be that the law of the arbitration agreement is the curial law as a matter of implied choice might be far-fetched, as those cases concerned an arbitration agreement with a specific reference to the provisions of the Arbitration Act. The court in *XL* had analysed whether such reference meant that English law would govern "not merely the arbitral procedure in the narrowest sense, but also the jurisdiction of the arbitral tribunal and the formal validity of the arbitration agreement", and concluded that the latter is true. This case specific difference was also considered by the lower court in *C v D* (as cited in *Enka* at [75]).

What is also arguable is that the court relied on the separability doctrine to justify its conclusions; by doing so it departed from *Sulamérica* where it was specifically held that "[t]he concept of separability itself, however, simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate

the arbitration agreement from the substantive contract for all purposes"; by doing so the court extended unwarrantedly the applicability of the separability doctrine to determine the law applicable to the arbitration agreement, instead of using it just as a starting point to undertake the analysis of the proper law of the arbitration agreement separate from the same analysis with the main contract.

Moreover, the court placed too much weight to the commercial sense of businessman that would not be expected to choose two different systems of law to apply to their arbitration package (at [99]). However, as the arbitration package involves complicated legal discussions onto the legal implications of the different applicable systems of laws, and it is unlikely that all such intricacies are explained for these midnight clauses, the traditional and opposing view, that businessman should not be taken to have intended that different systems of law should apply to their relationship might be more realistic.

It appears that the same arguments can and have been used to sustain either of above approaches, and the case law with the English courts is far from being settled. As Professor Lew anticipated, *Sulamérica* was not the final word on this issue in English law,[1)] and so far the main guidance seems to be that the circumstances of each case will be decisive.

One might also look at what appears to be an inconsistent practice of the English courts as an implicit application of the validation principle, as several of the decisions above approached the analysis in an attempt to avoid the arbitration agreement being ineffective (*Sulamérica*, *XL*, also *Hamlyn & Co v Tlisker Distillery* [1984], in *Enka* at [71]). This is actually indicated in *Enka*, as the judge admits his conclusions "may yield to specific contrary factors thrown up by the circumstances of individual cases, for example if the arbitration agreement would be invalid under the law of the seat" (at [104]).

References

?1 Julian Lew, *Sulamérica and Arsanovia: English Law Governing Arbitration Agreement*, in 12 Jurisdictional Choices in Times of Trouble at 142 (Bachir Georges Affaki & Horacio Alberto Grigera Naón eds., 2015).

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