English Court of Appeal seeks to impose “order and clarity” on the English law approach to identifying the law of the arbitration agreement.

Kristopher Kerstetter (Managing Partner) and Ibukun Alabi (Managing Associate)

19th MAY 2020
Followers of the development of the English law approach to identifying the law applicable to the arbitration agreement where the law of the main contract and the law of the seat are different, will be aware that this is one of the few areas of English arbitration law in which clarity has been lacking. The Court of Appeal is aware of this and has made an attempt to “impose some order and clarity on this area of the law” in its latest pronouncement in the case of Enka Insaat Ve Sanayi A.S. v OOO "Insurance Company Chubb", Chubb Russia Investments Limited, Chubb European Group SE, Chubb Limited [2020] EWCA Civ 574, handed down on 29 April 2012.

The issue of the proper law of the arbitration agreement

A recurring issue in international arbitration is how the proper law of the arbitration agreement which governs scope of an arbitral tribunal’s jurisdiction (referred to by Poppelwell, LJ in Enka Insaat as the “AA law”) is to be determined, particularly in situations where the parties have chosen a seat that does not match the law they have chosen to govern the underlying contract (referred to as “main contract law”). It is rare for commercial contracts to include an arbitration agreement clause expressly specifying the AA law. It is more common for there to be an identifiable express choice of law when interpreting the arbitration agreement along with the main contract. But the most common scenario that occurs is where there is no express choice of AA law. This requires the court to decide what relative weight is to be given to the curial law on the one hand provided by the law of the seat and the main contract law on the other, in determining which law is the proper law of the arbitration agreement.

The English law approach to determining the answer to this question has not been entirely consistent. As Poppelwell LJ notes in Enka Insaat (at paragraph 69), it is “a question on which it would be idle to pretend that the English authorities speak with one voice”.

However, as Poppelwell LJ further pointed out (at paragraph 70), “[t]he English conflict of law rules are not themselves in doubt ... The AA is to be determined by applying the three stage test required by English common law conflict of laws rules, namely (i) is there an express choice of law? (ii) if not, is there an implied choice of law? (iii) if not, with what system of law does the arbitration agreement have its closest and most real connection?” It is the application of this three stage test that requires clarity.

The facts in Enka Insaat

The claimant (”Enka Insaat”), a Turkish construction company with a substantial presence in Russia, undertook subcontract work at a Russian power plant in respect of which the first defendant (“Chubb Russia”) was involved in insurance and reinsurance arrangements.

The contract pursuant to which the dispute arose (the “Contract”) contained an arbitration agreement which provided that the resolution of disputes should be by arbitration under the rules of arbitration of the International Chamber of Commerce and that the place of arbitration should be London, England. It was common ground that the law of the main contract was Russian law but there was a dispute as to whether this was by express choice.

Chubb Russia brought proceedings against Enka Insaat and 10 other parties in the Moscow Arbitrazh Court seeking damages in relation to a fire at the Russian power plant. Enka subsequently made an application to the High Court in England for (i) a declaration that Chubb Russia was bound by the arbitration agreement in the Contract and that it applied to the claim brought in the Russian proceedings; and (ii) an anti-suit
injunction restraining Chubb Russia from continuing the Russian proceedings in breach of the arbitration agreement and requiring Chubb Russia to discontinue those proceedings.

Andrew Baker J, presiding on the matter at first instance, declined to decide whether the proper law of the arbitration agreement was English or Russian but held that the most convenient forum for all questions of the scope of the arbitration agreement and its applicability to the claim in the Russian proceedings including the conflicts issue as to the governing law of the arbitration agreement was the Moscow court.

Enka Insaat appealed on the basis, amongst others, that the proper law of the arbitration agreement was English law, and therefore the Russian claim was brought and pursued in breach of the agreement to arbitrate. Chubb Russia however contended, *inter alia*, that the court of appeal should find that the arbitration agreement was governed by Russian law and uphold the judge’s decision to decline to grant the declaratory and injunctive relief sought in the exercise of its discretion and for reasons of comity, leaving to the Russian courts the question of whether the Russian claim involved a breach of an arbitration agreement governed by Russian law.

**The decision in Enka Insaat**

Popplewell LJ (with whom Flaux LJ and Males LJ agreed), undertook a comprehensive review of the authorities on the proper law of the arbitration agreement, including the Court of Appeal decisions in *Sulamérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A. and others* [2012] EWCA Civ 638 where the court held the AA law to be the law of the seat and the very recent decision in *Khabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] 1 Lloyd’s rep 269 where the court held based on the construction of the contract in that case that the parties had expressly chosen the arbitration agreement to be governed by the main contract law. He then stated (at paragraph 105):

“I would therefore summarise the principles applicable to determining the proper law of an arbitration agreement, what I have called the AA law, when found in an agreement governed by a different system of law”, as follows:

“(1) The AA law is to be determined by applying the three stage test required by English common law conflict of laws rules, namely (i) is there an express choice of law? (ii) if not, is there an implied choice of law? (iii) if not, with what system of law does the arbitration agreement have its closest and most real connection?

(2) Where there is an express choice of law in the main contract it may amount to an express choice of the AA law. Whether it does so will be a matter of construction of the whole contract, including the arbitration agreement, applying the principles of construction of the main contract law if different from English law.

(3) In all other cases there is a strong presumption that the parties have impliedly chosen the curial law as the AA 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”.

It should be noted that in considering cases which would fall within (2) above (referred to elsewhere in his judgment as “Khabab-ji type cases”) Popplewell LJ had earlier noted (at paragraph 90) that this “is not a
conclusion which will follow in all cases, or indeed the majority of cases, in which there is an express choice of main contract law but only in the minority of such cases where the language and circumstances of the case demonstrate that the main contract choice is properly to be construed as being an express choice of AA law”.

Applying these principles to the facts of the case, Popplewell LJ concluded (at paragraph 106) that the AA law was clearly English law as there was no express choice of AA law and no countervailing factors to disturb the presumption he had postulated earlier in the judgement. He held that the governing law of the main contract was Russian law but not by express choice, noting further (at paragraph 108) that even if it had been by express choice, “this is not one of those rare cases where it is or informs an express choice of the AA law”.

Analysis

In adopting this approach, the court has essentially reduced the English law test to stages one and two in most cases. Stage one is whether, on the construction of the arbitration agreement in light of all the circumstances including the terms of the underlying contract, the parties made an express choice of law (as they had in Kabab). If not, there is a strong presumption that the parties made an implied choice of the law of the seat that can only be rebutted by “powerful countervailing factors”. The court did not elaborate on what those might be beyond citing the example of the arbitration agreement being invalid under the law of the seat. Popplewell LJ did not say whether this would require actual invalidity or whether it would be sufficient that one party took the position that the arbitration agreement was invalid under the law of the seat. Nor did he say whether this factor would always override the presumption. Where such factors are present, presumably, they could be so strong as to create an implied choice of the main contract law or they could merely dispel the notion that the parties made an implied choice at all which would then lead to the application of stage 3: which system of law has the closest and most real connection to the arbitration agreement. In almost all cases, this would lead one back to the law of the seat for the reasons stated by Moore-Bick LJ in Sulamerica (paragraph 32):

“In my view an agreement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, does not have a close juridical connection with the system of law governing the policy of insurance, whose purpose is unrelated to that of dispute resolution; rather, it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective”.

There are two other useful clarifications provided by the Enka Insaat decision. First, the decision makes clear that the initial presumption set out in the Sulamerica decision that the main contract law governs the arbitration agreement because the parties would normally intend their dealings to be governed by a single law has no application where they have chosen a seat different to the main contract law. Second, the court made clear, in line with the separability principle recognised in English law, (at paragraph 92) that Kabab-ji type cases aside, the main contract law has little to say about the AA law because it is a choice of law for a “different and separate agreement”.

Conclusion

The judgment in Enka Insaat expressly set out to “impose some order and clarity on this area of the law”. It appears to clarify the law in the direction of favouring the law of the seat that the English courts had
embarked upon for some time. By introducing a strong presumption of the law of seat in the absence of an express choice to the contrary, the court has provided some welcome certainty. However, questions remain as to what constitutes “powerful countervailing factors” for the courts and tribunals to grapple with in future decisions. It is notable that the court relied heavily on the doctrines of separability and party autonomy, confirming the robust application of those principles in English law and the general pro-arbitration approach for which the English courts are known.