

English Supreme Court to decide approach to determining governing law of arbitration agreement

By Craig Tevendale, Olga Dementyeva and Rebecca Warder

On 27 and 28 July 2020, the Supreme Court heard an expedited appeal against a recent judgment of the Court of Appeal in *Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb* [2020] EWCA Civ 574, which we discussed in one of our previous blog posts. The Supreme Court is asked to consider two issues: (i) the correct approach to determining the proper law of an arbitration agreement; and (ii) the role of the court of the seat of arbitration in determining whether foreign proceedings give rise to a breach of an agreement to arbitrate.

Background

In June 2020, the Supreme Court allowed OOO Insurance Co Chubb ("**Chubb Russia**") to proceed with its appeal against the judgment in favour of Enka Insaat ve Sanayi AS ("**Enka**"). Chubb Russia was seeking to overturn the decision of the Court of Appeal, which precluded it from pursuing a subrogation claim in the Russian courts (the "**Russian Court Claim**"). The Court of Appeal had determined that the Russian Court Claim was brought in breach of the arbitration agreement (the "**Arbitration Agreement**") in the main contract (the "**Contract**").

The decision of the Court of Appeal

The Court of Appeal concluded that: (i) the English court as the court of the seat was necessarily an appropriate court to grant an anti-suit injunction and questions of *forum conveniens* did not arise; and (ii) the Arbitration Agreement in the Contract was governed by English law. In particular, on issue (ii) the Court of Appeal held that there was nothing to suggest an express choice of Russian law as the governing law of the Contract and/or the Arbitration Agreement. Accordingly, in the absence of any countervailing factors which would point to

a different system of law, the parties had impliedly chosen that the Arbitration Agreement was governed by the law of the seat, i.e. English law. The Court of Appeal emphasised that if there is no express choice of law in an arbitration agreement itself, then it is necessary to review whether the express law of the main contract also applies to the arbitration agreement. However, the law of the contract would apply to the arbitration clause only in the minority of cases. In "*all other cases, the general rule should be that the...[arbitration agreement] law is the curial law, as a matter of implied choice*", unless there are powerful factors to counter this being the implied choice of law. If there is no implied choice of law, the law of the arbitration agreement will be the system of law with which the arbitration agreement has its closest and most real connection.

Russian court proceedings

As noted in our previous blog post, Chubb Russia filed the Russian Court Claim in May 2019. The decision of the first instance court dismissing the claim was published in full in May 2020. Although the Russian Court Claim was dismissed, the court also dismissed Enka's motion seeking dismissal



decision of the first instance court dismissing the claim was published in full in May 2020. Although the Russian Court Claim was dismissed, the court also dismissed Enka's motion seeking dismissal without considering the merits of the case in reliance on the Arbitration Agreement, noting that the dispute did not fall within the Arbitration Agreement. Both Enka and Chubb Russia appealed, and the Russian appellate court is due to hear the appeal at the end of October 2020.

Supreme Court hearing: brief overview of the parties' positions

Overview of submissions made by Chubb Russia

Chubb Russia argued that the Arbitration Agreement formed an integral part of the Contract, and therefore, upon the application of the rules of contractual construction, the Arbitration Agreement should be governed by the same system of law as the Contract (i.e. Russian law, being the law impliedly chosen by the parties). Chubb Russia also argued that it would be just and convenient for the English court to stay the English proceedings to allow the Russian court to determine whether it had jurisdiction to hear the Russian Court Claim.

Overview of submissions made by

Chubb Russia

Enka argued that the Arbitration Agreement was a separate contract, and the starting point should accordingly be the Arbitration Agreement itself (rather than the Contract, as suggested by Chubb). By agreeing to arbitration seated in London, the parties (i) impliedly agreed that the Arbitration Agreement was governed by English law; and (ii) therefore submitted to the jurisdiction of the English courts to grant an injunction to restrain a breach of the Arbitration Agreement and to determine whether there was such breach.

Comment

This case is likely to become the leading English law authority on the applicable principles relating to the approach to determining the proper law of an arbitration agreement. It remains to be seen whether the Supreme Court agrees with the Court of Appeal in relation to the significance of the law of the seat for the purpose of determining the proper law of the arbitration agreement.

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