AA Breakdown: assistance available.

Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb" and Others – Court of Appeal (Flaux, Males and Popplewell LJJ) [2020] EWCA Civ 574 – 29 April 2020

Abstract.
Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb" and Others – Court of Appeal [2020] EWCA Civ 574
Legal practice – Anti-suit injunction – Principles to be applied for determining proper law of arbitration agreement.

Cases cited.
C v. D [2007] All ER (Comm) 557 and
[2008] 1 All ER (Comm) 1001 CA
Dallah Real Estate v. The Ministry of Religious Affairs [2020] UKSC 46
Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb" and Others – Court of Appeal [2020] EWCA Civ 574
Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2020] 1 Lloyd's Rep 269
Kum v. Wah Tat Bank Ltd [1971] 1 Lloyd's Rep 439
Sulamerica Cia Nacional de Seguros SA v. Enesa Engelharia SA [2013] 1 WLR 102.
West Tankers Inc v. RAS Reiunione Adriatica di Sicurta SpA ("The Front Comor") [2007] 1 Lloyd's Rep 391

Introduction.
Important issues of the law of England and Wales concerning commercial practice are considered in this note of a recent Court of Appeal judgement and we hope also to raise awareness of a contrary position recently taken by the Cour d'appel de Paris.
Popplewell LJ has taken the opportunity to clarify both terminology and, importantly, the principles to be used in determining the proper law of an arbitration agreement; an issue that has sometimes seemed confusing. The result is to support the widely held view that England is an attractive place to hold commercial arbitration under English law and that the English courts are willing and able to protect the rights of those who agree to arbitrate there. In particular the award of an anti suit injunction was supported.

The facts.
A Turkish construction company, ENKA Insaat ve Sanayi AS, (ENKA) in 2012 was a subcontractor in the construction of a large power plant in Russia. It

was to provide works relating to the boiler and other equipment. It did so via a contract with CJSC Energoproekt, the general contractor which later assigned its rights to PJSC Unipro, (Unipro). The contract was made in writing and the document was 97 pages long with approximately 400 pages of attachments. The document was in "landscape" format and in both the English and Russian languages, set out side by side. It was provided that if there was a dispute about meaning then the Russian language was to prevail.
There was no express choice of law clause for the contract. However, there was a term which said that "Applicable Law" should be Russian Law.

The contract contained an arbitration agreement that all legal disputes were to be resolved by ICC arbitration "seated" in London.

In February 2016 there was a large fire at the power plant. Following this Unipro received approximately US$ 400m from the insurer OOO Insurance Company Chubb", (Chubb).
On the 3rd of September 2019, Chubb claimed against ENKA and ten other defendants for recovery of the sum it had paid to Unipro.

In the High Court
Baker J considered whether or not the English High Court had oversight. The learned judge made his decision the basis of *forum non conveniens* and held that the Russian court was a more appropriate forum than the High Court.

In the Court of Appeal.

The court considered the argument that the court's authority was based on *forum non conveniens* principles but rejected this firmly in favour of the reasoning that the court's power stems from the fact that it was the curial court and that the curial court has primacy and as such had power over the arbitration.

Analysis.
This is an important case for the law concerning English arbitration. We now have clarity, whereas recent court decisions had left open the possibility of complexity and confusion. Previously, the issue of what was the proper law of an arbitration agreement where the main contract either had a choice of law clearly identified in a specific clause or where such a choice could be

interpreted, (albeit that this was arguable) rested with *Sulamerica Cia Nacional de Seguros SA v Enesa Engelharia SA [2013]* [1]
Here Moore- Bick LJ held that a court should consider if the parties had made an "implied choice of law". In the same case Lord Neuberger expressly agreed with this but went on to point out the difficulty presented by historical tension that had arisen between decisions

> *"it seems to me that the attitude of the courts over the past 20 years or so has not been entirely consistent…..*
>
> *Accordingly: (i) there are a number of cases which support the contention that it is rare for the law of the arbitration to be that of the seat of the arbitration rather than that of the chosen contractual law, as the arbitration clause is part of the contract; but (ii) the most recent authority is a decision of this court which contains clear dicta (albeit obiter) to the opposite effect, on the basis that the arbitration clause is severable from the rest of the contract and plainly has a very close connection with the law of the seat of the arbitration.*
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> *Faced with this rather unsatisfactory tension between the approach in the earlier cases and the approach in C v D*[2]*, it seems to me that, at any rate in this court, we could take one of two courses. The first would be to follow the approach in the most recent case, given that it was a decision of this court, namely C v D. The alternative course would be to accept that there are sound reasons to support either conclusion as a matter of principle."*

In the High Court judgement in the present case, Baker J, speaking obiter, had suggested that a choice of law for the main contract could be construed as including the arbitration agreement.
Popplewell LJ now took the opportunity to take stock of matters. In so doing he has sought to bring clarity to the law and clarity to the language of the law and in our view he has done so admirably.

We welcome his comments on terminology, or as he says, the use of "labels".

He points out that the "seat of the arbitration" is relevant in coming to a decision about the appropriate law, (and we will look at this a little more closely later in this note), and that:

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[1] Sulamerica Cia Nacional de Seguros SA v Enesa Engelharia SA [2013] 1 WLR 102

[2] *C v. D* [2007] All ER (Comm) 557 and
[2008] 1 All ER (Comm) 1001 CA

"*The law of the place of the seat is usually referred to as the curial or procedural law or the lex fori"* (paragraph 43)

But that he would refer to it as the curial law.

He went on to say that:

> *"The powers which are conferred by such a choice of seat are often described as the court's "supervisory jurisdiction""*

His Lordship made the point that this expression had the potential to mislead, for example, the Arbitration Act grants powers in situations that arise before there is yet an arbitration taking place. He would instead use the expression "curial jurisdiction".

At paragraph 68, he says:

> *"I shall refer to the proper law of the arbitration agreement as "the AA law" and the proper law of the main contract in which the arbitration clause is to be found as "the main contract law".*

We find this use of these particular labels to be helpful and will follow them in this note.

As for the state of the law; at paragraph 89 he says:

> *"In my view the time has come to seek to impose some order and clarity on this area of the law, in particular as to the relative significance to be attached to the main contract law on the one hand, and the curial law of the arbitration agreement on the other, in seeking to determine the AA law. The current state of the authorities does no credit to English commercial law which seeks to serve the business community by providing certainty."*

The idea that the function of English commercial law is to serve business is not novel and one thinks of:

Lord Devlin in *Kum v. Wah Tat Bank Ltd* [1971][3] and more recently:

Lord Hoffman in *The Front Comor [2007]*[4] where he says:

> "*The courts are there to serve the business community rather than the other way around*."

There may additionally be an another factor; that for the legal system of England and Wales to retain its pre-eminence as a centre for international dispute resolution it has to continue to provide solid analysis, consistent and fair decisions, which the wide spread acceptance of the principle of the right of freedom of contract, will encourage the adoption of England and Wales as the law of commercial contracts and the seat of arbitration; defending its authority by the use of anti suit powers is thus important.

With this prevailing wind filling our sails, how should the courts deal with the situation where a commercial contract contained an arbitration agreement but where there is some doubt as to which law applied to that arbitration agreement?

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[3] *Kum v. Wah Tat Bank Ltd* [1971][3] 1 Lloyd's Rep 439 at 444

[4] *West Tankers Inc. v. RAS Reiunione Adriatica di Sicurta SpA (The "Front Comor")* [2007] 1 Lloyd's Rep 391

In *Enka v Chubb* the relevant clause for the resolution of disputes was clause 50.1: this does not say in bald terms which law should apply but inter alia:

> *"…the arbitration shall be conducted in the English language and the place of arbitration shall be London, England"*

Later clause 50.5 says:

> "*All other documentation such as financial documentation and cover documents for it must be presented in Russian."*

Does this form of words suggest at least a difference of emphasis and possibly a broader difference between the main contract and the AA?

The Court of Appeal unanimously found that the High Court decision was wrong in principle because it had based its decision on *forum non conveniens* which it said did not arise because:

> *" the choice of the seat of the arbitration is an agreement by the parties to submit to the jurisdiction of the courts of that seat in respect of the exercise of such powers as the choice of seat confers"* (at paragraph 42).

Counsel for the Respondents had argued that the power of the court to grant permission to serve out of the jurisdiction under Civil Procedure Rules, (CPR) 62.5(1) was a discretionary one and in support of this pointed to the phrasing, "the Court may grant permission…" and also that CPR 6.37(3) required a finding that England and Wales was the proper place in which to bring the claim.

Lord Popplewell cited with approval the view of the editors of a leading commentary on this area: Robert Merkin and Louis Flannery, *The Arbitration Act 1996*[5]

> *"§44.12.5.1.4 Appropriate forum.*
>
> *When the court grants an injunction under its inherent power contained in section 37 of the Senior Courts Act 1981, there is typically a requirement that the applicant shows that England is the natural forum for the underlying claim. If there is any such requirement in relation to injunctions sought under section 44(2)(e) of the 1996 Act, or in CPR Part 62, it is academic in most cases and easily satisfied if the seat of the arbitration is here, because it is the function of the courts of the seat to support the arbitration."*

The footnote to this point says:

> *"The lack of an express provision in CPR 62.5 requiring the court to be satisfied that the case is a proper one for service out of the jurisdiction is in this sense explicable."*

Lord Popplewell also referred directly to CPR 62.5 (1)(c):

[5] 6th edition at paragraph 44.12.5.1.4

"…by contrast with the requirement in CPR 6.37(3), there is no requirement that England and Wales must be the proper place to bring the claim. This is because questions of forum conveniens do not arise when the court is exercising the curial jurisdiction which goes with the choice of England (or Wales) as the seat of the arbitration."

Conclusion.

Popplewell LJ reaffirmed the principles to be used to determine the proper law of an arbitration agreement, (the AA law) which were set out in *Sulamerica* that:

> *" (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?*
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> *(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. Applying these principles to the current case it is clear that the proper law of the arbitration agreement in clause 50 of the Contract is English law."*

These are reassuringly straightforward statements of the law in England and Wales; but there is the possibility of problems arising as between English law and that of other jurisdictions. In coming to his decision His Lordship had considered:

Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)[6] [2020] here the main contract was clearly governed by English law, there was no express provision of AA law but the seat of the arbitration was to be in Paris. The judge in the High Court held that the AA law was also English and the Court of Appeal upheld this decision.

Interestingly however, on 23rd June 2020 the *Cour d'appel de Paris,* (Paris Court of Appeal Court)[7] was also asked to consider the status of this arbitral

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[6] *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] 1 Lloyd's Rep 269

[7] pôle 1 - ch. 1, 23 Juin 2020 (n° 17/22943)

award; it did not consider itself to be bound by conflict law rules and instead took the view that the French arbitrator had jurisdiction; the opposite view to that of the English Court of Appeal; a difference of outcome based on a different of emphasis. The Paris Court of Appeal seems to have been persuaded by the idea that the AA can be severed from the main contract. This leads to the situation where the arbitral award can be enforced in one country but not in the other; an unfortunate outcome but not one without precedent see: *Dallah Real Estate v. The Ministry of Religious Affairs [2020]*[8]
Leaving this issue to one side, where does this decision leave the state of English law in this area? There is a welcome statement of principle on the question of the applicable law in arbitration agreements, clear definition of expression and an emphatic assertion of the English court's right to hear and order applications for anti suit injunctions in support of arbitrations seated in England and Wales.
The Paris Court of Appeal is willing to advance the status of French jurisdiction in these matters by refusing to be limited by the existence of "foreign decisions". No doubt this will not end here.
As a point of good practice the parties to international contracts would do well to specify the law that they wish to apply to arbitration agreements as well as specifying the law and jurisdiction of the main contract. Experience suggests that this is likely to be English law, for many reasons, but on the evidence of the *Enka v Chubb* appeal, important factors in making the decision should be the willingness of the English courts to strive for clarity of law that provides for the needs of commercial parties and their support for English arbitration decisions by means of anti suit injunctions.

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[8] Dallah Real Estate v. The Ministry of Religious Affairs [2020] UKSC 46