Taking a stand for the law of the seat: anti-suit injunctions and arbitrations

Stephanie Barrett

9 June 2020

Parties to arbitration agreements often find that their counterparty nonetheless seeks to pursue proceedings in a foreign court (in many cases their home court). The foremost weapon in order to restrain such abuses is the anti-suit injunction, and the existence of this type of remedy under English law is well known internationally. Injunctive relief is available in some cases under section 37 of the Supreme Court Act 1981, even where no arbitral proceedings are current or contemplated (***Ust-Kamenogorsk v AES***).

However, where there is no English arbitration in progress, and no express choice of law to govern the arbitration agreement, the question arises as to which court should decide whether the dispute submitted to the foreign court falls within the arbitration clause and what law is applicable to determine the scope of the clause. Is the mere choice of a London seat enough to engage the anti-suit jurisdiction and to indicate a choice of English law?

The recent Court of Appeal decision in ***Enka Insaat v Chubb*** suggests that there will be a greater willingness in future to grant anti-suit relief in such circumstances. Chubb commenced proceedings against Enka in the Moscow Arbitrazh Court in respect of alleged defective work on a Russian power plant. The relevant contract contained a clause providing for ICC arbitration with a London seat. The parties disputed whether the arbitration agreement was governed by English or Russian law, but agreed that the contract overall was governed by Russian law. Enka sought an anti-suit injunction before the English Commercial Court restraining Chubb from pursuing the Moscow proceedings.

At first instance, Andrew Baker J refused to grant the injunction. In his view, it was for the Moscow court to determine all questions of the scope of the arbitration agreement, including its governing law and its applicability to the Moscow claim.

The Court of Appeal reversed this decision and granted the injunction. It held that the anti-suit jurisdiction arises from the choice of the arbitration's seat, and therefore questions of forum non conveniens do not arise. The choice of seat determines the "curial law" (or the lex fori) and is an agreement 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 (including, under English law, granting anti-suit injunctions)

It also held that the arbitration agreement was governed by English law and the Moscow proceedings were brought in breach of the arbitration agreement. The test for determining the proper law of an arbitration agreement is as follows:

» Is there an express choice of law?

» If not, is there an implied choice of law?

» If not, with what system of law does the arbitration agreement have its closest and most real connection?

Where there is an express choice of law in the main contract, this may amount to an express choice of the law of the arbitration agreement. This is a matter of construction of the whole contract in accordance with the main contract law. In all other cases, there is a strong presumption that the law of the arbitration agreement is the same as the law of the seat, subject only to any features of the particular case demonstrating powerful reasons to the contrary (for example, if the arbitration agreement would be invalid under the law of the seat). On the facts, the main contract law was Russian law, but not by express choice, and there was no indication in the contract that the arbitration agreement was governed by Russian law. It was therefore presumed that the parties had implicitly chosen the law of the seat to govern the arbitration agreement.

This is a bold decision by the Court of Appeal which attempts to impose some order on this area of the law, in light of conflicting (and often confusing) earlier decisions. Enka is likely to become a leading case on the determination of the proper law of an arbitration agreement and the role of the courts of the seat.

The decision seeks to promote both party autonomy and certainty by ensuring that the English courts protect the parties' choice to arbitrate. Without an anti-suit injunction, the "innocent" party must steer a difficult course between participating in the foreign proceedings enough to avoid default judgment or issue estoppel, but not so much as to submit to the jurisdiction. However, some parties might be surprised to learn that the choice of seat has such important consequences for the applicable law and availability of an anti-suit injunction. The court thought that parties would intend the same law

to govern all aspects of the arbitration agreement (that is, the curial law), but one could similarly argue that parties might intend the main contract law to govern their entire relationship. The decision highlights the importance of clear drafting. It is obviously preferable to agree an express choice of law, in particular if the parties do not intend that the curial law governs the arbitration agreement.

JOIN OUR MAILING LIST FOLLOW QUADRANT FOLLOW QUADRANT

Stephanie Barrett

"She is first-rate." (Legal 500 UK, 2020)

Stephanie's practice encompasses a wide range of commercial litigation and arbitration, but is primarily focused on dry shipping (especially charterparty and bill of lading disputes), shipbuilding and offshore construction, international trade, insurance, aviation/travel and energy. Her practice often involves cases of technical complexity, such as unsafe port claims, dangerous cargo claims and shipbuilding contract termination claims involving large numbers of defects. She undertakes drafting and advisory work in all areas of her practice. Stephanie also appears regularly (both as a junior and as sole counsel) in Commercial Court hearings and in commercial arbitrations on various terms including LMAA.

> View Stephanie's full profile stephanie.barrett@quadrantchambers.com