GEDİK & ERAKSOY

Enka v Chubb: The Choice of Governing Law of the Contract and the Arbitration Agreement

November 2020

The UK Supreme Court (the **Supreme Court**) has recently published its judgment in "Enka Insaat Ve Sanayi AS (**Enka**) v OOO Insurance Company Chubb (**Chubb**)". In this judgment, the Supreme Court settles a vexed question concerning the law governing the arbitration agreement.

Background

Under the subcontraction agreement dated 27 June 2012 and entered into with the general contractor CJSC Energoproekt, Enka undertook the boiler and auxiliary equipment installation works of Berezovskaya coal power plant in Russia. Two years after, CJSC Energoproekt assigned all its rights under the subcontraction agreement to the owner of the power plant , PJSC Unipro. On 1 February 2016, a fire broke out at the power plant and, as the insurer, Chubb covered all damages amounting to approximately USD 400 million. Following the insurance payment, Chubb was subrogated to the rights of PJSC Unipro under the subcontraction agreement and accordingly filed a claim in the Moscow Commercial Court against Enka (as well as ten other subcontractors) for being liable for the damage caused by the fire.

Enka filed a motion to dismiss before the Russian court and also requested an anti-suit injunction from the English Commerical Court by arguing that the lawsuit before the Russian court violates the arbitration agreement under the subcontraction contract that requires disputes to be resolved by the ICC Arbitration seated in London.

English Commercial Court Decision

As the arbitration agreement did not provide for a choice of law governing the arbitration agreement, the English Commercial Court (the **Commercial Court**) was expected to first resolve the law governing the arbitration agreement issue. However, based on the *forum non conveniens* grounds, the Commercial Court declined to determine the proper law of the arbitration and rejected Enka's claims mainly on the grounds that the appropriate forum to determine the validity and scope of the arbitration agreement (*forum non conveniens*) is Russia rather than England. The Commercial Court, nevertheless, concluded that the seat of arbitration (London) is not a true indication of the parties' intention for English law to be the governing law of the arbitration agreement.

The Court of Appeal Decision

As a result of Enka's application to the Court of Appeal, the Court of Appeal reversed the Commercial Court's decision and also provided a detailed explanation on how to determine the applicable law if there is no expressed preference in the arbitration agreement. The Court of Appeal followed the established three stages test and considered: (i) the existence of an express choice of law, (ii) if not, the existence of implied choice of law, and (iii) if not, what system of law does the arbitration agreement have its "closest and most real connection".

The Court of Appeal held that parties are prone to choose the same law for the the governing law of the main contract and the curial law of the arbitration (i.e. the law of the seat of arbitration). In such cases, it should be assumed that parties also wanted the same law to be applicable to the arbitration agreeement. However, in cases where the main contract is governed by another law then the seat's, as a general rule, there is a presumption that parties have impliedly chosen the seat of the arbitration as the law of the arbitration agreement, subject to any particular features of the case demonstrating "powerful reasons" to the contrary.

In line with the above-mentioned considerations, the Court of Appeal resolved that although the main contract is governed by Russian law, the seat of arbitration is determined as London and thus law applicable to the arbitration agreement must be English law and the anti-suit injunction has been granted by the Court of Appeal.

The Supreme Court's decision

Although in the end the Supreme Court upheld the Court of Appeal's anti-suit injunction decision, the Supreme Court fundamentally disagreed with the Court of Appeal's reasoning concerning the law governing the arbitration agreement. The Supreme Court held that the general assumption of the choice of law is not consistent with English law principles and it established a new test called "the closest connection test" regarding the governing law of the arbitration agreement that parties do not expressly determine. According to this test, if there is no choice of law, the law of the seat of arbitration will apply as the law most closely connected with the arbitration agreement. The Supreme Court set out several justifications for the application of the closest connection test as follows:

(i) It is commonly accepted that the seat of the arbitration is the connecting factor for determining the applicable law, or

(ii) If the arbitration agreement is in line with international law and legislative policy, it is agreed that the arbitration agreement could be governed by the law of the seat of the arbitration, or

(iii) The contracting parties may choose a location for the arbitration without determining the law to govern the main agreement or arbitration agreement which upholds the reasonable expectations of both parties, or

(iv) There must be a legal certainty clarifying the choice of governing law in case of the absence of choice of law.

Pursuant to the above criteria, the Supreme Court decided that the arbitration agreement will be governed by English law.

Conclusion

Enka v Chubb is no doubt a milestone in the old-dated (but still hot) issue of the law governing the arbitration agreement. Time will show as to whether the courts in different jurisdicions will adopt the new "closest connection test" established by the Supreme Court when they face with this problem in the future.

Contacts

Hakkı Gedik
Turkey – Istanbul

Umut Gürgey
Turkey – Istanbul

Emre Önal
Turkey – Istanbul

Tel +90 212 371 29 53
Mobile +90 549 480 15 35
hakki.gedik@gedikeraksoy.com

Tel +90 212 371 29 66
Mobile +90 549 480 15 37
umut.gurgey@gedikeraksoy.com

Tel +90 212 371 29 65
Mobile +90 549 480 15 33
emre.onal@gedikeraksoy.com