The Proper Law of the Arbitration Agreement – Express Choice makes a come-back?

An update

With impeccable timing my bulletin on express choice was published on the very same day as the Court of Appeal handed down its judgment in *Enka v Chubb ("Chubb")*[1].

The Court took the opportunity to clarify the law saying: "*… 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 [arbitration agreement] law. The current state of the authorities does no credit to English commercial law which seeks to serve the business community by providing certainty*."[2]

The Court recited the trite law that the law of an agreement 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?

As to express choice the Court said: "*An express choice of [arbitration agreement] law may exceptionally be found in the arbitration agreement itself. If not, it may be found in the terms of an express choice of main contract law, or a combination of such express choice with the terms of the arbitration agreement. …. That 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. This solution is likely to be confined to cases where there is an express choice of main contract law. …. It 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*."[3]

What is, therefore, clear is that the mere express choice of the governing law of the main contract will not, of itself, be an express choice of the arbitration agreement: there has to be more. As I said in my 29 April paper, this casts doubt, correctly in my view, on the *obiter* comments in *Arsanovia* namely that wording to the effect that 'this agreement is governed by the laws of X' might give rise to an express choice of law for the arbitration agreement as a clause in the main contract.

[1] *Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb* [2020] EWCA Civ 574 – commendable speed bearing in mind that the judgment appealed was dated 20 December 2019 – and which I had mentioned in my 29 April 2020 paper was subject to appeal.
[2] At [89]
[3] At [90]

As to implied choice the Court said: "*In all other cases, the general rule should be that the [arbitration agreement] law is the curial law, as a matter of implied choice, subject only to any particular features of the case demonstrating powerful reasons to the contrary*."[4]

The reasons for this are essentially[5]:

- there is no principled basis for treating the main contract law as a significant source of guidance for that of the arbitration agreement; and
- the overlap between the scope of the curial law and that of the law of the arbitration agreement strongly suggests that they should usually be the same.

There are two further key points that come out of the judgment.

Firstly, the Court analysed the choice clearly as a matter of implied choice, rather than by application of the closest and most real connection test. The Court thus appeared to distance itself from *SulAmérica*, where Moore-Bick LJ noted that in practice the enquiry into implied choice of law often merges into the enquiry into the closest connection, "*because identification of the system with which the [arbitration] agreement has its closest and most real connection is likely to be an important factor in deciding whether the parties have made an implied choice of law*".[6]

Secondly, the Court addressed the question of separability (it was a necessary incident of discussing the choice of law). The Court said: " …*without going so far as to suggest the doctrine [of separability] insulates the arbitration agreement for all purposes … there are good reasons for treating it as doing so for the purposes of choice of [arbitration agreement] law where there is a different curial law from that applicable to the main contract. In such circumstances the parties have, ex hypothesi, chosen a separate system of law to govern one aspect of their relationship, namely the curial law of the arbitration agreement. The arbitration agreement is treated as separate and severable for the purposes of this choice of curial law, about which the main contract law has nothing to say*."[7]

This is, in my view, correct and it is not appropriate to limit separability to the scope of s7 Arbitration Act 1996 namely that there is separability only for the purposes of the agreement to arbitrate surviving the main or host contract. It is clear that prior to the Act separability was considered as a wider concept than the restricted ambit of s7, and that remains.

Overall, I applaud the judgment and the clarity that it has given.

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[4] At [91]
[5] See [92] – [104]
[6] *SulAmérica* at [25]
[7] At [94]