No 'Russian gamechanger' in anti-suit injunctions

July 9, 2020 Robert Blackett

PRACTICES Litigation, International Arbitration

In January 2020 Enka, a Turkish contractor, applied to the Commercial Court in England for an injunction to restrain Chubb, an insurance company, from bringing proceedings against Enka in Russia in breach of an arbitration agreement which had provided for such disputes to be resolved by arbitration in England. The court refused an injunction on a novel (and controversial) ground.

The decision was the subject of an appeal. On 29 April 2020 the Court of Appeal gave its decision (*Enka Insaat Ve Sanayi AS v. OOO "Insurance Company Chubb" & Ors* [2020] EWCA Civ 574) reversing the first instance decision, granting the injunction sought and giving some clear(er) indication about precisely what the law is in this area, an area which had become overlain with a patina of unwelcome complexity. While the Court of Appeal's decision is welcome, there remains a real trap in this area (which can easily be remedied in contractual drafting) whereby a party may easily be deprived of the protection of an anti-suit injunction and forced to defend a claim in a foreign court which they would have wished, and probably would have assumed, would fall to be resolved exclusively by arbitration.

The Angelic Grace

Before looking at what the courts decided in *Enka v Chubb*, it helps first to look at *Aggeliki Charis Compania Maritima SA v Pagnan SpA* [1995] 1 Lloyd's Rep 87 ("*The Angelic Grace*") and the jurisdiction to restrain foreign proceedings brought in breach of an arbitration agreement.

There, charterers had chartered the *Angelic Grace* to transport a cargo of grain to Chioggia (near Venice, on Italy's Adriatic coast) and unload it to another vessel which the charterer owned. The charterparty was subject to English law. The charterparty said: "*All disputes from time to time arising out of this contract shall . . . be referred to the arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic and engaged in the shipping and/or grain trades* ...".

During unloading the vessels collided. The charterer began court proceedings in Venice against the *Angelic Grace*'s owners, alleging that the ship's master had acted negligently and seeking compensation for the damage to the charterer's vessel. The owners sought an injunction in England to restrain the foreign proceedings, alleging they had been brought in breach of the arbitration agreement. The injunction was granted at first instance, and the charterer appealed that decision.

The charterers argued that their Italian tort claim fell outside the words of the arbitration agreement. The Court of Appeal was unimpressed with that argument:

> *"Where such general words have been chosen in an arbitration clause as "arise out of", it is not difficult to conclude that a particular dispute is within its terms. It is then that Judges have found room for the exercise of common sense, and have not readily been prepared to assume that the parties would have intended that cross-claims arising out of the same*

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> *incident should be tried in different countries by different processes, that is by litigation and by arbitration."*

Counsel for the charterer referred to this as a 'presumption in favour of one stop adjudication'. Thirteen years later this 'one stop' presumption was confirmed in a famous passage from the judgment of the House of Lords' judgment in *Premium Nafta Products Ltd (20th Defendant) & Ors v. Fili Shipping Company Ltd & Ors* [2007] UKHL 40 (also known as *Fiona Trust v Privalov*):

> *"… the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."*

The Court of Appeal in *The Angelic Grace* upheld the injunction which had been issued at first instance (emphasis added):

> *"The present case is … the paradigm case for the prompt issue of an injunction. The charter here is governed by English law. According to English law, the arbitration clause extends to claims in tort. Proceedings in a foreign Court are in breach of contract, so an injunction can issue to restrain them".*

Millett LJ confirmed that English courts should have little hesitation in granting injunctions against parties who bring proceedings in breach of arbitration agreements (emphasis added):

> *"… the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution."*

> *"… there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them".*

> *"In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced".*

The effect of the *Angelic Grace* was that, when parties agreed that their dispute was to be arbitrated in England, parties could expect that the English courts would grant anti-suit relief to protect that choice, and prevent a party seeking to have that dispute resolved in some other forum in breach of that agreement.

This protection was eroded by the decision of the European Court of Justice in *Allianz SpA and Another v West Tankers Inc* Case C-185/07, holding that the English courts could not grant anti-suit injunctions to restrain proceedings in EU member states – a decision which will be revisited in the wake of Brexit.

Assume though, that a party has brought a claim in a non-EU Member State, and is seeking to resist the grant of an anti-suit injunction. On their face the judgments in the *Angelic Grace* seem to leave three arguments open to such a party:

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- Argue that the arbitration agreement is not "*governed by English law*". That would seem an odd, and arbitrary, precondition for granting an injunction. If the parties have agreed that their dispute is to be resolved exclusively by arbitration in England, why should the fact that this agreement was subject to (say) Russian law make any difference? There is still just as much a promise not to bring proceedings elsewhere.
- Argue that, on its proper construction (according to whatever is its governing law) the arbitration agreement does not, in fact, extend to the claim which has been brought in the foreign court.
- Argue that the claim for injunctive relief was not sought sufficiently promptly and/or that the foreign proceedings are too far advance.

To this should be added at least one further possible argument (related to the preceding one):

- Argue that the party seeking the relief has acceded to the foreign jurisdiction (by participating in the foreign proceedings).

The residual jurisdiction to restrain arbitrations

The *Angelic Grace* jurisdiction concerns the situation where a party to an arbitration agreement brings proceedings in breach of that agreement. But it is worth noting that the English court also has a residual jurisdiction (which is almost never exercised) to issue an injunction restraining a party from bringing proceedings by way of arbitration, pursuant to an arbitration agreement if: (a) granting such an injunction does not cause injustice to the claimant in the arbitration; and (b) the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process. See *Intermet FCZO v Ansol Limited* [2007] EWHC 226 (Comm), *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm), *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC 1262 (TCC), *Sana Hassib Sabbagh v Wael Said Khoury* [2019] EWCA Civ 1219.

There is a clear commonality between that jurisdiction (restrain arbitration proceedings if they are oppressive and restraint does not cause injustice) and the limits on the *Angelic Grace* jurisdiction set out in the third and fourth bullet points above (don't restrain foreign proceedings if they're too far advanced because of the fault of the party seeking the injunction or because that party has taken part in the proceedings – in such case it would be oppressive to restrain the foreign proceedings, and it would not be unjust to the party seeking the injunction).

Forum conveniens

A detailed set of rules sets out when the English courts are to have jurisdiction to try cases. When a claim is made against someone who is domiciled in EU Member States, and certain other states (like Iceland and Switzerland), the issue falls to be determined according to rules which are set out in EU regulations and conventions. Where the English court has exclusive jurisdiction under one of those instruments, the English court cannot decline jurisdiction on the ground that some other forum would nonetheless be more appropriate (the "*forum conveniens*").

Where, however, the defendant is not domiciled in one of the relevant states, the question of the English court's jurisdiction is governed by a different set of common law rules. These allow that, even where the court would have jurisdiction according to those rules, it can choose not to exercise that jurisdiction on the ground that England is not the most appropriate forum. The leading case is *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 ("*The Spiliada*"), in which the House of Lords held:

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> *"the basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice".*

One might have thought that questions of *forum conveniens* would be entirely irrelevant where there is a choice of jurisdiction. In such a case, the parties have agreed that their dispute is to be resolved in England. It should not be open to one party to resile from that agreement, and complain that it is no longer convenient for it to comply with its obligation to conduct any dispute there.

In *Donohue v Armco Inc* [2001] UKHL 64, however, the House of Lords did recognised a narrower jurisdiction to stay proceedings notwithstanding an exclusive jurisdiction clause if the party seeking the stay could show strong reasons why the clause should not be enforced against it. The House of Lords allowed an action in New York to proceed despite an exclusive jurisdiction clause between some of the parties in favour of England. Lord Bingham said:

> *"… the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions".*

The court held that "*the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue*" (namely the New York court) and that was sufficient reason not to grant an anti-suit injunction. Lord Bingham reasoned that:

> *"The Armco companies contend that they were the victims of a fraudulent conspiracy perpetrated by Messrs Donohue, Atkins, Rossi and Stinson. Determination of the truth or falsity of that allegation lies at the heart of the dispute concerning the transfer agreements and the sale and purchase agreement. It will of course be necessary for any court making that determination to consider any contemporary documentation and any undisputed evidence of what was said, done or known. But also, and crucially, it will be necessary for any such court to form a judgment on the honesty and motives of the four alleged conspirators. It would not seem conceivable, on the Armco case, that some of the four were guilty of the nefarious conduct alleged against them and others not. It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice."*

The discretion exercised in *Donohue*, to allow foreign proceedings to continue notwithstanding that they are in breach of an English exclusive jurisdiction clause, seems to require much stronger reasons than would be required to justify staying an English action in favour of a more appropriate foreign forum where the English court's jurisdiction does not result from an exclusive jurisdiction clause. Factors which would justify a stay in the latter case might include matters such as that the parties, witnesses and evidence are located in the other country, that evidence is predominantly in the language of the other country rather than in English, or that the governing law is that of the country. Donohue suggests those kinds of factors are insufficient to justify allowing foreign proceedings to continue in breach of a jurisdiction agreement. It is probably not enough that the foreign proceedings will be cheaper, or that the foreign court is better equipped to resolve the

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issues. Rather, it may be that what is required is that there be related proceedings which the English court cannot stay (because it has no jurisdiction over those matters) but which, if resolved separately to the matters over which the English court does have jurisdiction, will be liable to give rise to injustice.

The judgment in *Donohue* was concerned with a jurisdiction agreement in favour of England, not an arbitration agreement. But the judgment does seem to assume that the same principles apply where an anti-suit injunction is being sought for breach of an arbitration agreement. Indeed, Lord Bingham cited *The Angelic Grace* as an example of the normal principle to which the approach in *Donohue* is an exception, the normal principle being that: "[w]*here the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause*".

The situation in *Donohue* does not seem all that dissimilar to *Fiona Trust v Privalov* (see above), though the outcome there was different. That case concerned an intricate claim before the English courts alleging that several defendants had, over a long period of time, bribed officers and employees of the claimants to enter into a large number of contracts on terms favourable to the defendants or their associates. Eight of the contracts were charterparties which contained arbitration agreements, and it was the claims seeking to rescind those eight contracts for having been procured by bribery which the defendants sought to have stayed, forcing those claims to be pursued in arbitration while the remaining claims continued in court. The House of Lords held that the claims in question were subject to the arbitration agreements, and declined to order any stay.

In that case, applying the 'one-stop' presumption (that people intend all dispute arising out of the same relationship to be decided by the same tribunal) led, paradoxically, to a multiplicity of proceedings - court proceedings plus eight separate arbitrations covering the same, or at least closely related, subject matter, with the same pattern of behaviour being alleged against the same, or some of the same people in each case. Yet in *Fiona Trust*, unlike in *Donohue*, the courts thought this to be of no significance. As Longmore LJ had put it in the Court of Appeal judgment "[t]*hat is … merely how things have happened in this particular case and cannot affect the true construction of the clause*" [2007] EWCA Civ 20.

Enka v Chubb - the Berezovskaya plant

Sharypovo is a town in Siberian Russia around 700km north of the Kazakhstan/Mongolia border. The town is home to the Berezovskaya power plant, a coal-burning plant originally built in the 1970s but since expanded. The plant burns coal which is transported to the plant by long open conveyors from a mine which is around 14km away. The plant's main stack is 370 metres high (sixty metres taller than the 'Shard', London's tallest building).

In May 2011 the Plant's owner, PJSC Unipro (formerly E.ON Russia) ("**Unipro**") retained a contractor called CJSC Energoproekt ("**Energoproekt**") to build a new, third, 800MW power plant on the site, which would increase the total capacity on the site to 2,400MW (for comparison, the UK's largest capacity power station, Drax in North Yorkshire has a capacity of 3,906MW).

Energoproekt retained several subcontractors to execute the works. Energoproekt retained Enka Insaat Ve Sanayi AS ("**Enka**") to carry out works relating to the boiler and auxiliary equipment installation. Enka is a contractor based in Turkey but with a long history of carrying out projects in Russia.

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Arbitration agreement

Clause 50.1 of the Subcontract concerned disputes. It provided for any dispute initially to be negotiated between senior management and then, if not resolved:

> "… *the Dispute shall be referred to international arbitration as follows:*
>
> • *the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,*
> • *the Dispute shall be settled by three arbitrators appointed in accordance with these Rules,*
> • *the arbitration shall be conducted in the English language, and*
> • *the place of arbitration shall be London, England."*

Fire at the plant

On 1 February 2016 there was a fire at the Berezovskaya plant. No one was injured, but the plant was badly damaged.

Unipro was insured by Chubb Russia Investments Limited ("**Chubb Russia**"), a company registered in England, which is part of the Chubb insurance group. Chubb Limited, the group's parent, is incorporated in Switzerland but it is listed on the NYSE and the Chubb group's centre of operations seems arguably to be in New Jersey, US.

Chubb Russia paid Unipro 26.1 billion Roubles (around US$400 million) and became subrogated to any rights Unipro might have had against Enka in respect of the fire.

A Russian state commission investigating the fire concluded that it had been caused by "*defects (deficiencies) in the design, structures, fabrication and installation of the Facility including fuel oil pipelines*" (heavy fuel oil being used in the coal-fired plant's start-up sequence).

Chubb Russia's claim

Chubb Russia began proceedings in the Moscow Arbitrazh Court against Enka and ten other parties (not specified in the judgment, but presumably Energoproekt's or Unipro's other subcontractors).

Enka's position on the merits, incidentally, is that the fuel pipes which are alleged to have leaked were something which, although it had originally been within Enka's scope of work, had latterly been removed from Enka's scope of work and the work performed by a different contractor. Enka wrote to Unipro:

> *"By commencing a court action in deliberate disregard of a valid and binding agreement to arbitrate, Chubb has breached the arbitration agreement between UNIPRO and ENKA. Chubb should be asked to desist from any further action against ENKA in the Russian courts as a matter of urgency.*
>
> *We are concerned that the only plausible motivation for a party to frustrate an arbitration agreement may be its belief that it would obtain some undue advantage in local litigation. ...*
>
> *It is our hope and belief that a reputable American company such as Chubb and its reinsurers would be extremely concerned about these matters and that if presented with accurate facts its senior management would never sanction a frivolous claim before local courts …*

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> *As we understand that E.ON/UNIPRO has a global professional relationship with Chubb, it is well placed to inform Chubb and its decision-makers in US of the accurate facts and to remind it of Unipro's and thus now Chubb's obligations under the arbitration agreement.*
>
> *… we urgently request you reach out to Chubb"*

Unipro responded: "*Local CHABB* [sic.] *confirmed that the initiative came from international level and they will transfer our concerns accordingly*". Unipro's email appeared supportive of Enka's underlying position on the merits, stating that Unipro were "*fully on the same page with you regarding ENKA's role in the construction and further accident. We have a strong position that your company has nothing to do with the accident at all"*.

Enka's application for an injunction

Enka applied to the court in England seeking a declaration that Chubb Russia was bound by the arbitration agreement in Clause 50.1, that it applied to the claims Chubb Russia had brought in Moscow and seeking an 'anti-suit' injunction to restrain Chubb Russia from continuing the proceedings in Moscow.

Chubb's arguments

Chubb raised various arguments, including that Enka had delayed unduly in making its application (something which was accepted at first instance but then rejected on appeal). Chubb's more interesting argument though turned on an allegation that Enka's contract, including the arbitration agreement, was governed by Russian law, something Chubb called "*A Russian Game-Changer*".

It was common ground that, if the arbitration agreement were to be construed according to English law, then (*applying Fiona Trust*) the claim which Chubb had brought in Moscow was within the scope of that agreement. Chubb's position, however, was that, if the arbitration agreement were to be construed according to Russian law then the claims which Chubb had brought against Enka and the other subcontractors in Russia, would instead fall outside the scope of that agreement.

Chubb argued that, once the arbitration agreement was determined to be governed by Russian law, then the court which was best placed to determine whether Chubb was right on the question of what that Russian law arbitration agreement meant was the Russian court, and so the English court should defer to the Russian court and let the Russian court decide that issue – a form of *forum conveniens* argument.

The court at first instance (Baker J) proceeded to decide the case on a somewhat different basis. Baker J declined to make any finding on the issue of whether the arbitration agreement was governed by Russian Law. Rather, the court held:

> *"… my preferred and primary ground for dismissing Enka's claims is that this court is not the appropriate forum … in which to determine finally the real issue between the parties, which is whether the acknowledged obligation to arbitrate disputes extends to the dispute over Enka's liability as alleged by Chubb Russia on the Moscow Claim. The appropriate forum for that determination is the Moscow Arbitrazh Court …"*

Baker J also had an alternative basis for refusing Enka relief, saying there was a strong reason for refusing Enka the relief sought because Enka had delayed, Enka had participated in the Russian proceedings, and Enka had itself failed to commence arbitration proceedings.

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Appeal

On appeal, Enka took the position that *forum conveniens* considerations are irrelevant to such applications. The English court, as the seat of the arbitration, is the appropriate forum to exercise the jurisdiction to grant anti-suit relief. Enka argued that the proper law of the arbitration agreement was English law, so the Moscow claim was brought in breach of that agreement. Alternatively, Enka argued, even if the proper law of the arbitration agreement was Russian law, the arbitration agreement still applied to the claims Chubb had brought in Moscow.

***Forum conveniens* is irrelevant**

The Court of Appeal held that:

> *"The Judge's approach was wrong in principle. The English court as the court of the seat of the arbitration is necessarily an appropriate court to grant an anti-suit injunction and questions of forum conveniens do not arise. This follows from two essential principles. First, 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. Secondly, the grant of an anti-suit injunction to restrain a breach or threatened breach of the arbitration agreement is an exercise of such powers. It follows, therefore, that by the choice of English seat the parties agreed that the English Court is an appropriate court to exercise the power to grant an anti-suit injunction."*

Contract subject to Russian law

As the Court of Appeal put it: "*it is common ground that the main contract law is Russian law, but the route to that conclusion is also in issue*".

One term defined in the Contract was "*Applicable Law*". Applicable Law was defined to mean:

> *"Law of the Russian Federation, including legislation of the Russian Federation, all regulatory legal acts of State Authority Federal Bodies, State Authorities of the constituent entities of the Russian Federation, legislation of the constituent entities of the Russian Federation, regulatory legal acts by Local Authorities and any other regulatory legal acts."*

Chubb Russia maintained that this was an express choice that the governing law of the contract be Russian law. The court of appeal rejected that. There was no overarching clause in the contract to say "*this Agreement is governed by the Applicable Law*". Rather, the term "*Applicable Law*" was used in a more limited way, as described by Popplewell LJ in the Court of Appeal judgment:

> *"Typical is Article 4.1(b) which provides that Enka shall ensure performance of the work in accordance with the Applicable Law. This is a common technique in international construction contracts where quite apart from the governing law of the contract, which can be chosen by the parties, there are particular local laws and regulations which are mandatorily applicable, such as those governing planning, health and safety, labour laws, taxes and customs. The technique is to define such applicable laws and impose an obligation to comply with them separately from any choice of governing law of the contract as a whole … The definition of Applicable Law in Attachment 17 is accordingly drafted in suitably wide terms to cover not just Russian law as such but so as to have a particular focus on regulatory requirements. It only specifically applies to certain obligations in the Contract where the definition is used, in each*

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case in a way which fulfils this function of compliance with mandatory local regulations. There is nothing to suggest an express general choice of Russian law as governing law."

The Contract was thus governed by Russian Law not because of any express, or even implied, choice but, rather by operation of the English conflict of law rules which serve to determine the applicable law of a contract (other than an arbitration agreement) in the absence of choice. These are (presently) to be found in Article 4 of Regulation (EC) 593/2008, known as the 'Rome I Regulation'. Absent a choice Article 4 provides that in a contract for the provision of services the governing law is *prima facie* that of the habitual residence of the service provider (in Enka's case, Turkey) but that the law of another country applies where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with that country.

Although it is not expressly stated in the judgment, presumably Enka accepted that governing law of the contract was Russia because a contract to carry out construction work in Russia is manifestly more closely connected with Russia than with Turkey.

Applicable law of the arbitration agreement

Questions about the law governing arbitration agreements, on the other hand, are not covered by the Rome I Regulation because by Article 2(e) it does not apply to arbitration agreements.

Following a review of the authorities, the Court concluded:

"I would therefore summarise the principles applicable to determining the proper law of an arbitration agreement, what I have called the AA law, when found in an agreement governed by a different system of law, as follows:

(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?

(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. The governing law of the Contract is Russian law but that is not by express choice …"

"Even if I were wrong in this and there were an express choice of Russian law, this is not one of those rare cases where it is or informs an express choice of the AA law of clause 50, and [Enka's counsel] did not argue to the contrary."

"Accordingly the presumption applies that the parties have impliedly chosen that the proper law of the arbitration agreement should coincide with the curial law and be English law."

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The reference to 'mediation' is confusing, since Clause 50 did not include any provision for mediation – rather it provided for tiered-negotiation between senior management. Popplewell LJ had, however, in the preceding paragraphs been discussing the *Sulamerica* case, where the contract did include a mediation clause. The references to mediation should be read as 'tiered negotiation' – the reasoning is unaffected.

The real crux of this case concerns Rule (2). The court put it this way (emphasis added):

> *"Where the AA law question can be answered at the first stage, namely whether there is an express choice of the AA law, no conceptual difficulty arises. An express choice of AA 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 was the position in Kabab-Ji. 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. If the main contract law is not one by express choice it is difficult to conceive of circumstances in which it could support a finding of express choice of AA 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.*
>
> *In all other cases, the general rule should be that the AA 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."*

This part of the judgment is crucial – the court is saying that it is only in the minority of cases that an express choice of law in the main contract will be held to be an express choice of the law which is to govern the arbitration clause. In the majority of cases there will be no such choice and so the arbitration agreement will be governed by the curial law (i.e. the law of the seat – England).

"Only in the minority of cases" express

The difficulty here is that it is not at all clear why the Court of Appeal was so sure that it is only in 'a minority' of cases that an express choice of law in the main contract will be held to be an express choice of the governing law of the arbitration agreement.

The Court of Appeal refers to *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 as an example of a case which falls into the 'minority' of cases where a choice of law in the contract applied to the arbitration agreement.

The problem is that the contractual wording which led the Court of Appeal to that conclusion in that case does seem very unusual, and something very similar appears in lots of contracts. The contract in that case simply said:

> *"Article 1: Content of the Agreement*
>
> *This Agreement consists of the foregoing paragraphs, the terms of agreement set forth herein below, the documents stated in it, and any effective Exhibit(s), Schedule(s) or Amendment(s) to the Agreement or to its attachments which shall be signed later on by both Parties. It shall*

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be construed as a whole and each of the documents mentioned is to be regarded as an integral part of this Agreement and shall be interpreted as complementing the others."

"Article 15: Governing Law

This Agreement shall be governed by and construed in accordance with the laws of England."

The Court of Appeal held:

"Articles 1 and 15 of the FDA in themselves provide for the express choice of English law to govern the arbitration agreement in Article 14. Article 1 makes it clear that "This Agreement" (capitalised) includes all the terms of agreement then set out, which include Article 14. Because Article 15 provides that: "This Agreement [again capitalised] shall be governed by and construed in accordance with the laws of England" it is making clear that all the terms of the Agreement, including Article 14, are governed by English law. The answer to the suggestion that, if this analysis were correct, there would be an express choice of governing law of the arbitration clause in every contract which contains a governing law clause is essentially that given by Andrew Smith J in Arsanovia at [22]. Governing law clauses do not necessarily cover the arbitration agreement. This one does because of the correct construction of the terms of Articles 1 and 15 taken together."

The relevant passages from Arsanovia were:

"Mr Hirst's submission was that the parties' choice of Indian law was implied: he felt unable in light of authority to contend at first instance that the parties made an express choice, but he reserved that argument should the case go to superior courts. It seems to me that Mr Hirst might have been too diffident: that a case for an express choice might have been available even before me. When the parties expressly chose that "This Agreement" should be governed by and construed in accordance with the laws of India, they might be thought to have meant that Indian law should govern and determine the construction of all the clauses in the agreement which they signed including the arbitration agreement. Express terms do not stipulate only what is absolutely and unambiguously explicit, and it seems to me strongly arguable that that is the ordinary and natural meaning of the parties' express words …"

It is very difficult to see why, on this rationale, a clause that "*this agreement shall be governed by the laws of X*" will not ordinarily be held to cover the arbitration agreement contained in the agreement.

Exercise of discretion

The Court of Appeal was critical of the judge's alternative ground for rejecting Enka's application, that there were strong grounds for exercising his discretion against granting relief: "[t]*he judge's exercise of his discretion was infected by errors*". Enka had not delayed unduly, and had not taken any steps in the Russian proceedings beyond the minimum which was required to protect its position.

"He also fell into error in treating Enka's failure to commence arbitration as a "very significant factor" counting against it. It is not a relevant factor at all. It is clear from AES Ust-Kamenogorsk that the anti-suit injunction jurisdiction arises irrespective of any actual or contemplated arbitration proceedings because an arbitration agreement contains the independent negative promise not to commence proceedings anywhere in the world. The

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Judge was also mistaken in treating an arbitration tribunal as prima facie the a priori forum in which Enka should seek to resolve the scope of the arbitration agreement: that was the primary function of the English Court in exercise of its curial jurisdiction which Enka was entitled to invoke without commencing arbitration proceedings to seek a declaration of non-liability".

Conclusion

The Angelic Grace and *Fiona Trust* are two pillars of a regime which is at least (relatively) straightforward, and easily explained and understood, and which probably does reflect what business people want and expect. Fiona Trust means that, if you put an arbitration agreement in your contract, and if that arbitration agreement is governed by English law, then it will be assumed that you want all your disputes arising out of the relevant relationship to be resolved by arbitration. *The Angelic Grace* means that, so long as you act quickly, you will be entitled to an injunction to restrain the other party from breaching that agreement, and suing you in a different forum. That probably does, genuinely, reflect what most business people would want and expect.

The gap, though, is that if the arbitration agreement is not governed by English law, but is governed by some other law, then that law might not apply as an English 'one-stop' *Fiona Trust*-type presumption. That law might construe the arbitration agreement in such a way that some claims arising out of the same relationship don't fall within the arbitration agreement. Then the other party will be free to sue you for those things in other forums.

The first instance decision in *Chubb v Enka* had attracted some comment, because it seemed to open that gap even wider. To avoid an anti-suit injunction, one did not even need to show that the arbitration agreement was governed by a foreign law, and that – according to that foreign law - the dispute in question was not caught by the arbitration agreement. All one had to show, it seemed, was that the arbitration agreement *might* be governed by a foreign law. The English court would then wash its hands of the matter, and let the foreign court decide.

The Court of Appeal's decision does somewhat close that gap again. The idea that the English Court should defer to the foreign court to decide: (i) what law applies; and (ii) what the arbitration agreement means according to that law, because the foreign court is a more convenient forum, is roundly rejected.

The Court of Appeal confirms that the applicable law of an arbitration agreement is to be determined according to a three stage test: (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? Absent an express choice, there is a strong presumption that the parties have impliedly chosen the curial law (i.e. the law of the seat – the law of England) as the law of the arbitration agreement. In such a case *Fiona Trust* will apply, the foreign proceedings will probably be caught by the arbitration agreement and the business people will get their injunction.

The real beartrap lies in the precedent question: whether there is an express choice of the law which is to govern the arbitration agreement. Enka was lucky, because its contract did not contain any express choice of law clause at all, and so the issue of whether that choice of law also applied to the arbitration agreement did not really arise. Most commercial contracts, though, do contain choice of law clauses which say something like 'this agreement shall be governed by and construed in accordance with the laws of X'. The Court of Appeal in *Kabab-Ji* and the Commercial Court in *Arsanovia* both thought that such a choice of law did not just apply to the substantive agreement, but extended also to the arbitration agreement. The Court of Appeal's statement in *Enka* that this "*is*

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not a conclusion which will follow … in the majority of cases, in which there is an express choice of main contract law" should be viewed with some caution. But even if the Court of Appeal is correct, there will still be some 'minority' of cases where the main contract choice of law will apply to the arbitration agreement.

The safest approach then, if one is concerned to maximise the chances of the arbitration agreement being held to apply to one's disputes, and so protected by an anti-suit injunction, is always to expressly agree that the arbitration agreement is to be governed by English law, even if the substantive contract is to be governed by some other law.

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