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Enka Insaat Ve Sanayi A.S. ("Enka" or the "Respondent") v OOO Insurance Company Chubb ("Chubb" or the "Appellant") - UK Supreme Court Hearing Report (July 2020) by L. Winnington-Ingram and E. Litina

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Enka Insaat Ve Sanayi A.S. (“Enka” or the “Respondent”) v OOO Insurance Company Chubb (“Chubb” or the “Appellant”) - UK Supreme Court Hearing Report (July 2020)

Lucy Winnington-Ingram[1] and Eva Litina[2]

1. Background to the Dispute

This dispute has its genesis in the contractual arrangements for Enka’s participation in building the Berezovskaya power plant in Russia for PJSC Unipro (then called E.ON Russia) (“Unipro”) pursuant to a contract entered into with Unipro’s general contractor, CJSC Energoproekt (the “Contract”). Pursuant to the Contract, Enka was to provide works relating to the boiler and auxiliary equipment installation. Energoproekt subsequently assigned its rights under the Contract to Unipro.

Unipro was insured by Chubb Russia under a primary policy, with reinsurance and retrocession arrangements involving retention of some risk in companies within the Chubb group and the balance of the risk ceded into the market.

In 2016 a fire broke out at the power plant which caused Chubb to pay out USD$ 400 million to Unipro. Chubb became subrogated to Unipro’s rights and asserted that the fire had been caused by Enka’s defective works.

On 25 May 2019, Chubb commenced proceedings against Enka in the Moscow Arbitrazh Court. After some rectification, Chubb’s claims were accepted on 3 September 2019. On 16 September 2019, Enka issued an Arbitration Claim Form in the Commercial Court in London seeking: (i) a declaration that Chubb was bound by the arbitration agreement in the Contract (the “Arbitration Agreement”); and (ii) an anti-suit injunction pursuant to s.37 of the Senior Courts Act 1981 requiring Chubb to discontinue the Russian proceedings.

On 17 September 2019, Enka filed a motion with the Moscow Arbitrazh Court seeking dismissal without consideration of the claim against it on the basis that Chubb was bound by the Arbitration Agreement in the Contract.

2. The Judgments of the Lower Courts

In the first instance decision of the Commercial Court dated 20 December 2019,[3] Baker J declined to grant the relief sought by Enka on *forum non conveniens* grounds.

In declining to exercise jurisdiction, Baker J considered that the exercise of the power to grant an anti-suit injunction to restrain proceedings in breach of an arbitration agreement does not derive from the powers of the supervisory court conferred by being the court of the seat. Rather, it is an exercise of original substantive jurisdiction to restrain by injunction a breach or threatened breach of contract by a party over whom it has a personal jurisdiction. Enka’s

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[3] *Enka Insaat Ve Sanayi AS v OOO “Insurance Company Chubb” & Ors* [2019] EWHC 3568 (Comm).

argument that the choice of seat gives the English Court the power to determine whether the Russian proceedings are brought in breach of the Arbitration Agreement was accordingly rejected.

Baker J also addressed the significance of the choice of seat in determining the proper law of the Arbitration Agreement (on the assumption that it was the English Court's approach to that question which mattered). He concluded that he did not regard the London seat of the arbitration as a clear indication of a choice of English law.

In reaching this conclusion, Baker J noted that the parties had opted for arbitration under the ICC Rules, which is well known to be under the auspices of a supranational institution. In this context, the choice of London as the seat was merely indicative of a preference for the proceedings to be held in London, or for the intervention of the English courts (should this be required). This was held to be insufficient to convey or imply a choice of English law as the governing law for the Arbitration Agreement under the Contract.[4]

On appeal by Enka, the Court of Appeal granted the anti-suit injunction.[5] The Court of Appeal held that:

(a) The express choice of England as the seat meant that English law is the curial law (i.e. the law governing the arbitration).[6] Applying the common law three-stage test to determine the proper law of an arbitration agreement, the parties' choice of English law as the curial law created a strong presumption that the proper law of the Arbitration Agreement should coincide with the curial law and be English law.[7]

(b) Baker J's decision to decline jurisdiction on *forum non conveniens* grounds 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 non conveniens* do not arise.[8]

(c) There was no undue delay on the part of Enka in seeking the anti-suit injunction so as to cause the Court to decline the application. Relevant to this finding was the Court's consideration of the utility of injunctive relief. In this regard, the Court held that an injunction to prevent Chubb from pursuing an appeal from the dismissal of its claim on the merits would still serve the necessary and useful purpose of giving effect to the bargain of the parties in the arbitration agreement. As such, Enka should not be exposed to continued involvement in the foreign court proceedings.[9]

Chubb was granted permission to appeal the Court of Appeal decision to the Supreme Court.

[4] *Enka v Chubb* [2019] EWHC 3568 (Comm), paragraph 63.
[5] *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] EWCA Civ 574.
[6] *Enka v Chubb* [2020] EWCA Civ 574, paragraph 46.
[7] *Enka v Chubb* [2020] EWCA Civ 574, paragraphs 105-106.
[8] *Enka v Chubb* [2020] EWCA Civ 574, paragraph 42.
[9] *Enka v Chubb* [2020] EWCA Civ 574, paragraphs 118-119.

3. The Grounds for Appeal

The specific grounds for appeal may be summarised as follows:

(a) What is the correct approach to determining the proper law of an arbitration agreement.

(b) What is the relevance of the parties' choice of law for the main contract under Rome I Regulation.

A further general issue that arose is the role of the court of the seat of arbitration and in what circumstances is it appropriate for the English court to permit a foreign court to decide whether proceedings brought before the foreign court are in breach of an arbitration agreement.

4. Summary of the Supreme Court Hearing on 27 to 28 July 2020[10]

(A) Submissions from the Appellant, Chubb

Mr Bailey QC began his submissions on behalf of the Appellant by noting that the appeal involves two headline issues: (1) whether the Arbitration Agreement is subject to the same proper law as the Contract (i.e. Russian law); and, if the answer to (1) is yes, then (2) whether the Russian courts should be prevented by way of an anti-suit injunction from exercising their jurisdiction under the New York Convention to determine whether the dispute falls within the scope of the Arbitration Agreement (properly construed in accordance with Russian law) and therefore should be referred to arbitration.

The Appellant begins by raising an anterior issue – the practical and commercial consequences of the Court of Appeal decision. The Court of Appeal concluded that the Contract is governed by Russian law and the Arbitration Agreement is governed by English law. Whilst this may appear to be superficially coherent, it gives rise to a number of commercial and practical questions to which the Court of Appeal's analysis gives no easy answer.

The first question is which terms of the Contract constitute the obligation to arbitrate. In order to answer this question one has to look at the Contract. Article 50.1 contains two obligations followed by an option: *"If the matter is not resolved within twenty (20) calendar days after the date of the notice referring the matter to appropriate higher management or such later date as may be unanimously agreed upon, the Dispute shall be referred to international arbitration as follows:"*

The last sentence of Article 50.1 constitutes the obligation to arbitrate. According to the Court of Appeal, that obligation is governed by English law, but if that is correct it raises a number of questions. What about the other obligations that appear in Article 50.1, for example the alternative dispute resolution provisions (e.g. "*The Parties undertake to make in good faith every reasonable effort to resolve any dispute or disagreement arising from or in connection with this Agreement (including disputes regarding validity of this agreement and*

[10] This section sets out the live updates circulated by Lucy Winnington-Ingram and Eva Litina during the Hearing.

the fact of its conclusion (hereinafter – "Dispute") by means of negotiations between themselves.") which are clearly related to the obligation to arbitrate. These are distinct – one might think they are governed by Russian Law. The Court of Appeal's answer is that Article 50.1 is indivisible, such that all obligations constitute the obligation to arbitrate and are therefore governed by English law. In the Appellant's submission that is not self-evident from the Contract, but even if it is right that in itself then gives rise to a series of difficult questions. For example:

(a) If the word "notification" is governed by English law, what do the parties intend that to mean, and is it to have the same meaning as the definition given to notices in Article 51.4? Nobody has suggested that Article 51.4 is not governed by Russian law.

(b) The same question arises in respect of capitalised terms in this article and, for example, the reference to "good faith". The question arises as to whether those terms used in Article 50.1 are to be given the meaning accorded to them pursuant to English or Russian law. A further point in this context is Article 50.2, which falls after the obligation to arbitrate and provides: "[u]*nless otherwise explicitly stipulated in this Agreement the existence of any Dispute shall not give the Contractor the right to suspend Work.*" Based on the Court of Appeal's analysis it is not clear whether this right should be governed by English or Russian law.

None of these questions would arise for consideration if the reality is that the proper law for the whole Contract, including the obligations to arbitrate, are governed by Russian law. And the particular dilemma of the Court of Appeal decision arises when you look at other clauses in the Contract – for example, Article 42.2 which is entitled "*Change of Scope*". This clause provides that if the customer disagrees with T&Cs proposed by the contractor, the contractor may refer the dispute to arbitration. Nobody has suggested that this clause is governed by any law other than Russian law. This gives rise to a real difficulty in respect of the interplay between this Article and Article 50.1, which is governed by English law.

The reality is that what we see when we look at the Contract is that the arbitration obligations are not hermetically sealed from the other obligations. The reality is that the Arbitration Agreement is very deep inside the Contract and forms an integral part of the same contractual set of obligations. That is a very strong pointer to the right answer – that the Arbitration Agreement and the balance of the obligations must all be governed by the same system of proper law. This analysis reveals the truism in Edwin Peel's article where he stated that the relative weight to be afforded to either the proper law of the main contract or the curial law may well depend for its answer on the facts of each case, and in particular the construction of the contract as a whole and the relationship between the obligation to arbitrate and the other obligations set out in the main contract.

In Mr Bailey QC's submission, we can debate the various significance of the presumptions that have been suggested in the authorities but ultimately, in a final analysis, this is one of those cases where the answer turns on construction. This chimes with what Lord Neuberger said in *Sulamerica Cia Nacional de Seguros SA v Enesa Engelharia* SA [2013], namely that ultimately there is no reason necessarily to overrule one presumption or the other, because the question is one of construction. Determining the proper law of the arbitration agreement is in each case a matter of contractual interpretation. This approach leads to the conclusion that, on

the construction of this particular body of rights and obligations, the Arbitration Agreement cannot be sliced off without leading to confusion and uncertainty.

Having completed this introductory analysis, Mr Bailey QC moves to the authorities. Mr Bailey QC notes that there is a body of learning that the Judges need to consider and his submissions in respect of these authorities are summarised below.

Jacob v Credit Lyonnais, 12 Q. B. D. 589 [1884]

This case involved a claim for short delivery of Algerian esparto (a form of grass fibre used in basket weaving). The question arose whether, if the sales contract was governed by English law, what is the effect of French law on the obligation to make shipment.

The Court of Appeal judgment was given by Bowen LJ. The first matter to be determined was whether the contract was to be construed under English or French law. It was held that the question of the law governing the contract, or any part of it, must always be a matter of construction. Having noted that there was no conceptual objection to the parties' freedom to apply different systems of proper law to differing obligations within the same contract, Bowen LJ went on to consider the different principles of conflicts of law analysis that applied in the 1880s. In that case, the contract was made in London between merchants carrying on business in London, but it remained to be considered whether anything in the contract displaced the *prima facie* view that it should be governed by English law wholly or in part. This contemplates that the parties may have intended some set of obligations to be governed by a different system of law. Just as in the instant case, there was no express choice in the contract. In the absence of an express choice, Bowen LJ went on to consider whether it was possible for the parties to infer whether any obligations should be governed by French law. He held that there was nothing in the contract which could amount to an indication that any part of the contract should be treated as anything other than an English law contract. Mr Bailey QC highlighted Bowen LJ's reasoning that a finding which displaced the ordinary presumption, and held that the parties must have intended some law other than English law to cover any of the obligations, would introduce a serious level of uncertainty to mercantile contracts. If the parties had wanted to achieve this outcome, they should have done so in express terms.

Comparing this to the analysis of the Court of Appeal, Mr Bailey QC noted that the Court of Appeal judgment gives rise to considerable commercial uncertainty and difficulties, which would be avoided if Russian law governed the entire Contract (including the Arbitration Agreement). This points strongly towards the parties' intention that Russian law would govern the entire Contract.

The point of principle that the *Lyonnais* case demonstrates is that the presumption that a contract is governed by a single proper law will only be displaced or rebutted in the case of an express choice of a different choice of law, or, in rare and exceptional cases, where such a choice can be inferred. This is consistent with the general presumption against *dépeçage* – the court will not split the law of the contract readily and without good reason.

Hamlyn & Co v Talisker Distillery [1894]

The contract contained a dispute resolution clause providing for disputes "*to be settled by arbitration by two members of the London Corn Exchange or their umpire in the usual way.*"

The issue that faced the Scottish court was whether to enforce this clause when it would have been null and void if governed by Scottish law. The Court of Appeal reached a conclusion that the arbitration clause was governed by the same law as the law of the contract (Scottish law), it was therefore void and could not be enforced. The case went to the House of Lords ("HoL") on appeal.

Mr Bailey QC identified a number of "*significant*" points from the judgment of the HoL:

(a) The HoL recognised that there was no express or implied choice of Scottish law for the contract as a whole. The rule in relation to *locus solutionis* is the default rule in circumstances where the parties have not made a choice as to the proper law of the contract.

(b) In any event, one has to be cautious in how they approach this case. There have been significant changes in the field of private international law since 1894.

(c) An important feature is that a key feature of the arbitration clause was not the choice of seat (which in one sense had not even been expressly identified), rather that it specified that the arbitrators would be members of the London Corn Exchange and that any dispute would be settled in the usual way. These do not apply in the instant case.

(d) In its decision in the instant case, the Court of Appeal was wrong to hold at [100] that *Hamlyn* is authority for the proposition that the choice of a London seat is an implied choice of English law as the proper law of the arbitration agreement. The correct interpretation is that the HoL concluded that the arbitration agreement was governed by English law as a matter of express choice. This is not an example of a case where the court felt it was possible to infer *dépeçage*. Rather, properly construing the arbitration clause, the court was able to conclude that there was an express choice of English law. Critical to this interpretation is the fact that the parties could not have intended that the clause would have been invalid if it was governed by Scottish law. This interpretation finds support in the first edition of Dicey's "*Conflict of Laws*" (published in 1896), where it was cited as an example of a case where the parties made an express choice.

Cie D'Armement Maritime SA v Cie Tunisienne de Navigation SA [1971] AC 572

The Court of Appeal was correct to note that this case was concerned with the proper law of the contract as a whole, however it remains an important case for a number of key reasons.

First, it proceeds on the basis that there would be a single proper law for the whole contract. There is no suggestion in any of the speeches that the proper law of the contract should be split so that the arbitration clause would be governed by English law.

Secondly, the case assists in identifying the test to be applied in determining whether the parties have made an express choice of law. The majority reached a conclusion that the relevant clause of the charter party amounted to an express choice of French law. The proper question is therefore whether the parties succeeded in expressing their choice, and this must be decided by applying the ordinary rules of construction of commercial contracts. The first stage of the test is accordingly – did the parties succeed in expressing a choice of law in a

manner which is sufficiently clear to indicate to the court, or enable the court to identify, a choice of law. Applying this to the instant case, it is very clear that Russian law is the proper law of the Contract.

Question from Lord Leggatt: Lord Diplock seems to be proceeding on the basis that the only alternatives are express choice or real connection, whereas the orthodoxy now at least is that there is also a category of implied or inferred choice and demonstrated choice. It would seem to me that in this case it is quite hard to say, if those are the differences between those two, that this is an express choice because it is very easy to say that Russian law is the applicable law and what has been done is to define applicable law as Russian law and then it pops up in various places, so it might be better to say that it is an inferred choice, but Lord Diplock isn't contemplating that intermediate possibility as far as I can see.

In response to this question, Mr Bailey QC noted that if one looks at the HoL decision as a whole, then Lord Diplock elides the first and second limbs of the common law test into what he calls Stage 1 and then moves into Stage 2 [page 603 of speech]. It is clear that Lord Diplock recognised that there were two limbs relevant to the question of choice. No distinction was made between the first and second limbs, both are valid for the construction of the contract. If one is able to demonstrate that the choice has been made, the consequence of that choice should not depend on whether it was done expressly or not. What matters is whether the parties have made that choice.

As an aside, Mr Bailey QC noted that if the Supreme Court were minded to consider a "revamping" of the common law rules in this context, one could see the force in the argument that, in the context of arbitration clauses, and in the absence of an express choice, the default law ought to be the law of the seat. However, this does not apply in the instant case, because the parties to the Contract did make a clear choice (Russian law).

Question from Lord Burrows: To query what you have just said – I was slightly puzzled in this sense. If you have decided that choice is not what is governing, what is the realm of a default rule, why would you regard the law of the seat as more obviously the default rule than the rule that would otherwise apply to the rest of the contract?

In response, Mr Bailey QC commented that perhaps the rule does not need to be default rule. This would accord with what Edwin Peel said – each case depends on its own facts. The basis for a default rule is that it creates certainty, that was the only reason for the suggestion and there is some support for the analysis that treats the law of the seat as the default position.

Thirdly, *Tunisienne* is also authority for the proposition that the choice of seat is authority for an implied choice of the curial law. Whilst the Appellant does not disagree with this analysis, it prefers the way this was put by Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, where it was said that this is not so much a matter of choice, but a matter of logic – it is a logical result of the choice.

Fourthly, the implied choice of proper law arises from the fact that arbitrators of a particular seat would ordinarily be expected to be conversant with their own proper law and to apply that law.

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

The presumption from *Sulamerica* is that, in the absence of any assumption to the contrary, the law of the arbitration agreement should be the same as the law of the main contract. At paragraph [11]: "*It has long been recognised that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole, but it is probably fair to start from the assumption that in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law.")*.

In that case, the Court of Appeal ultimately concluded that English law, not Brazilian law (being the law of the main contract), governed the arbitration agreement, however the basis for this was that under Brazilian law the arbitration agreement would have been invalid.

Moorbick LJ's dealing with the concept of severability is particularly relevant. He says that this is not applicable in the context of a conflict of law enquiry. This is an analysis which is reflected in other authorities (*Hamlyn & Co v Talisker Distillery* [1894]; *BCY v BCZ* [2016] SGHC 249). Rather, severability is a limited concept, which serves to protect the validity of the arbitration agreement in circumstances where the validity of the main contract is in jeopardy. It should be limited to those scenarios. This issue does not arise in the instant case.

Question by Lord Sales: I appreciate that it's probably not relevant in our case, but I have a difficulty in understanding how the invalidity of the arbitration agreement feeds into the choice made by the parties, because one might think that you decide what choice they've made as to the law, and they then take whatever law they've decided and if it happens to cause invalidity (which they will not have anticipated) then that is just a consequence of the choice they have made. It is almost as a second order of making that choice. But they are presumed to have chosen the other law – is there any explanation as to how that works conceptually?

In response, Mr Bailey QC noted that Lord Sales' analysis was "*intellectually unassailable*", and was in fact the analysis of the Court of Appeal in its decision in *Hamlyn*, however the HoL's decision in that case illustrates that, perhaps for policy reasons, the courts have taken the view that when an arbitration clause will be invalid under what appears *prima facie* to be the proper law, and there is a relevant competing law, then the court is entitled to infer that the parties must have intended for the law which does not invalidate the arbitration clause to be the governing law.

Further on the issue of validity, Mr Bailey QC noted that in its written submissions to the Supreme Court, the Respondent had claimed that the validation principles are engaged in this case. He noted in this regard that this is a new point which had been taken, and a manifestly bad one. It is not addressed in the underlying judgments of Baker J and the Court of Appeal because it was common ground between the parties' experts that the Arbitration Agreement was valid under Russian law. In addition, the Respondent had misunderstood the submissions made in this regard by the Appellant to the Russian court. The Appellant did not at any time challenge the enforceability or the validity of the Arbitration Agreement, rather the only question was as to its scope and whether the dispute fell within it.

Arsanovia Ltd v Cruz City 1 Mauritius Holdings [2013] 2 All ER 1

In this case, Smith J followed the decision in *Sulamerica* finding that the arbitration agreement was governed by Indian law, notwithstanding the fact that the seat was in London.

Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS and VSC Steel Company Ltd [2013] EWHC 4071 (Comm)

This case is particularly significant because Hamblen J applied the principles from *Arsanovia* and *Sulamerica*. In this case, there was no choice of law for the main contract. This is very significant and distinguishes *Habas* from the instant case where, in the Appellant's submission, there is a demonstrated choice of Russian law. In relation to the question of the closest connection, Hamblen J noted that it is the terms of the arbitration clause itself which may give rise to an implied choice of law. The choice of forum is not, by itself, an implied choice of law, but there may be other factors which give rise to that implication. Hamblen J confirmed that *Sulamerica* was authority for the proposition that where there is no choice of law in the main contract, the applicable law will be the law of the seat.

BMO v BMP [2017] SGHC 127

The arbitration agreement in this case was contained in the charter, which included no express choice of governing law. The Singapore court therefore had to determine the proper law of the charter and the arbitration agreement within it.

This case is important because it demonstrates the rationale behind the *Sulamerica* approach (i.e. that there is a rebuttable presumption that an implied choice of governing law of the arbitration agreement is the law of the substantive contract) will apply even where the choice of law in the main contract is implied rather than express.

This is consistent with the Appellant's position in the instant case. A choice is a choice (this is also consistent with Article 3.1 of the Rome I Regulation).

BCY v BCZ [2016] SGHC 249

Finally, Mr Bailey QC referred to another decision of the Singapore court *BCY v BCZ* which he noted was significant because the court sought to align itself to the English position and adopted *Sulamerica*. Chong J held that, based on *Sulamerica*, the governing law of the main contract is a strong indicator of the governing law of the arbitration agreement. The choice of seat is not, by itself, sufficient to displace this.

In the Appellant's submission, this is the orthodoxy and it is consistent with the authorities, save for two exceptions (*C v D* [2008] Bus LR 843; *XL Insurance Co SE v Little* [2019]). It is also supported by Professor Briggs in his book "*Private International Law in English Courts*". By reference to this text, Mr Bailey QC noted that the autonomy of the arbitration agreement is one thing – its hermetic isolation is another. The arbitration agreement is severable, but not separate. It must remain governed by the same law. The result is that the law which governs the substantive contract is very likely to govern the arbitration agreement and should therefore be used to consider the validity, scope and meaning of the arbitration agreement. The Appellant submits that this is the general principle. It is supported by the authorities and its justification is clear. In particular:

(a) As explained in cases like *Sulamerica*, where the parties enter into an arbitration agreement there is a rebuttable presumption that they intended all obligations and rights to be dealt with under the same system of proper law.

(b) This approach is simple and common sense.

(c) This approach is consistent with the principle that *dépeçage* will not be inferred readily and without good cause.

(d) It should not be easily inferred or implied that the parties intended to adopt a harlequin proper law – it is highly unlikely that this is what the parties intended to achieve.

The Court of Appeal reverses this presumption and, in the Appellant's submission, this is a fundamental error – it arises out of a failure to understand the distinction between proper law and curial law. There are other aspects to this. You don't need to have a curial law when you enter into a contract, the absence of a curial law doesn't make an arbitration agreement invalid in any way. The reality is that the curial law is essentially irrelevant at the time the parties enter into a contract. That is because the curial law is concerned with what will happen in the future. That is a conditional concept that may or may not arise in the future, so it is natural that the parties will regard the proper law chosen from the very outset to govern all of their substantive rights and obligations.

Having concluded his submissions, Mr Bailey QC turned over the floor to Mr Landau, QC.

Mr Landau QC's submissions will discuss two points: firstly the Court of Appeal analysis of what they said was an overlap of the provisions of English Arbitration Act 1996 ("Arbitration Act") on curial law and provisions governing the Arbitration Agreement itself; secondly more briefly on Article 5(1)(a) of the New York Convention.

The Court of Appeal suggested that the curial law should be connected to the arbitration agreement law and they relied upon what they suggested was an overlap in the Arbitration Act.

When the Arbitration Act applies, the parties are at the same time faced with specific provisions. The Court of Appeal identified specifically s.5,6,7,8,12,13,14,30,66-68 of the Arbitration Act. However, there are two separate points that have not been properly addressed by the Court of Appeal and Enka. These are the operation of s.4,5 and s.4(3) of the Arbitration Act.

It is critical that most of the provisions suggested by the Court of Appeal are non-mandatory. All of them, apart from s.12,13, and 66-68 are non-mandatory. That takes us to the structure of the Arbitration Act comprising of mandatory and non-mandatory provisions and in particular s.4 of the Act.

The Arbitration Act sets out a particular mechanism to avoid the consequences of the Court of Appeal judgment. In Enka's submission, i.e. by virtue of the choice of seat and the Arbitration Act, other distinct parts of the arbitral process will then also naturally be governed by English law, such as the Arbitration Agreement. That was something which the

Departmental Advisory Committee on Arbitration Law ("DAC") wanted to avoid, as explained in its 1996 Report on the Arbitration Bill.

Thus, the DAC report wanted to avoid the choice of seat leading to a choice of law for the arbitration agreement. Different laws may govern the arbitration agreement and the arbitral procedure. If the seat is England, then those parts of the Arbitration Act related to the procedure will apply. The mechanism in s.4(5) allows for the application of a different law for arbitration agreement than that of a seat. If a foreign law applies to an arbitration agreement either by express or implied choice, then only the mandatory provisions of the Arbitration Act will be applicable. The choice of foreign law itself will be equivalent to an agreement on a non-mandatory matter.

Mr Landau further referred to the *Lesotho* case (*Lesotho Highlands Development Authority (Respondents) v Impregilo SpA and others (Appellants)* [2005] UKHL 43) and an article of (late) Johnny Veeder, one of the chief architects of the Arbitration Act analysing the unfortunate understanding of the *Lesotho* case.

On Article 5(1)(a) of the New York Convention, Mr Landau briefly considered that it does not provide any assistance. Article 5(1)(a) lists the grounds for refusing recognition and enforcement of foreign arbitral awards. Enka submitted that if there is no express agreement or express designation on the law of the arbitration agreement, then it must be the law of the seat. That is wrong. Article 5(1)(a) has been interpreted as including an express or implied designation. That is in the UNCITRAL Guide to the New York Convention. Secondly, Article 5(1)(a) cannot be viewed as a default conflicts of law rule. It is only designed for the final stage of recognition and enforcement of arbitral awards. It only refers to validity of an arbitration agreement and does not refer to interpretation.

(B) Submissions from the Respondent, Enka

Mr Dicker opened his submissions by asserting that by agreeing to arbitration in London, the parties also agreed that English courts would determine the scope of the Arbitration Agreement, that the proper law is English law and that English courts may grant an anti-suit injunction. By choosing London, the parties agreed to submit to the jurisdiction of English courts. The parties' choice of seat is an implied choice of English law for the Arbitration Agreement. The arbitration agreement is distinct.

Question from Lord Burrows: Would you say the same for an exclusive jurisdiction clause?

Mr Dicker replied that there are similarities, but there are also additional issues pertinent to arbitration, which he will address tomorrow.

Mr Dicker QC continued his submissions on behalf of the Respondent by taking the Judges through the authorities.

The first point to be addressed is that the package of rights and obligations provided by English law is among the reasons why parties choose one seat over another. It is sometimes asserted that arbitration agreements are boiler-plate provisions. It would be very surprising if this were the case – one would expect sophisticated commercial parties to give some thought to dispute resolution and the location of the seat. The authorities emphasise that parties

choose the seat on the basis of what they consider will best serve their interests (*West Tankers Inc. v RAS Reiunione Adriatica di Sicurta SpA* (The "Front Comor") [2007] 1 Lloyd's Rep 391; *C v D* [2007] 2 All ER (Comm) 557). This is also supported by the empirical evidence (Jonathan Mance, Arbitration: a Law unto itself?, Arbitration International, Volume 32, Issue 2, June 2016, Pages 223–241; QMUL 2015 and 2018 International Arbitration Surveys). This is not just a parochial view, similar views have been expressed by the Chief Justice of Singapore recently in 2018.

The next issue is the proper law of an arbitration agreement. It is common ground that the proper law is determined by applying the common law three stage test (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?). The difference between the parties is how this test should be applied.

The Appellant approaches this from the perspective of the main contract. It starts by considering whether there is an express choice for the main Contract and then extends this to be an implied choice for the Arbitration Agreement. In the Respondent's submission, this is not a sensible starting point. The arbitration agreement is a separate contract and the starting point should accordingly be the arbitration agreement itself.

Mr Dicker QC states that he will begin by dealing with the authorities where there is a choice of seat, but no express choice of law for the main contract. The authorities support the following five propositions of the Respondent:

(a) A choice of seat is an implied choice of law. It operates at stage 2 of the common law test, not merely stage 3.

(b) In the absence of an express choice of law for main contract, choice of seat is an implied choice of law for the arbitration agreement regardless of the proper law of the contract. That is the outcome in every single English authority to date.

(c) A choice of seat may also be an implied choice of law for the main contract.

(d) The implied choice for the main contract is capable of being overridden if there are compelling reasons to the contrary.

(e) Implied choice may be overridden in relation to the main contract alone, but not be displaced in respect of the arbitration agreement.

Hamlyn & Co v Talisker Distillery [1894]

The contract in this case did not contain an express choice of law for the main contract, however it was to be performed in Scotland and it was held that the law of the main contract should be Scottish law. The contract also contained an arbitration agreement which provided for arbitration by members of London Corn Exchange to be conducted in the usual way.

There are two main points to be derived from this authority:

(a) Choice of London as the seat was treated as a choice of law for the arbitration agreement. The choice of the seat was the clearest indication that the arbitration

agreement should be interpreted and governed by English law. Contrary to the Appellant's submissions yesterday, the fact that the arbitration agreement would have been null and void under Scottish law was only an additional reason for this finding and not the primary reason.

(b) This was the position despite the fact that the main contract was governed by Scottish law.

Question from Lord Leggatt: Would you agree that the words in the "usual way" would be interpreted as an implied choice of English law for the arbitration agreement?

In response to this question, Mr Dicker QC noted that these words are not critical – it would be surprising if the parties intended their arbitration to be governed otherwise than in the usual way. *Hamlyn* has been the authority for the choice of seat determining the choice of the law for the arbitration agreement ever since 1894. There are numerous modern references, which also support this view (Chitty on Contracts and Dicey and Morris on the Conflict of Laws).

There are also cases in which choice of seat on the back of a more anodyne arbitration agreement has been held to give rise to a choice of law for the arbitration agreement (*Cie D'Armement Maritime SA v Cie Tunisienne de Navigation SA* [1971] AC 572; *Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS and VSC Steel Company* Ltd [2013] EWHC 4071 (Comm); *C v D* [2007] 2 All ER (Comm) 557; *Bangladesh Chemical Industries Corporation v Henry Stephens Shipping Co Ltd and Tex-Dilan Shipping Co Ltd (The SLS Everest)* [1981] 2 Lloyd's Rep 389 (CA)).

Question from Lord Leggatt: In all the cases up to and including *Tunisienne*, it seems to be the assumption that if you choose arbitration in London, the arbitrators will know English law but you wouldn't expect them to know some unusual foreign law. Lord Wilberforce was beginning to point this out in *Tunisienne* i.e. that this approach is not applicable any more as London is becoming an international centre.

In response to this question, Mr Dicker QC stated that this is not the approach in *Hamlyn*. The main contract was governed by Scottish law and there was no suggestion in that case that the arbitrators of the London Corn Exchange should know Scottish law. He agreed that the international aspect of English arbitration is increasingly obvious, but noted that Lord Wilberforce makes it clear that the inference arises despite the international nature.

Question from Lord Sales: I was looking again at Dicey and Morris. As I am understanding what is written there, this is addressing situations where there isn't a reference in the main contract to specify what the proper law of the main contract is, and in effect the only clue you have got is the specification of the seat of the arbitration in the arbitration clause and then the reasoning seems to be that, if that is the only clue you have, you then infer back from that what is the implied choice of the law governing the contract and it then concludes that in each of these cases the main contract and the arbitration agreement will be governed by the same law. What I wanted to ask is, doesn't that have some tendency against your argument, which is to separate out consideration of the proper law of the main contract and consideration of the proper law of the arbitration agreement because these cases seem to demonstrate that if you have got a clue in the arbitration agreement taken from the choice of seat that also leads

to an inference as to choice of proper law for the main contract, in other words on the basis that the main contract and the arbitration agreement are in fact so closely connected that you would expect them to have the same law?

In response, Mr Dicker QC stated that choice of seat leads to an implied choice of law for the arbitration agreement and maybe also for the main contract. This is capable of being rebutted for the main contract, but not for the arbitration agreement.

Follow-up from Lord Sales: No one is disputing that you can have a separate proper law for the two contracts in that in certain respects they are separate. The point I was putting to you is what inference do you draw as to the parties' intention if all you have got is indication of the seat, in other words an indication as to the proper law for the arbitration agreement. And the inference seems to be that it's not such an inference as to choice in respect of the arbitration agreement, but by virtue of the connection between arbitration agreement and the main agreement the inference is choice of law for the main agreement as well and what I am putting to you is, if by contrast you have a clear indication of choice of law in the main agreement, might it not be said that the same underlying reasoning that one expects the two to be the same then leads to the opposite inference that since the parties have clearly chosen a proper law for the main agreement that that choice by inference applies also to the arbitration agreement.

Mr Dicker QC made two points in response:

(a) The question is focusing on a situation where there is an express choice of law for the main contract. Whereas at this stage the Respondent is dealing with a situation where there is no express choice of law for the main contract. There is simply a choice of seat. This part of the argument is that choice of seat is an implied choice of law. It can be an implied choice of law not merely for the arbitration agreement, but also for the main contract.

(b) One point which will be addressed in later submissions is whether, where there has been a choice of law for the main agreement, if there is any logic in saying that choice applies equally to the arbitration agreement. The reasons why a certain law has been chosen for the main contract may have nothing to do with the arbitration agreement.

Cie D'Armement Maritime SA v Cie Tunisienne de Navigation SA [1971] AC 572

In this case, the HoL was concerned by whether the main contract was governed by English law. In the Respondent's submission this case is important because although the HoL held that the choice of seat did not give rise to an irresistible inference for choice of law for the main contract – it did give rise to a strong inference. It is the Respondent's case that that inference will be even stronger for the arbitration agreement.

Question from Lord Hamblen: I can see that this is what the Lords say in the judgment, but why should the choice of seat be a strong indicator of the main law of the contract?

Mr Dicker QC responded stating that, absent any other indications, if the parties have decided that their dispute should be decided by arbitrators in England then the arbitration agreement's seat in England has a gravitational centre in England because of the connection between the

choice of seat and the curial law. That is the reason. For the Respondent, the strength of the inference as far as the main contract is concerned is less important. If this is the strength of the inference for the main contract, it must be considerably stronger for the arbitration agreement.

There followed a discussion with Lord Hamblen and Lord Leggatt where they noted that the reasoning in *Tunisienne* (i.e. a familiarity with English law) would appear rather out of date and that arbitration had become increasingly international since 1970. Mr Dicker QC pointed to Lord Wilberforce's speech in this case noting that the inference arises despite the international character of arbitration in London ("*One of the reasons commonly given for attributing overwhelming force to the clause is that arbitrators in London are only to be supposed to be conversant with English law […] but I venture to think that in commercial matters, at the present time, that may give insufficient recognition to the international character of the City of London as a commercial centre-the reason, rather than any preference for English rules, for which arbitration in London is selected. In this case the arbitrators had no difficulty in finding for French law and I do not suppose they would find ascertainment of the French law as to damages any more difficult than the English law of anticipatory breach. So, unless otherwise constrained, I would regard the clause as a weighty indication, but one which may yield to others.*").

Question from Lord Leggatt: There is no treatment of the arbitration agreement separately in this judgment or in any of the earlier judgments apart from *Hamlyn* and if the reasoning is familiarity with English law, if that doesn't carry the day for the main contract then it is not going to carry the day for the arbitration agreement either.

In response, Mr Dicker QC emphasised the approach in *Hamlyn*, which was not based on familiarity with English law but on the connection between the choice of England as a seat and the English legal system.

The Respondent's submissions next turned to addressing an argument raised by the Appellant in its written submissions that the choice of seat was not necessarily a choice of curial law. Mr Dicker QC described this as a "*barren point*" since an express choice of forum by the parties to a contract necessarily implies an intention that their disputes shall be settled in accordance with the procedural law of the selected forum and thereby operates as if it were also an express choice of the curial law of the contract.

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

Sulamerica is entirely consistent with the proposition that in the absence of a choice of law for the main contract, the choice of seat will be a choice of law for the arbitration agreement. However, in the Respondent's submission this arises at stage 2 of the common law test, rather than stage 3 (i.e. this is an implied choice of law). This is what one would expect as it enables the entirety of the parties' arbitration package to be governed by the same law.

Fiona Trust & Holding Corp v Privalov [2007] UKHL 40, [2008] 1 Lloyd's Rep. 254

In this case the HoL re-emphasised both: (i) the presumption that parties to a contract who have included an arbitration clause intend that all questions arising out of that relationship should be determined in accordance with their chosen procedure; and (ii) the separability of arbitration agreements which enables their intention to be effective.

The Respondent submits that, consistent with this finding, one would expect questions of validity and scope to be governed by the law chosen for the seat.

Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS and VSC Steel Company Ltd [2013] EWHC 4071 (Comm)

This judgment reflects the outcome in every single English authority to date – absent an express choice of law in the main contract, choice of seat is a choice of law for the arbitration agreement. Whether or not this arises under stage 2 or stage 3 of the common law test does not matter.

Question from Lord Hamblen: The point that is put against you is that it should make no difference whether it is an express choice or an implied choice – it is still a choice. What do you think about that?

Mr Dicker QC noted that his short answer to this question is that there are two different exercises going on. If one has an express choice, it is ultimately a question of construction of the language. It may be that the language is sufficiently clear so as to indicate that the parties intended the arbitration agreement to be governed by the same law as the main contract and if they do so that is the end of it. An implied choice or a demonstrated choice is different. The Appellant stressed that it is just as much as of a choice. However, in the Respondent's submission, the question that arises is what is that choice? The reasons why one implies a choice of law for the main contract may not be relevant to the arbitration agreement because different factors apply to that. This goes back to the idea that the arbitration agreement is commercially distinct.

Question from Lord Sales: You say that where there is an express choice made in the main agreement, as a matter of construction of the express terms, then this may cover the arbitration agreement, but there is another case as well isn't there that the express choice in the main agreement may be clear as to the express terms in relation to that agreement, but one can still draw the inference (even though it does not expressly apply to the arbitration agreement) that by implication the parties did intend (because they specified the law expressly in relation to the main agreement) that it should apply also to the arbitration agreement. What do you say about that?

Mr Dicker QC noted that one needs to distinguish between two situations: (1) express choice where the parties have indicated expressly that the choice of law for the main contract is intended to apply to the arbitration agreement as well; and (2) where it is ambiguous. In this second scenario, one has two implied choices and one should apply the implied choice of the law of the seat.

Having taken the Judges through the authorities, the Respondent made its submissions as to why their interpretation is the correct one.

(a) The first reason is that there is a necessary overlap between the curial law and the law of the arbitration agreement. This suggests that where the parties have chosen a seat, the same law should govern all aspects of the arbitration package. Where the choice of seat is England, the Arbitration Act will apply – the mandatory provisions will apply regardless and the non-mandatory provisions will apply unless they are expressly excluded. The Appellant is contending for an English

seat, but the non-application of the non-mandatory provisions of the Arbitration Act 1996, and in their place the application of Russian law. This gives rise to all sorts of complexities and cannot be what the parties intended for. Two examples of why this cannot be the case. First, on the Appellant's approach the arbitration agreement may be invalid merely because the main contract is invalid. This is because s.7 of the Arbitration Act is excluded because the arbitration agreement is governed by foreign law. The second example is that a party to a London seated arbitration would be permitted to challenge an award in a foreign court because s.58 of the Arbitration Act has been excluded. These consequences are striking. A party who specifies London arbitration wants a London arbitration. The idea that they will end up in a situation where the arbitration agreement is invalid and they are required to litigate in a foreign court, or the idea that having received an award it can be challenged in a foreign jurisdiction is an anathema.

(b) The second reason is neutrality. One reason why England is often chosen as the seat is neutrality. It does not make sense for a party to specify that it wants to resolve disputes in London, but that the scope of the arbitration agreement should be determined by foreign courts. The Appellant contends that neutrality is irrelevant, unless the law of the main contract is also neutral. In the Respondent's view, this is a non-sequitur. There is no reason parties cannot agree that dispute resolution provisions are to be neutral even if substantive rights and obligations are not. An example of this is the Bermuda Form - one of its purposes is precisely to provide for New York law and London arbitration.

(c) The third reason is that this interpretation is consistent with the default rule under Article V(1)(a) of the New York Convention[11] and s.103(2)(b) of the Arbitration Act[12].

(d) The fourth reason why the emphasis on choice of seat is correct is the absence of sufficient connections between the main contract and the arbitration agreement. If there is no express choice of law for the main agreement, then the choice of law will be determined under Article 3 or Article 4 of the Rome I Regulation. The factors that are relevant in determining the choice of law under these articles may not have any relevance to the arbitration agreement. For example, Article 4(b) provides: "*To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows: (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence*;". The services being referred to here are those under the main agreement. This is irrelevant to the arbitration agreement. The view that there is an important commercial distinction between the main

[11] Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

[12] Recognition or enforcement of the award may be refused if the person against whom it is invoked proves: (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made.

contract and the arbitration agreement is supported by commentary (e.g. Fouchard Gaillard Goldman on International Commercial Arbitration).

Having made these points, Mr Dicker QC turned to address a question raised by Lord Burrows yesterday afternoon regarding the position in relation to exclusive jurisdiction clauses. He stated that a choice of forum, whether a court or a seat of arbitration, ordinarily gives rise to an inference that the dispute resolution agreement and the main contract are both governed by that law. In the Respondent's view, the inference is stronger in relation to arbitration agreements than exclusive jurisdiction clauses, because some part of the arbitration agreement will in any event be governed by the law of the seat because of the overlap with the curial law. This does not necessarily apply to exclusive jurisdiction clauses.

Question from Lord Burrows: What I had in mind is where one has an exclusive jurisdiction clause, for example whereby England is the exclusive jurisdiction in a contract and where the proper law is Russian law, what is the proper law of the exclusive jurisdiction clause. Am I to understand from what you have just said that the proper law of the jurisdiction clause would be English law?

Mr Dicker QC answered in the affirmative noting that in the Respondent's view the parties have a main contract governed by English law. They do not want to litigate in a foreign jurisdiction. Assume the English jurisdiction clause is invalid under the foreign law. If the English jurisdiction clause is not governed by English law then you run into an immediate problem – you apply foreign law to it and it is invalid, so the agreement they made to litigate in England is ineffective. The same analysis should be undertaken in respect of an arbitration agreement.

Follow-up from Lord Burrows: Let's assume that the issue is not the validity of the exclusive jurisdiction clause, but its interpretation.

In *Fiona Trust & Holding Corp v Privalov*, [2007] UKHL 40 the HoL stated that it is a matter of commercial common sense that the parties want one stop adjudication. So if the parties say that they want the English courts to determine any disputes, if you then apply foreign law to the interpretation of that clause you may end up with a situation where not all of the disputes can be determined in England because, as a matter of foreign law only, certain kinds of disputes are subject to an exclusive jurisdiction clause.

This concluded the submissions in the morning session. The afternoon session began by Lord Leggatt asking about the New York Convention-based argument.

Lord Leggatt: Is the point you are making that the enforceability of an award will at the end of the day depend on whether the arbitration agreement was valid or what its scope was?

Mr Dicker QC confirmed that this is precisely the point. The issue whether the choice of seat is a choice of law for the arbitration agreement is an issue of construction of contract. There must be sufficient wording that the law of the main contract was indeed the governing law of arbitration agreement.

Authorities such as Albert van den Berg suggest that Article 5(1)(a) is an instance of *dépeçage* and there is nothing problematic in *dépeçage*. *Dépeçage* can also be inferred, it is not necessary to refer to it expressly.

Article 16.4 of LCIA Rules also provides that the law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws. Like the New York Convention, the parties must have agreed specifically on the application of other laws.

Chubb asserts that the approach taken in other jurisdictions is that there is a very strong presumption that the choice of law of the main contract is an implied choice of law for the arbitration agreement. However, in the Respondent's submission, this view should be treated with a considerable amount of caution.

For example, in Scotland, in accordance with s.6 of Arbitration Scotland Act 2010, when the parties have agreed arbitration to be seated in Scotland, then unless the parties otherwise agree, the arbitration agreement will be governed by Scottish law. This is also the position in other jurisdictions, such as Belgium, China, Japan, Malaysia, Netherlands, and Sweden.

According to another passage of Mr van den Berg, the law to which parties have subjected the arbitration agreement can be different than the law of the country in which the award was made in the meaning of Article 5(1)(a) of the New York Convention. There is no reason why a different conflicts rule applies with regard to Article 2. Article 5(1)(a) actually cross-refers to Article 2. With regard to the New York Convention, Mr van den Berg's views are of some weight.

Dealing with the facts, Chubb submits that the choice of Russian law for the main Contract equals to a choice of Russian law for the Arbitration Agreement. The Respondent asserts: first, that there is no express choice of Russian law for the main Contract; second, that there is no implied choice of Russian law for the main Contract. In the absence of an express or implied choice for the main contract, there is no choice for the arbitration agreement. Dealing specifically with the terms of the Contract, the Respondent considers that the applicable law provisions are not the governing law of the main Contract, and even more of the Arbitration Agreement. These provisions refer to express obligations of contractor. In international construction projects, the applicable laws and permissions determine complex issues and such local laws are mandatory as a matter of public policy. These are standard-form contracts requiring the compliance of contractors with local law and such provisions are familiar to international construction lawyers.

Question from Lord Burrows: What is precisely the understanding of applicable law? Is the Respondent making the point that the applicable law is not a governing law, but instead it is incorporation by reference?

Mr Dicker replied that this is precisely the point. Obviously, it is practical to incorporate the text of all applicable laws in the contract.

Assuming that this analysis is incorrect and the main Contract is governed by Russian law, there are also other reasons why the Arbitration Agreement should not be governed by Russian law. The validation principle means that Russian law would not apply to the

Arbitration Agreement, if it would render it invalid. It would not make sense for parties to insert a foreign law that would invalidate the arbitration agreement. The contract should be construed to make commercial sense and the assessment should be objective (not the subjective intent of the parties).

In this context, the Respondent refers to the decision of the Commercial Court of Moscow (February 2018) holding that the ICC is not competent to hear the dispute, as the parties did not designate any particular institution (they only designated rules). This was classified as an ambiguous wording. In other words, it is not enough currently under Russian law to say that you want arbitration under the ICC rules, but it is also necessary to determine the body that will adjudicate the dispute. The ICC President Alexis Mourre has also sent a letter asking the court to clarify the position under Russian law. In those circumstances, the Respondent asserts that there is a risk that the Russian court (if it has not done already) will follow this ruling.

Question from Lord Leggatt: Would it make any difference if the Arbitration Agreement was made before this ruling of the Moscow Court?

Mr Dicker replied that there would have been equal uncertainty on the basis that this has been an issue in Russia and was an issue when the agreement was made.

Then Mr Dicker addressed briefly the issue of *forum non-conveniens*. He submitted that if the Arbitration Agreement is governed by English law, English courts can decide on injunctive relief and damages for breach of the Arbitration Agreement.

Question from Lord Leggatt: Is it a matter of discretion to leave to the foreign court to decide rather than the English court deciding on the content of Russian law?

Mr Dicker replied that the parties have agreed to arbitration and supervision by English courts and the exercise of anti-suit injunctions is within this agreement. The purpose is to ensure that arbitration agreement will be construed by a neutral body, either the arbitral tribunal or the English court (if necessary).

Finally, Mr Dicker made a separate point. As the Court of Appeal in Russia is likely to deliver judgment on 28 October, it would make sense for this court to decide in advance of this date.

Question from Lord Leggatt: If we were to decide, what would the Respondent want us to decide?

Mr Dicker replied that obviously they want to send the matter to be decided by the arbitral tribunal.

(C) Reply submissions by the Appellant

Mr Bailey submitted that remission to the arbitral tribunal would be both legally and logically impossible, as it would require the arbitrators to hear fresh evidence and then the court would have to review it all over again. Finally, he highlighted again that the mere choice of seat is not a choice of law for the arbitration agreement.

After concluding his final submissions, Lord Kerr thanked Mr Dicker, Mr Bailey and Mr Landau. He remarked that this is an interesting case and not an easy one. He asserted that the Court will render the judgment as quickly as it can and adjourned the session.

5. Concluding Remarks

This appeal raises significant issues for international commercial arbitration law and practice and presents an important opportunity for final clarification on the powers exercisable by the English court in support of arbitrations seated in England, as well as the principles for determining the law of an arbitration agreement. The Supreme Court's decision will undoubtedly have far-reaching implications for parties to contracts which have selected England as the seat of arbitration.

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