Neutral Citation Number: [2023] EWHC 2365 (Comm)

Claim No. CL-2023-000498

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

IN AN ARBITRATION CLAIM

22nd September 2023

Court 5
The Rolls Building
Fetter Lane

Before:

Sir Nigel Teare
(Sitting as a High Court Judge)

BETWEEN

G
(A company incorporated under the laws of Germany)

Claimant

-and-

R
(A company incorporated under the laws of the Russian Federation)

Defendant

1. **SIR NIGEL TEARE:** This is the trial of an action for final anti suit relief. I have heard the argument today and a decision is required urgently because of a hearing scheduled in Russia next week.

2. In view of that urgency, I give my decision and reasons now, albeit in a shorter form than is usual when one reserves judgment.

3. I take the factual background from paragraphs 12 to 14 and paragraphs 16 to 21 of the defendant's skeleton argument, which I do not understand to be in dispute. Those paragraphs are to be regarded as set out in this judgment.

4. Clause 11 of the bonds provides as follows:

   "This bond and all non-contractual or other obligations arising out of or in connection with it shall be construed under and governed by English law."

5. Clause 12 of the bonds provided as follows:

   "In case of dispute arising between the parties about the validity, interpretation or performance of the bond, the parties shall cooperate with diligence and in good faith, to attempt to find an amicable solution. All disputes arising out of or in connection with the bond which cannot be resolved amicably, shall be finally settled under the rules of arbitration of the International Chamber of Commerce, the ICC, by one or more arbitrators appointed, in accordance with the said ICC's rules. The place of arbitration shall be Paris and the language to be used in the arbitral proceedings shall be English."

6. I take the procedural background from paragraphs 20 to 31 of the claimant's skeleton argument, which I do not understand to be in dispute. Those paragraphs are to be regarded as set out in this judgment.

7. The defendants have challenged the jurisdiction of this court. It is common ground that there must be a jurisdictional gateway. The gateway relied upon is that the claim is made:

"In respect of a contract, where the contract is governed by the law of England and Wales."

8. Thus the question is whether the arbitration agreement is governed by English law. The claimant says that it is; the defendant says that it is not.

9. If it is, the next question is whether the English court is the proper forum for the claimant's claim to an anti suit injunction. The claimant says that it is; the defendant says that it is not.

10. I deal first with the governing law of the arbitration agreement. The manner in which choices of law are to be construed is explained and summarised in the judgment of the Supreme Court in Enka v Chubb [2020] WLR 4117.

11. The guidance which the Supreme Court has given is set out in paragraph 170 of the judgment of Lord Hamblen and Lord Leggatt. Of particular importance to what I have to decide are paragraphs 4, 5 and 6. Paragraph 4 provides:

"Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.

5: "The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.

6: "Additional factors which may, however, negate such an inference and may, in some cases, imply that the arbitration agreement was intended to be governed by the law of the seat, are (a) any provision of the law of the seat which indicates that where an arbitration is subject to that law, the arbitration [and the parties agree the word 'agreement' should be inserted] will also be treated as governed by that country's law; or (b), the existence of a serious risk that if governed by the same law as the main contract, the arbitration agreement would be ineffective. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as

a neutral forum for the arbitration."

12. I was at one stage attracted by the argument that in the light of the doctrine of severability, clause 11 was not expressed so as to extend to the separate arbitration agreement but I have been persuaded by Mr Houseman that that is not the correct approach. I do not think that there is any substantial disagreement by Mr Gunning in that regard. Indeed, Mr Gunning referred me to paragraph 61 of the judgment of Lords Hamblen and Leggatt, which said as follows:

"The Court of Appeal justified its approach on a ground that a choice of law to govern the contract has little, if anything, to say about the arbitration agreement law choice because it is directed to a different and separate agreement. This was said to follow from the doctrine that an arbitration agreement is separable from the rest of the contract. In our view this puts the principle of separability of the arbitration agreement too high. For reasons given earlier, the requirement that an arbitration clause is to be treated as a distinct agreement for the purpose of determining its validity, existence and effectiveness, makes it more amenable than other parts of a contract to the application of a different law. The rationale underlying the separability principle is also relevant, as we will mention later, in cases where applying the governing law of the contract to the arbitration clause would render the arbitration agreement invalid or ineffective. But it does not follow from the separability principle that an arbitration agreement is generally to be regarded as a different and separate agreement from the rest of the contract or that a choice of governing law for the contract should not generally be interpreted as applying to an arbitration clause."

13. So it appears to me that severability has little traction, when one is construing a choice of law clause and that, indeed, appears to be the effect of their Lordships' guidance in paragraph 170(iv) which says, as I have already quoted:

"Where the law applicable to the arbitration agreement is not specified, a choice of governing

law for the contract will generally apply to an arbitration agreement which forms part of the contract."

14. That is the starting point. What their Lordships describe as the inference may be negated in the circumstances set out in clause 6 of paragraph 170 and in this case, the court is concerned with the first of those two circumstances, namely any provision of the law of the seat which indicates that where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law.

15. In this case, the defendant has responded to the suggestion that the court has jurisdiction by reason of English being the proper law of the arbitration agreement by saying that in the present case such inference is negated by the law of the seat, which is French, and which provides that the French courts would regard the arbitration agreement as being subject to what its expert describes as French substantive rules applicable to international arbitration. This, indeed, appears to be common ground.

16. Counsel for the claimant has summarised the matter in this way at paragraph 39(b) of the claimant's skeleton argument. "The experts agree that the French court would follow the approach in Municipalite de Khoms El Mergeb v Societe Dalico and apply "a substantive rule of international law of arbitration", whereby the existence and effectiveness of the arbitration agreement is to be determined in accordance with the parties' common intention."

17. It is also common ground that there is no statutory provision to this effect in French law, rather, the relevant principles have been worked out via courts. The claimant submits that Lords Hamblen and Leggatt, in Enka, only had a statutory provision in mind and in that regard counsel referred to paragraphs 70 and 71 of their Lordships' judgment, where two statutory provisions in Sweden and Scotland were referred to.

18. I accept that the Supreme Court had statutory provisions in mind but I am not persuaded that that

circumstance means that the guidance of the Supreme Court in paragraph 170(vi)(a) has no application. If a foreign law provides by well established case law that where the arbitration is subject to its law, so will be the arbitration agreement, there is no reason in logic why the inference cannot be negated.

19. Counsel for the claimant said that this would lead to uncertainty and that it would be necessary to trawl through case law with the assistance of experts. This argument was a advanced in paragraph 96 of the claimant's skeleton argument.

20. However, that is not the position here. The content of French law is clear and is not in dispute.

21. I was also referred to a previous case where this aspect of French law was referred to: Dallah Real Estate and Tourism Holding v Ministry of Religious Affairs of the Government of Pakistan [2011] 1 AC 763 and in particular, paragraphs 14 and 15 of the judgment of Lord Mance, where Lord Mance said at paragraph 15, having quoted from the French law on the subject:

"This language suggests that arbitration agreements derive their existence, validity and effect from supra national law, without it being necessary to refer to any national law. If so, that would not avoid the need to have regard to French law. It is a law of the country where the award was made, under article 5.1(a) of the Convention and section 1032B of the 1996 Act. The Cour de Cassation is, however, a national court giving a French legal view of international arbitration and Dallah and the government agree that the true analysis is that French law recognises transnational principles as potentially applicable to determine the existence, validity and effectiveness of an international arbitration agreement, such principles being part of French law."

22. I was also referred to a later case, Kabab-Ji v Kout Food group [2022] AER 911, and in particular at paragraphs 88 and 89, where Lord Leggatt also refers to this aspect of French law.

23. Thus, the question for the court is whether the inference or approach in paragraph 170(iv) of the judgment in Enka is negated in the present case by the circumstance that French law, being the

law of the seat of the arbitration, would not regard the parties' choice of English law as governing the arbitration but would instead regard the arbitration as governed by the substantive rules of international arbitration which the French courts have developed.

24. In choosing France as the seat of the arbitration, the parties can fairly be taken as being aware of that aspect of French law and having it in mind and to have intended that the arbitration would be governed by those principles. For that reason I consider that the inference relied upon by claimants cannot be drawn in the present case. It is negatived in the way that the Supreme Court has suggested is possible in an appropriate case.

25. It follows that English law is not the governing law of the arbitration agreement. Instead, the governing law of the arbitration is the French substantive rules applicable to international arbitration. It is true they are not French domestic law, but they are nevertheless provisions of French law which apply to international arbitrations.

26. I next deal with proper forum.

27. If I am wrong about that conclusion, the next question is whether England is the appropriate forum for the claimant's claim to an anti suit injunction. The proper or appropriate forum is that where the case may be more suitably tried for the interests of all the parties and the ends of justice. That England is the appropriate forum must be shown clearly and distinctly. These are the well known principles set out by Lord Robert Goff in Spiliada.

28. The present case is unusual in that the arbitration sought to be protected by the anti suit injunction is not in England but is in France. Indeed, counsel for the claimant accepted that the application in this case was unprecedented.

29. The only connection with England is that the underlying contract is governed by English law, as is, as I must now assume in this part of the judgment, the arbitration agreement.

30. There is also, of course, a clear connecting factor with France, namely the seat of the arbitration.

31. It was submitted by counsel for the claimant that the connecting factor of English law is a powerful connecting factor. In some cases it will be a powerful connecting factor. That is particularly so in cases where there is doubt as to what English law is and it is particularly appropriate for an English court to determine such matters. But it has not been suggested in the present case that there is any real doubt about the English law relevant in this case. So, although there is a connecting factor, it is not a particularly cogent one.

32. The English court is not the court with supervisory or supporting jurisdiction over the arbitration, assuming one were to be commenced. It is not the court which the parties have chosen to have that role. It is the French court which would have that role.

33. In that context, the court must, I think, proceed with caution or particular care before concluding that this court is the proper forum for determining the claim for coercive relief in support of the arbitration agreement, even though as explained in paragraphs 46 to 55 of the claimant's skeleton argument, the jurisdiction to grant anti suit relief stems from section 37 of the Senior Courts Act.

34. The claimant relies upon six submissions which are set out in the claimant's skeleton argument, for saying that England is the appropriate forum. As will be apparent, they very much overlap. Indeed, there are really only five submissions relied upon, because the sixth is simply countering certain arguments advanced by the defendant.

35. The defendant's response to these six submissions is really encapsulated in paragraphs 82 to 83 of the defendant's skeleton argument.

36. The first of the five or six matters relied upon is that England is the only forum where the coercive remedy of an anti suit injunction is available. Such a remedy is not available in France, although the French courts will, in certain circumstances, enforce anti suit injunctions ordered by a foreign court.

37. However, it does not follow that England is the only forum where substantial justice can be done.

The position is merely that the remedy of an injunction, an anti suit injunction, is only available in England. Were there to be an arbitration in France in which the claimant sought remedies in respect of the breach of the arbitration agreement, the remedy of damages for breach of the arbitration agreement would no doubt be available.

38. I do not consider that it can be said that substantial justice cannot be done in the arbitration in France merely because the remedy of an anti suit injunction is not available there.

39. It was said in response by counsel for the claimant that any such award of damages will be difficult to enforce in Russia. That may be so. It has not been the subject of detailed evidence in this case, but I do not consider it can be said that substantial justice cannot be done in the arbitration in France merely because the remedy of an anti suit injunction is not available there.

40. Second, it is said that the availability of an anti suit injunction is a legitimate juridical advantage of which the claimant is entitled to avail itself by commencing proceedings in England. However, when assessing what is and what is not a legitimate juridical advantage, one must keep well in mind the approach of Lord Robert Goff in Spiliada, when dealing with this topic. The remedies available in another jurisdiction may be less advantageous than those available in England but it does not follow that substantial justice can only be done in England or that substantial justice cannot be done in another jurisdiction.

41. Thirdly, it is said that England, where the coercive remedy has evolved and developed, is the only available forum in which justice can be done. But for the reasons I have already given, it does not follow that substantial justice cannot be done in the arbitration in France.

42. Fourthly, it is said that the English court has its own juridical interests to protect, namely that those who contract should be held to their bargains. That is true but it does not follow that substantial justice cannot be done in the arbitration in France. Were the claimants to seek to enforce their rights by arbitration in Paris, the arbitration tribunal would also seek to enforce the

parties' bargain.

43. I am mindful, of course, of the important role that anti suit injunctions play in the enforcement of arbitration agreements. I have had much experience of that in this court. In Enka, reference was made by the majority to an earlier observation by Lord Mance that anti suit injunctions are:

"A highly efficient means to give speedy effect to clearly applicable arbitration agreements……..." and that "in practice, it is of no or little comfort or use for a person entitled to the benefit of an arbitration clause, to be told that where it is being breached, he must engage in foreign litigation."

44. Whereas in Enka no question of forum conveniens arose because there the agreement was to arbitration in London, here the agreement is for arbitration in Paris and so questions of forum conveniens do arise. For the reasons I have given, I have great difficulty in concluding that substantial justice cannot be done in that arbitration in Paris, merely because anti suit relief is not available in French law. It is not enough to say that the remedy available in the English court is more effective.

45. Fifthly, reliance is placed on the recent decision of the Court of Appeal in SQD, where the Court of Appeal granted an interim anti suit injunction because such relief could not be obtained in France. However, that was an ex parte appeal. The defendant was not present and made no submissions. There is therefore a limit to the assistance which I can derive from that decision. By contrast, in this case I have had the benefit of submissions made on behalf of the defendant.

46. In oral submissions, much was made by counsel for the claimant of the recent Russian law which, it was said, effectively departs from Russia's obligation as a signatory to the New York Convention on arbitration by permitting a party to such an agreement to ignore it. However, whilst that is a striking development, if indeed it is to the effect suggested by counsel, and may well be, as he said, a novel circumstance, it does not assist me in excluding that substantial

justice cannot be done in Paris.

47. I am not, therefore, persuaded that in this case England is the proper forum in which to enforce an arbitration agreement which provides for arbitration, not in England, but in another jurisdiction. Substantial justice can be done in the arbitration in France, notwithstanding that coercive relief is not available in France. Indeed, counsel for the claimant submitted that the parties chose Paris as the seat of the arbitration because it is a respected and neutral jurisdiction in which arbitration is supported.

48. For these two reasons, I must conclude that this court has no jurisdiction to hear this claim and so I cannot grant the anti suit injunction which is sought.

49. The claim must be dismissed.

50. That being so, it is unnecessary to consider whether, had there been jurisdiction, the relief sought would have been granted.