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O caso Enka Insaat *v.* Insurance Company Chubb e a questão relativa à lei aplicável à cláusula arbitral: entre a *lex contractus* e a Lei da Sede

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Resumo: Na esfera dos negócios internacionais, frequentemente as partes convencionam que eventuais e futuras disputas, resultantes da execução de um contrato, serão resolvidas pelo método alternativo da arbitragem. Tal escolha, referida como expressa manifestação da autonomia da vontade, manifesta-se a partir da cláusula arbitral, inserida no corpo do contrato. O modo como se encontra redigida e, por conseguinte, compreendida, pode gerar extensas e custosas disputas entre as partes. No Reino Unido, a Suprema Corte recentemente se manifestou sobre a interpretação de cláusulas compromissórias, principalmente sob o aspecto da lei aplicável à sua validade e eficácia. Concluiu aquela Corte que, na ausência de previsão expressa em contrário, será aplicável à cláusula a lei previamente eleita pelos contratantes para reger o contrato. Em não se manifestando em qualquer desses sentidos, considerou a Corte que deveria ser aplicada a lei da sede da arbitragem, por se tratar do sistema legal que mais se aproxima da convenção. Este trabalho realiza uma resenha do caso julgado, além de transcrever os seus trechos mais relevantes.

Palavras-chave: Cláusula arbitral. Lei aplicável. Escolha expressa ou implícita. Lei do Contrato. Lei da Sede da Arbitragem.

Introdução

No campo dos negócios transnacionais, a arbitragem representa um importante método para resolução de disputas que eventualmente possam emergir de uma relação contratual. Na intenção de se distanciar das cortes domésticas de

cada país, as partes inserem no instrumento de contratação uma cláusula compromissória, que produz efeitos de duas grandezas: positivo, consubstanciado na prorrogação da jurisdição a um tribunal arbitral; e negativo, caracterizado pela derrogação da jurisdição do judiciário nacional, que, salvo hipóteses excepcionais, não poderá conhecer e resolver eventual demanda surgida entre as partes e que tenha ligação com as obrigações pactuadas.[1]

Apesar da sua importância e do alcance de seus efeitos, referida cláusula nem sempre recebe a devida atenção dos contratantes. Em muitos casos, a cláusula compromissória é um dos últimos elementos inseridos no contrato, estando no grupo das chamadas *midnight clauses*. As partes acabam por abrir mão de negociações mais aprofundadas sobre a sua redação. Em razão disso, no futuro, a ausência de determinados elementos pode resultar desde a nulidade da cláusula, até dificuldades interpretativas que prejudicam o escorreito desenvolvimento do procedimento arbitral.[2]

Recentemente, a Suprema Corte do Reino Unido se pronunciou sobre o tema, ao julgar a possibilidade de concessão, pelas cortes inglesas, de uma *anti-suit injunction*, para restringir uma das partes de prosseguir com um procedimento arbitral que, supostamente, violava a cláusula arbitral, já que iniciada em local diverso da sede eleita. A despeito de se tratar de uma questão jurisdicional, todas as instâncias se manifestaram sobre as implicações resultantes da lei aplicável à validade e eficácia da cláusula compromissória. Principalmente, discutiu-se a escolha de lei quando o sistema legal que rege o contrato é diverso daquele do local da sede da arbitragem, e, no corpo da cláusula, não há nenhuma indicação quanto à vontade das partes de se submeterem a uma lei determinada.

Este artigo tem por objetivo analisar pormenorizadamente a decisão proferida pela Suprema Corte. Para isso, dividiu-se este estudo em duas seções. Na primeira delas, transcrevem-se os principais trechos da decisão, enquanto, na segunda, realiza-se um comentário do seu teor. No âmbito desta, são descritos os fatos da causa e as questões de Direito suscitadas pelas partes e, em seguida, sumariamente, o fundamento das decisões da Corte de Apelação e da Suprema Corte.

[1] Os mesmos efeitos podem ser vislumbrados na cláusula de eleição de foro. Veja-se ARAUJO; FREITAS, 2020, p. 467-468.

[2] "A well-drafted arbitration clause has a significant impact on how well the parties resolve the dispute – how efficiently, how fairly, and how successfully. Unfortunately, in negotiating and drafting a contract, attorneys and parties too often do not focus on drafting the arbitration clause" (MOSES, 2008, p. 39).

1 Julgado

LORD HAMBLEN AND LORD LEGGATT: (with whom Lord Kerr agrees)[3]

I. Introduction

1. Where an international commercial contract contains an agreement to resolve disputes by arbitration, at least three systems of national law are engaged when a dispute occurs. They are: the law governing the substance of the dispute; the law governing the agreement to arbitrate; and the law governing the arbitration process. The law governing the substance of the dispute is generally the law applicable to the contract from which the dispute has arisen. The law governing the arbitration process (sometimes referred to as the "curial law") is generally the law of the "seat" of the arbitration, which is usually the place chosen for the arbitration in the arbitration agreement. These two systems of law may differ from each other. Each may also differ from the law which governs the validity and scope of the arbitration agreement.

2. The central issue on this appeal concerns which system of national law governs the validity and scope of the arbitration agreement when the law applicable to the contract containing it differs from the law of the seat of the arbitration.

3. This is an issue which has long divided courts and commentators, both in this country and internationally. On one side there are those who say that the law that governs a contract should generally also govern an arbitration agreement which, though separable, forms part of that contract. On the other side there are those who say that the law of the chosen seat of the arbitration should also generally govern the arbitration agreement. There have been Court of Appeal decisions falling on either side of this divide: *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA* [2012] EWCA Civ 638; [2013] 1 WLR 102 and *C v D* [2007] EWCA Civ 1282; [2008] Bus LR 843.

4. In its judgment in the present case [2020] EWCA Civ 574, the Court of Appeal considered that "the time has come to seek to impose some order and clarity on this area of the law" (para 89) and held that, unless there has been an express choice of the law that is to govern the arbitration agreement, the general rule should be that the arbitration agreement is governed by the law of the seat, as a matter of implied choice, subject only to any particular features of the case demonstrating powerful reasons to the contrary (para. 91).

5. On this appeal the appellant argues that this conclusion is heterodox and wrong and that the correct approach is that, in the absence of strong indications to the contrary, a choice of law for the contract is a

[3] Nesta primeira seção, transcreveu-se apenas a opinião majoritária, formulada por Lord Hamblen e Lord Legatt, acompanhada por Lord Kerr. A opinião divergente, formulada por Lord Burrows e acompanhada por Lord Sales, foi apresentada ao longo da seção 2, de comentário do caso.

choice of that law to govern the arbitration agreement. The appellant contends that in the present case the parties have chosen Russian law to govern the construction contract between them and that the implication that they intended the arbitration agreement included in that contract to be governed by Russian law is not displaced by their choice of London as the seat of arbitration.

6. If that issue is decided in its favor, the appellant goes on to argue that the Court of Appeal was wrong to grant an injunction to restrain it from pursuing proceedings in Russia in alleged breach of the arbitration agreement. The appellant's case is that, because the arbitration agreement is governed by Russian law, the Russian courts are best placed to decide whether or not the arbitration agreement applies to the claim which the appellant has brought against the respondent in Russia and that, as a matter of comity or discretion, the English courts ought not to interfere with those proceedings by granting an anti-suit injunction.

(...)

III - The English conflict of laws rules

(i) The Rome I Regulation

25. Where a court of England and Wales has to decide which system of national law governs a contract, the court must normally apply the provisions of the "Rome I Regulation" (a shorthand for Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations). By article 1(1), the Rome I Regulation applies, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. Article 1(2)(e), however, excludes from its scope "arbitration agreements and agreements on the choice of court".

26. Pursuant to article 3, a contract to which the Rome I Regulation applies is governed by the law chosen by the parties, where the choice is made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. In determining whether the parties have made a choice of law, the court should adopt a broad Regulation-based approach, not constrained by national rules of contractual interpretation: see *e .g.* Dicey, Morris & Collins on *The Conflict of Laws*, 15th ed (2012), para 32-048. Article 4 contains rules for determining the law applicable to the contract to the extent that no such choice has been made. Article 4(1) sets out presumptions or prima facie rules that apply in relation to particular types of contract. However, where it is clear from the circumstances of the case that the contract is manifestly more closely connected with another country, or where none of the prima facie rules applies, articles 4(3) and 4(4) respectively provide for the contract to be governed by the law of the country with which it is most closely connected.

(ii) The common law rules

27. Because the Rome I Regulation does not apply to arbitration agreements, an English court which has to decide which system of law governs the validity, scope or interpretation of an arbitration

agreement must apply the rules developed by the common law for determining the law governing contractual obligations. Those rules are that a contract (or relevant part of it) is governed by: (i) the law expressly or impliedly chosen by the parties; or (ii) in the absence of such choice, the law with which it is most closely connected: see *e. g.* Dicey, Morris & Collins on *The Conflict of Laws*, 15th ed (2012), rule 64(1).

28. In view of the similarity between the common law rules and the rules provided by the Rome I Regulation, cases in which the two regimes would yield different results are likely to be rare. But in principle, where an English court has to determine which law governs an arbitration agreement incorporated in a contract, it is the common law rules alone which – because of the exclusion of arbitration agreements from the scope of the Rome I Regulation by article 1(2)(e) – the court must apply.

(iii) Party choice

29. The starting point at common law (as under the Rome I Regulation) is that contracting parties are free to choose the system of law which is to govern their contract, provided only that their choice is not contrary to public policy. The court must therefore construe the contract to see whether the parties have agreed on a choice of law to govern it. (...)

30. The exclusion of arbitration agreements from the scope of the Rome I Regulation by article 1(2)(e) does not prevent an arbitration clause from being taken into consideration for the purposes of article 3 in determining whether there has been a choice of the law applicable to other parts of the contract, as noted in *Giuliano and Lagarde, Council Report on the Convention on the law applicable to contractual obligations* (OJ EU No C 282-1) at p 12. By the same token, the fact that other parts of the contract are within the scope of the Rome I Regulation does not prevent them from being taken into consideration in determining in accordance with the English common law rules of construction whether the parties have agreed on a choice of law to govern the arbitration clause. Like any question of contractual interpretation, this is a unitary exercise which requires the court to construe the contract, including the arbitration clause, as a whole.

(iv) Law of the forum

31. Where an English court has to decide whether a contract which is said to be governed by a foreign system of law is valid, the court applies the "putative applicable law", in other words the law which would govern the contract if it were validly concluded. At the prior stage, however, of determining what is the applicable law or putative applicable law of the contract, all the leading authorities proceed on the basis that it is English rules of law which apply, as stated by Lord Diplock in the passage quoted above. In the *Tunisienne* case, for example, a contract for the transport of oil in several shipments contained a provision (clause 13) that the contract "shall be governed by the laws of the flag of the vessels carrying the goods...". The first question which the House of Lords had to decide was whether, in the circumstances

of the case which included the fact that vessels flying different flags were used to ship the oil, this clause conveyed a choice of French law to govern the contract, as the shipowners argued. To answer that question the House did not apply the rules of French law governing the interpretation of contracts, but (only) those of English law.

(...)

33. In our view, it is both consistent with authority and sound in principle to apply English law as the law of the forum to ascertain whether the parties have agreed on the law which is to govern their contract (and, if not, what law governs it in the absence of agreement). To apply any other law for this purpose would introduce an additional layer of complexity into the conflict of laws analysis without any clear justification and could produce odd or inconsistent results. (...)

34. The Court of Appeal in the present case asserted (although without explanation) that, in construing the contract to determine whether a choice of governing law applies to an arbitration agreement within it, the court should apply the principles of construction of the main contract law if different from English law (see paras 90 and 105(2) of the judgment). We do not consider this to be correct. As we have indicated, the proper approach in determining whether there has been a choice of law is to apply English law as the law of the forum. Where the question is whether there has been a choice of the law applicable to an arbitration clause, the relevant English law rules are the common law rules which require the court to interpret the contract as a whole applying the ordinary English rules of contractual interpretation. The main contract law, if different, has no part to play in the analysis.

(...)

(vi) The default rule

36. Where a choice of law cannot be identified by interpreting the contract, the approach of the common law was at one time to presume that the parties must nevertheless have intended their contract to be governed by some particular system of national law and to impute a relevant intention to them. This is reflected, for example, in the first edition of Dicey's treatise on the conflict of laws, which defined the law governing a contract as "the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves": Dicey, *A Digest on the Law of England with reference to the Conflict of Laws*, 1st ed. (1896), rule 143. In the second half of the 20th century, however, the test of presumed intention came gradually to be superseded by an acknowledgement that at this stage of the analysis the court is no longer concerned with intention at all and is applying a positive rule of law, with the rule being that the contract is governed by the system of law with which it has its "closest and most real connection": see Dicey, Morris & Collins on *The Conflict of Laws*, 15th ed (2012), paras 32-006 – 32-007; *Hellenic Steel Co v. Svolamar Shipping Co Ltd (The Komninos S)* [1991] 1 Lloyd's Rep 370, 374 (Bingham LJ). (...)

(...)

(vii) Splitting the contract

38. English common law (along with other legal systems) recognizes the possibility that different parts of a contract may be governed by different laws – a concept known in conflict of laws theory as *dépeçage*. (...)

39. There are many English cases in which courts have contemplated that different obligations in the same contract may be governed by different laws. The earliest such case to which we were referred was the decision of the Court of Appeal in *Jacobs, Marcus & Co v. Crédit Lyonnais* (1884) 12 QBD 589. There appear to be few cases, however, in which such a situation has been found to exist (although one such case is *Libyan Arab Foreign Bank v Bankers Trust* [1989] QB 728, 746-747). No doubt this is because, as Lord MacDermott said in *Kahler v Midland Bank Ltd* [1950] AC 24 at 42, "the courts of this country will not split the contract in this sense readily or without good reason". It is generally reasonable to assume that parties would intend or expect their contract to be governed by a single system of law. To apply different systems of law to different parts of a contract has the potential to give rise to inconsistency and uncertainty. This is particularly so where questions about the validity or enforceability of contractual obligations arise. (...)

40. The assumption that, unless there is good reason to conclude otherwise, all the terms of a contract are governed by the same law applies to an arbitration clause, as it does to any other clause of a contract. As Mustill J said in *Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446, 456: "In the ordinary way, this [sc the law of the arbitration agreement] would be likely to follow the law of the substantive contract." An arbitration clause may, however, more readily than other clauses be governed by a different law. One reason for this is that an arbitration clause has a different subject matter and purpose from the rest of the contract. It is concerned not with establishing substantive rights and obligations of the parties but with providing a mechanism by which a dispute about such rights and obligations will be resolved. A second reason flows from the principle of separability of the arbitration agreement. This is a cardinal principle of arbitration law, codified in section 7 of the Arbitration Act 1996. Section 7 provides that, unless otherwise agreed by the parties, "an arbitration agreement which forms or was intended to form part of another agreement... shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

41. As counsel for Chubb Russia emphasized, the principle of separability is not a principle that an arbitration agreement is to be treated as a distinct agreement for all purposes but only that it is to be so treated for the purpose of determining its validity or enforceability. That is clear from the words "for that purpose" in section 7 of the 1996 Act. Thus, the separability principle does not require that an

arbitration agreement should be treated as a separate agreement for the purpose of determining its governing law. Nevertheless, the principle is relevant to the conflict of laws analysis because it alleviates the difficulty identified by *Dicey, Morris & Collins* in the passage quoted at para 39 above in treating different parts of a contract as governed by different laws. Where the separability principle is recognized by the putative applicable law of the arbitration agreement, no inconsistency will arise from treating issues such as whether the contract is discharged by frustration, or whether the innocent party may terminate or withhold performance on account of the other party's breach, or whether the contract has been rescinded for misrepresentation, as governed by a different law from the law of the arbitration agreement, as the resolution of those issues will not affect the validity or enforceability of the arbitration agreement.

(...)

IV. Choice of law for the whole contract

(i) Significance of a governing law clause

43. It is rare for the law governing an arbitration clause to be specifically identified (either in the arbitration clause itself or elsewhere in the contract). It is common, however, in a contract which has connections with more than one country (or territory with its own legal system) to find a clause specifying the law which is to govern the contract. A typical clause of this kind states: "This Agreement shall be governed by and construed in accordance with the laws of [name of legal system]." Where the contract also contains an arbitration clause, it is natural to interpret such a governing law clause, in the absence of good reason to the contrary, as applying to the arbitration clause for the simple reason that the arbitration clause is part of the contract which the parties have agreed is to be governed by the specified system of law. (...)

(...)

(iii) Considerations of principle

53. A number of further considerations confirm the reasonableness of, as a general rule, construing a choice of law to govern the contract as applying to an arbitration agreement set out in a clause of the contract, even where the law chosen to govern the contract differs from that of the place chosen as the seat of the arbitration:

i) This approach provides a degree of certainty. The parties can be assured that an agreement as to the governing law will generally be an effective choice in relation to all of their contractual rights and obligations and to all of their disputes.

ii) It achieves consistency. The same system of law governs all the parties' rights and obligations. It can be unsatisfactory for potentially closely related issues such as the identity of the contracting parties or the proper approach to the interpretation of their bargain to be governed by different systems of law, depending on whether it relates to the main contract or the arbitration agreement.

iii) It avoids complexities and uncertainties. As soon as the relationship between the parties is subject to two systems of law, problems can arise as to where and how to draw the boundaries between them. This is exemplified by the increasing prevalence of multi-tier dispute resolution clauses. If the arbitration agreement is governed by a different system of law from the main body of the contract, provisions that require negotiation and/or mediation and/or expert determination in advance of arbitration raise potentially difficult questions as to whether they are governed by the law applicable to the arbitration agreement or by the law generally applicable to the contract, and indeed as to whether those questions should be answered by applying the common law rules or the Rome I Regulation. Article 50.1 of the construction contract is an example of such a clause. Although we explain later how these difficulties may be addressed, if there is only one system of law then no such difficulties arise.

iv) It avoids artificiality. The principle that an arbitration agreement is separable from the contract containing it is an important part of arbitration law but it is a legal doctrine and one which is likely to be much better known to arbitration lawyers than to commercial parties. For them a contract is a contract; not a contract with an ancillary or collateral or interior arbitration agreement. They would therefore reasonably expect a choice of law to apply to the whole of that contract.

v) It ensures coherence. It is consistent with the treatment of other types of clauses whose validity is also insulated from challenges to the contract, such as choice of law or choice of court clauses. Such clauses are generally presumed to be governed by the law of the contract of which they form part: see Dicey, Morris & Collins on *The Conflict of Laws*, 15th ed (2012) at paras 12-103 and 12-109.

54. As a matter of principle and authority there are therefore strong reasons why an agreement on a choice of law to govern a contract should generally be construed as applying to an arbitration agreement set out or otherwise incorporated in the contract.

(...)

V. The approach of the Court of Appeal

(i) The Court of Appeal's judgment

59. The Court of Appeal reached a contrary conclusion in the present case. Leaving aside cases in which, exceptionally, a choice of the law governing the arbitration agreement is specified in the arbitration agreement itself, Popplewell LJ (with whom Flaux and Males LJJ agreed) was prepared to accept that an express choice of the law applicable to the contract containing the arbitration agreement may sometimes, as a matter of construction, amount to an express choice of the law applicable to the arbitration agreement (para. 90). But he considered that this conclusion would follow only in a minority of cases and that in all other cases there is a strong presumption that the parties have impliedly chosen the law of the seat of the arbitration to govern the arbitration agreement. This was said to be the general rule, "subject only to any particular features of the case demonstrating powerful reasons to the contrary" (para. 91).

(ii) Separability

60. Our first difficulty with this proposed general rule is that we do not agree that it is only in a minority of cases that an express choice of law to govern the contract should properly be construed as being a choice of law to govern an arbitration agreement included in the contract. As we have discussed, a clause such as "This Agreement is to be governed by and construed in accordance with the laws of [a named country]" is naturally and sensibly understood to mean that the law of that country should govern and determine the meaning and effect of all the clauses in the contract which the parties signed including the arbitration clause. It is unclear to us why more should be needed - or what more on the Court of Appeal's approach is required - to make it clear that a phrase such as "This Agreement" means the whole agreement and not just part of it.

61. The Court of Appeal justified its approach on the 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" (para 92). 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.

62. Descriptions of an arbitration clause as, for example, "collateral to the main contract in which it is incorporated" (*Paal Wilson & Co A/S v. Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 AC 854, 917, per Lord Diplock) or "a separate contract, ancillary to the main contract" (*Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corpn. Ltd.* [1981] AC 909, 998, per Lord Scarman) need to be seen in their context as ways of expressing the doctrine that the discharge by frustration (or for other reasons) of the substantive obligations created by the contract will not discharge the parties' agreement to arbitrate. The arbitration clause is nonetheless part of the bundle of rights and obligations recorded in the contractual document. (...)

(...)

64. In his lead judgment in the Court of Appeal Popplewell LJ quoted this passage (at para 93) and appeared there to recognize that it is wrong to characterize an arbitration clause generally as a separate agreement. He went on, however, to make a more specific point that

one of the purposes for which an arbitration agreement is treated as separate and severable is that of applying the curial law which, where the parties have chosen a different arbitration seat – and hence curial law – from the law applicable to their contract, is distinct from the latter system of law. The rhetorical question was posed, at para 94: "Why then should [the law applicable to the contract] have anything to say about the closely related aspect of the very same arbitration agreement, namely the [law which governs it] (absent express language to that effect so as to give rise to an express choice of [the arbitration agreement] law)?" Leaving aside what should count as "express language" in this regard, this argument rests on the premise that the curial law which governs the arbitration process is so closely related to the law governing the arbitration agreement that a choice of law to govern the contract should generally be presumed not to apply to an arbitration clause when the parties have chosen a different curial law. It is to this argument, which was central to the Court of Appeal's reasoning, that we therefore turn.

(iii) The overlap argument

65. This argument, which we will call the "overlap argument", seems to have made its first appearance in *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530, mentioned earlier, where Toulson J considered that, by stipulating for arbitration in London under the provisions of the Arbitration Act 1996, the parties had impliedly chosen English law to govern the validity of the arbitration agreement despite the choice of New York law as the governing law of the policy (see p 543b). His essential reasoning (at p 541e) was that the substance and process of arbitration "are closely intertwined" and that the 1996 Act "contains various provisions which could not readily be separated into boxes labelled 'substantive arbitration law' or 'procedural law', because that would be an artificial division".

66. The Court of Appeal in the present case endorsed and elaborated on this reasoning, concluding that "the overlap between the scope of the curial law and that of the [arbitration agreement] law strongly suggests that they should be the same" (para 96). They further considered that, given this overlap and the fact that the curial law which regulates the arbitration process is a matter of choice which comes with an express choice of seat, it seems "natural to regard" a choice of seat as an implied choice of the law applicable to the arbitration agreement (para 101). On this basis they held that there is a "strong presumption" that a choice of seat is an implied choice of the law which is to govern the arbitration agreement (para 105(3)).

(iv) Choice of curial law

67. On this appeal Chubb Russia disputed the initial premise that a choice of seat for an arbitration involves any choice of law at all, procedural or substantive. Counsel for Chubb Russia submitted that the application of the curial law of the seat is something that follows automatically from a choice of place of arbitration rather than being itself a matter of choice. (...)

68. (...) By contrast, the nature and scope of the jurisdiction exercised by the courts of a country over an arbitration which has its seat there is a highly material consideration in choosing a seat for the arbitration. That is reinforced by the fact that the seat of an arbitration is a legal concept rather than a physical one. A choice of place as the seat does not dictate that hearings must be held, or that any award must actually be issued, in that place. As the Court of Appeal observed (at para 46), it is perfectly possible to conduct an arbitration with an English seat at any convenient location, anywhere in the world. Furthermore, under section 53 of the Arbitration Act 1996, unless otherwise agreed by the parties, where the seat of an arbitration is in England and Wales, any award in the proceedings shall be treated as made there, regardless of where it was signed, dispatched or delivered to any of the parties (see also article 31(3) of the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985). The point of agreeing a seat is to agree that the law and courts of a particular country will exercise control over an arbitration which has its seat in that country to the extent provided for by that country's law. A choice of seat can in these circumstances aptly be regarded as a choice of the curial law.

69. As noted at the beginning of this judgment, however, the curial law which applies to the arbitration process is conceptually distinct from the law which governs the validity and scope of the arbitration agreement. Whether a choice of the curial law carries any implication that the parties intended the same system of law to govern the arbitration agreement – and, if so, the strength of any such implication - must depend on the content of the relevant curial law.

(vi) Section 4(5) of the 1996 Act

73. We agree that there is a close relationship between provisions of the Arbitration Act concerned with the arbitration agreement and provisions of the Act concerned with the arbitration process and that the distinction between them is not always clear or easy to draw. But we do not accept that this justifies the conclusion that a choice of an English seat of arbitration is an implied choice that the arbitration agreement will be governed by English law. In our view, a conclusive answer to that argument lies in a point raised by Chubb Russia on this appeal which was not fully developed in the Court of Appeal. The point in short is that almost all the provisions of the 1996 Act relied on to support the overlap argument are non-mandatory and, where the arbitration agreement is governed a foreign law, by reason of section 4(5) the non-mandatory provisions of the Act which concern arbitration agreements do not apply to it. As the legislation contemplates and specifically provides for a situation in which the arbitration agreement will be governed by a foreign law even though English law governs the arbitration process, no necessary inference can be drawn that, by choosing an English seat and with it English law as the curial law, parties are also impliedly choosing English law to govern their arbitration agreement.

(...)

VI. Avoiding invalidity

(i) The validation principle

95. It is a well-established principle of contractual interpretation in English law, which dates back at least to the time of Sir Edward Coke (see Coke upon Littleton (1628) 42a), that an interpretation which upholds the validity of a transaction is to be preferred to one which would render it invalid or ineffective. In the days when Latin was commonly used in the courts, it was expressed by the maxim "verba ita sunt intelligenda ut res magis valeat quam pereat" – translated by Staughton LJ in *Lancashire County Council v. Municipal Mutual Insurance Ltd.* [1997] QB 897, 910, as "the contract should be interpreted so that it is valid rather than ineffective".

96. This principle may apply if, in determining whether the parties have agreed on a choice of governing law, a putative governing law would render all or a part of the contract ineffective. For example, in *In re Missouri Steamship Co.* (1889) 42 Ch D 321 a contract for the carriage of cattle by sea from Boston to England contained a clause that the carrier should not be liable for the negligence of the master or crew of the ship. The clause was valid under English law but void under the law of Massachusetts as being against public policy. The cattle were lost by the negligence of the master and crew, and the shipper claimed against the carrier for the loss. In concluding that the parties intended the contract to be governed by English law, the judge and the Court of Appeal placed reliance on the presumption that, in the words of Fry LJ at p 341, "the law which would make the contract valid in all particulars was the law [intended] to regulate the conduct of the parties."

97. In that case the potential invalidity of a significant clause in a contract was relied on as indicating the law intended to govern the entire contract. Where the clause in question is an arbitration clause, because of its severable character its putative invalidity may support an inference that it was intended to be governed by a different law from the other provisions of the contract - or may at least negate an inference that the law generally applicable to the contract was intended to apply to the arbitration clause.

(...)

(iii) The decision in Sulamérica

101. It was this reasoning which led the Court of Appeal in the *Sulamérica* case to conclude that the arbitration clause in that case was governed by English law despite, as discussed earlier, starting from the position that an express choice of law to govern the contract is normally intended to apply to the arbitration clause.

(...)

103. The insured's case was that the contract, including the arbitration agreement, was governed by Brazilian law and that under Brazilian law the arbitration agreement was not enforceable against them without their consent. As noted earlier, Moore-Bick LJ (with whom Hallett LJ and Lord Neuberger MR agreed) accepted that the choice of Brazilian law to govern the contract was a strong indication that the parties

intended that system of law to govern the arbitration agreement. However, Moore-Bick LJ identified two factors pointing the other way. The first was the overlap argument which we have just discussed: that by choosing London as the seat of arbitration, the parties must have foreseen and intended that the provisions of the Arbitration Act 1996 should apply to any arbitration, including those provisions which are more substantive than procedural in nature (para. 29). For the reasons already given, we do not think that this argument is sound, as it overlooks the fact that, if the arbitration agreement was governed by Brazilian law, the non-mandatory substantive provisions of the Act would be excluded by section 4(5). It was the second factor, however, which the Court of Appeal regarded as decisive. This was the possible existence of a rule of Brazilian law which would render the arbitration agreement enforceable only with the insured's consent (para. 30). Moore-Bick LJ reasoned that, given the terms of the mediation and arbitration clauses, the parties could not have intended to choose a system of law that "either would, or might well, have that effect" (para. 31). As he also put it, Brazilian law could not have been intended to govern the arbitration agreement when "there is at least a serious risk that a choice of Brazilian law would significantly undermine that agreement".

104. In these circumstances it was necessary to identify the system of law with which the arbitration agreement was most closely connected. (...)

(...)

VII. Applying the closest connection test

118. So far we have been considering the question whether the parties to a contract have chosen the law applicable to the arbitration agreement, either specifically or by choosing a system of law to govern the contract as a whole including the arbitration agreement. We now turn to the situation in which no such choice has been made. As discussed earlier (see para 36 above), the court must in these circumstances determine, objectively and irrespective of the parties' intention, with which system of law the arbitration agreement has its closest connection. This exercise is different in nature from the attempt to identify a choice (whether express or implied), as it involves the application of a rule of law and not a process of contractual interpretation.

119. Even where the parties have not agreed what law is to govern their contract, it is reasonable to start from an assumption – for reasons given earlier - that all the terms of the contract, including an arbitration clause, are governed by the same system of law. Where, however, the parties have selected a place for the arbitration of disputes, there is authority for, as a general rule, regarding the law with which the arbitration agreement is most closely connected as the law of the seat of arbitration. As we have seen, this was the approach adopted by the Court of Appeal in the *Sulamérica* case (see para 104 above). It was also endorsed by the Court of Appeal in *C v. D* (see para 48 above), albeit that in that case insufficient reason was given, in our opinion, for rejecting the inference that the law chosen to govern the insurance contract was intended to apply to the arbitration

clause. Among commentators, this rule notably has the support of Dicey, Morris & Collins on *The Conflict of Laws*, 15th ed (2012), rule 64(1)(b) and para. 16-016; see also *Russell on Arbitration*, 24th ed, (2015) at para. 2-121.

120. There are a number of reasons of principle and policy which in our opinion justify as a general rule regarding the law of the place chosen as the seat of arbitration as the law most closely connected with the arbitration agreement which in the absence of choice will apply by default.

(i) The place of performance

121. The starting point is that the seat of arbitration is the place where (legally, even if not physically) the arbitration agreement is to be performed. In identifying the system of law with which a contract (or relevant part of it) has its closest and most real connection, the place where the transaction is to be performed is the connecting factor to which the common law has long attached the greatest weight (since the place where the contract was concluded ceased to be seen as significant): see *e. g.* Dicey, Morris & Collins on *The Conflict of Laws*, 15th ed (2012), para 32-073. This is justified by the fact that states have an interest in regulating transactions taking place within their territory and by the consequent natural assumption that the law of the territory in which a transaction is taking place will govern it in the absence of a contrary indication. By agreeing to a seat of arbitration the parties submit themselves to the jurisdiction of the courts of that place and to its law and coercive powers for the purposes of deciding any issue relating to the validity or enforceability of their arbitration agreement. Thus, as we discuss later in this judgment (see Part XI below), the courts of the seat have jurisdiction to grant an injunction to restrain proceedings brought in breach of the agreement to arbitrate. The parties also by their choice of seat impliedly agree to bring any claim for a remedy relating to the existence or scope of the arbitrators' jurisdiction (including any issue as to the validity or scope or the arbitration agreement), and any challenge to an arbitral award, in the courts of that place: see *C v D* [2007] EWHC 1541 (Comm); [2007] 2 All ER (Comm) 557, paras. 29-34 (Cooke J); *C v. D* [2007] EWCA Civ 1282; [2008] Bus LR 843, para. 17 (CA); *Minister of Finance (Inc) v. International Petroleum Investment Co* [2019] EWCA Civ 2080; [2020] Bus LR 45, paras 36-49; Dicey, Morris & Collins on *The Conflict of Laws*, 15th ed (2012), para. 16-036. The seat of arbitration is in these circumstances the place to whose system of law the arbitration agreement is most closely attached.

122. By contrast, there is no reason to regard the place of performance of the substantive obligations created by the contract as a significant connection for the purpose of determining the law applicable to the arbitration agreement (as opposed to for the purpose of determining what law the arbitrators should apply in deciding a dispute). This is because (as noted at para 40 above) the subject matter and purpose of an arbitration agreement are different from those of the contract in which it is incorporated. The irrelevance of the place of performance of the main contract is illustrated by the fact that seats

of arbitration are frequently chosen which have no connection with where the parties' substantive obligations are to be performed (or otherwise with the contract) and sometimes precisely because they have no such connection. Other factors connecting the main contract to a country or its laws are equally irrelevant in regard to the arbitration agreement. For example, article 4 of the Rome I Regulation adopts a presumption that the contract is most closely connected with the country where the party required to effect the characteristic performance of the contract has his habitual residence. There is no reason to regard this as a factor which should have any bearing on the law applicable to the arbitration agreement.

(...)

124. We do not consider that the importance of the connection between the law governing the arbitration agreement and the law of the seat is undermined by the fact that some national laws, such as the Arbitration Act 1996 in England and Wales, allow the parties a wide degree of freedom to make their own arrangements, either by choosing another system of law to govern their arbitration agreement or arbitral procedure (see section 4(5) of the 1996 Act, discussed earlier) or by agreeing to the application of institutional rules made by an arbitral body such as the ICC (see section 4(3) of the 1996 Act). The extent to which the parties are free to make such arrangements is itself a matter for the law of the seat. Furthermore, any national law is likely to include mandatory provisions, described in section 1(b) of the 1996 Act as "such safeguards as are necessary in the public interest," which have effect notwithstanding any agreement to the contrary. As noted earlier, in the 1996 Act these include sections 66 to 68, which govern any challenge to an award made in England including any challenge to the substantive jurisdiction of the arbitrators on grounds that the arbitration agreement is invalid or unenforceable or does not cover the dispute referred to arbitration. Such provisions of themselves establish a close nexus between the law determining the validity and scope of the arbitration agreement and the law of the seat of arbitration.

(i) Consistency with international law and legislative policy

125. A second, and in our view compelling, reason for treating an arbitration agreement as governed by the law of the seat of arbitration in the absence of choice is that such a rule accords with international law as embodied in the 1958 New York Convention and other international instruments, as well as with the national law which gives effect to the New York Convention in England and Wales.

(...)

127. Article V(1)(a) of the Convention specifies, among the limited circumstances in which recognition or enforcement by the courts of a Convention state of an award made in another Convention state may be refused, proof that the arbitration 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". (...)

128. Article V(1)(a) - enacted into English law by section 103(2)(b) of the Arbitration Act 1996 – has two limbs, which are intended to be treated as uniform international conflict of laws rules: see *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2008] EWHC 1901 (Comm); [2009] 1 All ER (Comm) 505, para .78 (Aikens J); and [2010] UKSC 46; [2011] 1 AC 763, para. 123 (Lord Collins). The first, and primary, rule is that the validity of the arbitration agreement is governed by "the law to which the parties [have] subjected it" – in other words the law chosen by the parties. The second, default rule, which applies where no choice has been indicated is that the applicable law is that of "the country where the award was made". Where the parties have chosen the seat of arbitration, this will be (or be deemed to be) the law of the seat. In English law this is expressly provided by section 100(2)(b) of the 1996 Act.

(...)

135. While this provision only applies directly in proceedings brought to enforce an award made in another Convention state, it would be illogical to apply different conflict rules to determine which law governs the validity of the arbitration agreement where the arbitration is seated (and the award therefore treated as made) in England. Thus, in cases where the parties have not chosen the law of the arbitration agreement but have chosen the seat of arbitration, it would be illogical if the English courts were to treat the validity of the arbitration agreement as governed by the law of the seat if the parties have chosen a foreign seat but by the law of the main contract if they have been chosen an English seat of arbitration. Such an approach would be all the more incoherent given that, if proceedings were brought in another Convention state to enforce an award made in England, the foreign court would apply the law of the seat (and not the law of the main contract, if different) to determine the validity of the award as required by article V(1)(a) of the Convention.

(...)

X. Conclusions on applicable law

170. It may be useful to summarize the principles which in our judgment govern the determination of the law applicable to the arbitration agreement in cases of this kind:

i) Where a contract contains an agreement to resolve disputes arising from it by arbitration, the law applicable to the arbitration agreement may not be the same as the law applicable to the other parts of the contract and is to be determined by applying English common law rules for resolving conflicts of laws rather than the provisions of the Rome I Regulation.

ii) According to these rules, the law applicable to the arbitration agreement will be (a) the law chosen by the parties to govern it or (b) in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected.

iii) Whether the parties have agreed on a choice of law to govern the arbitration agreement is ascertained by construing the arbitration

agreement and the contract containing it, as a whole, applying the rules of contractual interpretation of English law as the law of the forum.

iv) 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.

v) 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.

vi) 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 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.

vii) Where there is no express choice of law to govern the contract, a clause providing for arbitration in a particular place will not by itself justify an inference that the contract (or the arbitration agreement) is intended to be governed by the law of that place.

viii) In the absence of any choice of law to govern the arbitration agreement, the arbitration agreement is governed by the law with which it is most closely connected. Where the parties have chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations.

ix) The fact that the contract requires the parties to attempt to resolve a dispute through good faith negotiation, mediation or any other procedure before referring it to arbitration will not generally provide a reason to displace the law of the seat of arbitration as the law applicable to the arbitration agreement by default in the absence of a choice of law to govern it.

171. Applying these principles, we have concluded that the contract from which a dispute has arisen in this case contains no choice of the law that is intended to govern the contract or the arbitration agreement within it. In these circumstances the validity and scope of the arbitration agreement (and in our opinion the rest of the dispute resolution clause containing that agreement) is governed by the law of the chosen seat of arbitration, as the law with which the dispute resolution clause is most closely connected. We would therefore affirm – albeit for different reasons – the Court of Appeal's conclusion that the law applicable to the arbitration agreement is English law.

172. We have not found it necessary to consider arguments made by Enka that, if the arbitration agreement were governed by the law of Russia as the place of performance of the construction project and

country with which the parties' substantive contractual obligations have their closest connection, there would be a serious risk that the parties' intention of having their disputes finally settled by arbitration in a neutral forum would be defeated. This was disputed by Chubb Russia, but in the light of the conclusion we have reached there is no need to resolve this further issue.

XI. The anti-suit injunction

173. If, as we have held, the arbitration agreement is governed by English law, Chubb Russia does not dispute that it was legitimate for the Court of Appeal to exercise its discretion whether to grant an anti-suit injunction afresh and does not contend that it erred in so doing. Its challenge to the order made by the Court of Appeal rests on the assumption that the arbitration agreement is governed by Russian law. Chubb Russia contends that the English courts ought in these circumstances to defer to the decision of the Russian courts on whether their dispute must be referred to arbitration or may be resolved by litigation in the Russian courts. On Chubb Russia's case the English court's approach to the grant of anti-suit injunctions should differ according to whether the arbitration agreement is governed by English law or a foreign law. As we have held that the arbitration agreement is governed by English and not Russian law, it is not necessary to address this further ground of appeal. Nevertheless, given that it has been fully argued and the importance of the issues raised, we shall briefly address it.

174. As already noted, by choosing a seat of arbitration the parties are choosing to submit themselves to the supervisory and supporting jurisdiction of the courts of that seat over the arbitration. A well established and well recognized feature of the supervisory and supporting jurisdiction of the English courts is the grant of injunctive relief to restrain a party from breaching its obligations under the arbitration agreement by bringing claims which fall within that agreement in court proceedings rather than, as agreed, in arbitration. A promise to arbitrate is also a promise not to litigate.

(...)

177. In granting an anti-suit injunction the English courts are seeking to uphold and enforce the parties' contractual bargain as set out in the arbitration agreement. In principle it should make no difference whether that agreement is governed by English law or by a foreign law. In both cases the enquiry is whether there has been a breach of the arbitration agreement and whether it is just and convenient to restrain that breach by the grant of an anti-suit injunction. The detail of the enquiry may differ, but its nature is the same.

178. Chubb Russia contends that as a matter of discretion the considerations to be taken into account are different where the arbitration agreement is governed by foreign law. It submits that issues of scope and breach of the arbitration agreement are generally best left to the foreign court which has the requisite expertise in the applicable foreign law.

179. The judge's view was that different considerations arise where the arbitration agreement is governed by foreign law by reason of the doctrine of forum conveniens. We agree with the Court of Appeal that forum conveniens, which is a matter that goes to the court's jurisdiction, is not relevant. By agreeing to arbitrate in London the parties were agreeing to submit to the supervisory and supporting jurisdiction of the English courts, including its jurisdiction to grant anti-suit injunctions.

(...)

183. The grant of an anti-suit injunction is always a matter of discretion. There may be circumstances in which it would be appropriate to await a decision of a foreign court. If, for example, the scope of the arbitration agreement was about to be determined by the highest court in the country of the governing law in unrelated proceedings, then it might be sensible for the English court to await that decision. Where, however, the issue arises in proceedings brought in alleged breach of the arbitration agreement, deference to the foreign court should generally give way to the importance of upholding the parties' bargain and restraining a party to an arbitration agreement from doing something it has promised not to do.

184. We therefore agree with the Court of Appeal that the principles governing the grant of an anti-suit injunction in support of an arbitration agreement with an English seat do not differ according to whether the arbitration agreement is governed by English law or foreign law. Forum conveniens considerations are irrelevant and comity has little if any role to play. The court's concern will be to uphold the parties' bargain, absent strong reason to the contrary, and the court's readiness to do so is itself an important reason for choosing an English seat of arbitration.

185. It follows that if the agreement to arbitrate disputes contained in article 50.1 of the construction contract had been governed by Russian law, it would have been necessary for the English court to determine whether under the law of Russia the agreement is valid and the claim which Chubb Russia is seeking to pursue in Russia falls within its scope. If those questions were answered in the affirmative, it would in any event have been appropriate to grant an anti-suit injunction.

XII. Overall conclusion

186. Although our approach to the determination of the law applicable to the arbitration agreement differs from that taken by the Court of Appeal, we have similarly concluded that the arbitration agreement in this case is governed by English law. It is common ground that in these circumstances the arbitration agreement is valid, the dispute between the parties falls within it and that the injunction granted by the Court of Appeal to restrain Chubb Russia from proceeding against Enka in Russia was properly granted. It follows that we would dismiss the appeal (...).

2 Comentário

2.1 Fatos da causa e questões de direito em debate[4]

Em maio de 2019, a companhia de seguros Chubb Russia iniciou um procedimento arbitral na Corte de Arbitragem de Moscou (Moscow Arbitrazh Court) em face da sociedade turca Enka e outros 10 requeridos. A seguradora demandava o reembolso da quantia de US$ 400 milhões, que havia pagado a título de indenização a PJSC Unipro (Unipro) pelos danos resultantes de um incêndio, ocorrido em fevereiro de 2016, em uma usina elétrica localizada em Berezovskaya, Rússia.

A usina havia sido projetada e construída a partir de um contrato realizado entre a Unipro, proprietária, e a sociedade Energoproekt. Esta, por sua vez, realizou, à época, diversos outros contratos com subempreiteiras, entre elas a Enka, para execução do projeto. No contrato entre a Energoproekt e a Enka havia uma cláusula escalonada,[5] cuja redação previa, expressamente, que eventual disputa arbitral entre as partes (i) seguiria o Regulamento de Arbitragem da Câmara de Comércio Internacional; (ii) seria resolvida por três árbitros, indicados de acordo com tal regulamento; (iii) seria conduzida em inglês; e (iv) teria por sede a cidade de Londres, na Inglaterra.

Em maio de 2014, a Energoproekt, a Unipro e a Enka realizaram um contrato de cessão de direitos e obrigações, a partir do qual a primeira sociedade cedia a Unipro todos os direitos oponíveis a Enka, resultantes do contrato de prestação de serviço anteriormente realizado. Tal negócio reiterava que eventuais disputas seriam resolvidas por meio de arbitragem, seguindo os moldes previstos na cláusula 50.1 do contrato original.

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[4] Os fatos resenhados nesta seção se encontram extensivamente tratados em ambas as decisões. Veja-se, na Corte de Apelação, Enka Insaat Ve Sanayi AS *v.* OOO Insurance Company Chubb *et al.* (ENGLAND AND WALES, 2020). Na Suprema Corte, Enka Insaat Ve Sanayi AS *v.* OOO Insurance Company (UNITED KINGDOM, 2020).

[5] "Clause 50.1 of the Contract. 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 the fact of its conclusion (hereinafter – 'Dispute') by means of negotiations between themselves. In the event of the failure to resolve any Dispute pursuant to this Article within 10 (ten) days from the date that either Party sends a Notification to the opposite Party containing an indication of the given Dispute (the given period may be extended by mutual consent of the Parties) any Party may, by giving written notice, cause the matter to be referred to a meeting between the senior managements of the Contractor and Customer (in the case of the Contractor senior management should be understood as a member of the executive board or above, in the case of Customer, senior management shall be understood as general directors of their respective companies). The parties may invite the End Customer to such Senior Management Meeting. Such meeting should be held within fourteen (14) calendar days following the giving of a notice. 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 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."

Após indenizar a Unipro pelos prejuízos resultantes do acidente, a seguradora se sub-rogou nos direitos eventualmente existentes entre a proprietária da usina e a sociedade turca Enka, com relação à responsabilidade pelo incêndio. Em setembro de 2017, Enka recebeu uma carta, enviada em nome da seguradora. Nela, contava-se que o incêndio havia resultado de defeitos existentes em oleodutos que seriam de sua responsabilidade, e cuja instalação estava compreendida no trabalho realizado para a Energoproekt. Posteriormente, os representantes legais da seguradora enviaram mais uma carta a Enka, em que reafirmavam a causa do acidente e atribuíam a responsabilidade à sociedade, requerendo, ao final, o ressarcimento do valor pago à título de indenização para a Unipro. Enka, por sua vez, em comunicação enviada para a proprietária da usina, refutava todas as alegações da seguradora, afirmando que não possuía qualquer responsabilidade pelos danos ocorridos, uma vez que o serviço, cuja prestação deficiente teria causado o acidente, não estava compreendido nos trabalhos realizados pela Enka a Energoproekt.

Inobstante isso, a Chubb Russia iniciou um procedimento arbitral em face da Enka na Corte de Arbitragem de Moscou. Ineficazes os pedidos para que a seguradora extinguisse o procedimento na Rússia, a Enka instaurou uma demanda[6] perante a Corte Comercial de Londres, em que requeria (i) a declaração de que a Chubb Russia estava vinculada à cláusula arbitral prevista no contrato realizado entre a Enka e a Energoproekt, e que o objeto da demanda em Moscou estava compreendido no escopo da cláusula; e (ii) a concessão de uma *injunction*[7] requerendo que Chubb Russia extinguisse o procedimento russo, que, segundo ela, violava a cláusula 50.1 do contrato original.

A sociedade turca argumentava que, de acordo com as regras conflituais russas, a cláusula arbitral deveria ser regida pela lei inglesa, por se tratar do sistema legal da sede da arbitragem. Tal conclusão se baseava (i) no fato de que as partes não haviam realizado uma escolha expressa de lei aplicável à cláusula compromissória; e (ii) que, em geral, a esta cláusula não se estendia a lei eleita para reger o contrato. De acordo com a lei inglesa, a cláusula arbitral seria válida e eficaz, o que vincularia a seguradora Chubb Russia, já que o objeto da demanda em Moscou estaria compreendido no escopo da cláusula. Para a Enka, mesmo que a cláusula compromissória fosse regida pela lei russa, o procedimento estrangeiro violava a cláusula 50.1 do contrato original, uma vez que as matérias lá

[6] Na jurisdição inglesa, "Arbitration Claim Form".

[7] A *anti-suit injunction* se configura como medida própria do *Common Law* e tem por objetivo restringir uma parte de ajuizar/iniciar ou continuar um procedimento (judicial ou arbitral) em outra jurisdição. Para um estudo sobre a medida, veja-se FENTIMAN, 2017, p. 79-85.

tratadas seriam qualificadas, por aquela legislação, como de natureza contratual e, portanto, arbitráveis.

Por sua vez, Chubb Russia argumentava que, de acordo com os princípios ingleses sobre conflito de leis, a cláusula arbitral seria regida pela lei russa. Na visão da seguradora, uma vez que chegasse a tal conclusão, o magistrado deveria, por cortesia e discricionariedade, rejeitar os pedidos da Enka. Isso porque a Corte de Arbitragem de Moscou seria a mais apropriada para analisar se o objeto da disputa estaria compreendido no escopo da cláusula compromissória, de acordo com o Direito russo.

Ao analisar o pedido de ambas as partes, o juiz da Corte Comercial de Londres decidiu declinar a decisão sobre a lei aplicável à cláusula arbitral, extinguindo a demanda da Enka. A fundamentação de tal decisão teve por base a doutrina do *forum non conveniens*,[8] uma vez que o magistrado considerou que questões relacionadas ao escopo da cláusula arbitral e da lei aplicável seriam mais apropriadamente determinadas pela Corte de Arbitragem de Moscou, no procedimento que lá já havia sido instaurado. Em face dessa decisão, Enka interpôs recurso.

2.2 A decisão da Corte de Apelação

A Corte de Apelação (da Inglaterra e do País de Gales) decidiu reformar a decisão recorrida, afirmando que não caberia ao magistrado declinar sua jurisdição com base em questões de *forum non conveniens*. O fato de a sede da arbitragem ser em Londres significava que as cortes inglesas eram necessariamente apropriadas para conceder, se assim entendessem cabível, a *injunction* requerida. A escolha das partes por esse local indicava o seu desejo de submeter àquelas cortes o exercício de certos poderes, dentre eles o de concessão à ordem de *anti-suit injunction*, nas hipóteses de receio ou concreta violação da cláusula arbitral. Além da determinação de jurisdição, a escolha da sede representaria também uma escolha de lei, a *curial law*, voltada à regulação dos aspectos processuais da arbitragem.[9]

[8] Conforme desenvolve a doutrina, *forum non conveniens* pode ser definido como o poder discricionário de uma corte de declinar sua jurisdição, sob o fundamento de que uma corte estrangeira é mais apropriada para conhecer e decidir o litígio em questão. Para um estudo aprofundado do tema, veja-se FAWCETT, 1995.

[9] "The significance of the choice of a seat is not a practical one as to where hearings or deliberations of the tribunal will be held but a legal one as to the curial law and the curial court. (...) To hold that the choice of seat is a submission to the curial jurisdiction is therefore no more than to give effect to party autonomy which is fundamental to arbitration agreements and which it is the primary function of the courts to respect and uphold. Parties who agree a particular seat deliberately submit themselves to the law of the seat and whatever control it exerts. That not only gives effect to party autonomy but promotes certainty" (ENGLAND AND WALES, 2020, p. 17-18, parágrafo 46). Referida lei também é conhecida por *lex arbitri*

Uma vez que a função central da *injunction* seria a de proteger e garantir a integridade da cláusula compromissória, antes de conceder a ordem, devem os magistrados verificar se o tribunal arbitral detém ou deteria jurisdição, ou seja, se as questões em litígio estão compreendidas no escopo da convenção de arbitragem. Para a Corte de Apelação, a averiguação da jurisdição do tribunal arbitral se constitui em atividade de competência das cortes da sede da arbitragem, antes da sua constituição ou depois, como na hipótese das ações de anulação. Essa atribuição independeria do exame realizado pelo próprio tribunal, em manifestação do princípio *Kompetenz-Kompetenz*,[10] bem como da possibilidade de outras cortes, de forma concorrente, tutelarem a integridade da cláusula arbitral.[11]

No que toca ao problema suscitado pela seguradora, a Corte de Apelação se manifestou no sentido de que, para concessão da medida requerida pela Enka, pouco importava – relativamente à jurisdição – que a lei aplicável à cláusula arbitral fosse estrangeira. Desse modo, o magistrado deveria aplicar, se assim concluísse necessário, a lei russa, a partir do conjunto de provas do direito estrangeiro fornecido pelas partes. Um sistema jurídico diverso do inglês, não seria, assim, uma justificativa para declinar a jurisdição da corte da sede da arbitragem. Por conclusão, verificou-se ser necessário apenas analisar se o tribunal arbitral deteria jurisdição para resolver a demanda, seja em razão da validade da cláusula, seja porque o objeto do litígio se encontra compreendido em seu escopo.

Em relação à lei aplicável, a Corte de Apelação se referiu ao entendimento consolidado no célebre caso Sulamérica Cia Nacional de Seguros SA *v.* Enesa Engenharia SA (2012) EWCA Civ 638.[12] Naquela oportunidade, concluíram os magistrados que a definição da lei aplicável à cláusula arbitral deveria seguir um teste de três fases, em que se verificam (i) se as partes realizaram uma escolha expressa de lei; (ii) caso não, se há uma escolha tácita; ou (iii) em não se identificando qualquer escolha, qual o sistema jurídico legal que mais se aproxima da

e compõe o conjunto de normas que regulam o aspecto processual da arbitragem: "By contrast, the conduct of International arbitration is governed procedurally by norms drawn from a curious combination of sources: the procedural provisions if any expressly agreed by the parties (whether directly in their arbitration agreement or indirectly through procedural rules incorporated by reference), the procedural rules furnished by the arbitration law of the place of arbitration and, to extent a given procedural matter is not governed by these sources, procedural determinations made more or less freely by the arbitrators" (BERMANN, 2016, p. 180). Sobre alguns aspectos polêmicos do tema, ver DE BOER, 2015, p. 77-78. Na doutrina brasileira, veja-se BAPTISTA, 2011, p. 193 e ss.

[10] "There must be a court with power to determine the substantive jurisdiction of an arbitral tribunal, and when an arbitral tribunal has been constituted or it is in contemplation, this role is assigned to the court of the seat both before and after an award is made" (ENGLAND AND WALES, 2020, p. 20, parágrafo 53).

[11] Para essa última hipótese, a Corte de Apelação citou o Artigo II(3) da Convenção de Nova York sobre Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras: "O tribunal de um Estado signatário, quando de posse de ação sobre matéria com relação à qual as partes tenham estabelecido acordo nos termos do presente artigo, a pedido de uma delas, encaminhará as partes à arbitragem, a menos que constate que tal acordo é nulos e sem efeitos, inoperante ou inexequível."

[12] Para uma decisão integral do caso, cf. ENGLAND AND WALES, 2012.

convenção de arbitragem. No caso em comento, a Corte de Apelação se manifestou no sentido de que a escolha expressa poderia ser tanto identificada na própria cláusula arbitral, como também a partir dos termos da escolha de lei realizada para reger o contrato, ou mesmo por meio da combinação entre esta e os termos empregados pelas partes na redação da cláusula compromissória.[13] O resultado dependerá da interpretação do contrato como um todo, a partir dos princípios interpretativos dispostos na lei do contrato, se diferente da lei inglesa.

Nos demais casos, entendeu a Corte que, em geral, a escolha tácita das partes será pela Lei da Sede da Arbitragem.[14] Assim, não haveria por que tratar o contrato principal como uma fonte de lei, quando a cláusula compromissória prevê um sistema legal diverso para reger o processo arbitral. A lei do contrato estaria, assim, restrita à validade, interpretação e eficácia de seus termos, não se estendendo aos termos do contrato (cláusula) separado que prevê a arbitragem. Essa conclusão, na opinião da Corte, derivaria do princípio da autonomia da cláusula arbitral, previsto na legislação inglesa e enfatizado pela jurisprudência, e independeria da forma como a lei do contrato foi extraída, se por escolha expressa, tácita ou por aplicação das regras de conflito de leis.[15]

O fato de que os contratantes escolheram uma sede diversa representaria, segundo a Corte de Apelação, a sua vontade de se submeter a dois diferentes sistemas jurídicos legais, inclusive nas hipóteses em que há escolha expressa de lei para reger o contrato. Essa conclusão partiria do princípio que, ao negociar os termos do contrato, as partes esperam que as cortes da sede, caso precisem decidir sobre o escopo da cláusula arbitral e, por consequência, sobre a jurisdição do tribunal arbitral, apliquem a sua própria lei. Além disso, verifica-se que a *curial law*, em geral, não se limita aos aspectos processuais da arbitragem, regendo também questões de direito material das partes em relação à cláusula arbitral.

Por fim, concluiu a Corte de Apelação que, no contrato em questão, não havia qualquer escolha expressa de lei identificável, tanto para o contrato quanto para a cláusula compromissória. Aplicando a lei inglesa – por ser Londres a sede da arbitragem, as disputas entre a seguradora Chubb Russia e a construtora Enka

[13] "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" (ENGLAND AND WALES, 2020, p. 33, parágrafo 90).

[14] "Given the connection and overlap between the scope of the curial jurisdiction and the scope of the AA law, it seems natural to regard a choice of the former as a choice of the latter, rather than merely the latter being the system of law with which the arbitration agreement has its closest and most real connection" (ENGLAND AND WALES, 2020, p. 37, parágrafo 101).

[15] A única exceção a essa regra ocorreria nas raras hipóteses em que a lei aplicável ao contrato, e expressamente prevista pelas partes, não reconhece o princípio da autonomia da cláusula arbitral: "Of course if the main contract law does not recognise the doctrine of separability, and there has been an express choice of that law, that may be a reason for treating the main contract law choice as an express choice of the same AA law" (ENGLAND AND WALES, 2020, p. 33-34, parágrafo 92).

estavam compreendidas no escopo da cláusula, e, por isso, seria cabível a concessão da *anti-suit injunction* requerida.

Em face dessa decisão, Chubb interpôs recurso para a Suprema Corte. A seguradora alegava, em síntese, que a conclusão da Corte de Apelação não poderia subsistir, uma vez que, na ausência de fortes indícios em contrário, uma escolha de lei para o contrato significaria uma escolha de lei para a cláusula arbitral. Por isso, como as partes haviam elegido a lei russa para reger o contrato, esta se aplicava, da mesma forma, à cláusula compromissória, inobstante a sede da arbitragem ser Londres. Chubb também manteve o argumento de que as cortes russas seriam mais apropriadas para aplicar a lei estrangeira, e, por isso, não caberia a concessão da *anti-suit injunction*.

3 A decisão da Suprema Corte

A Suprema Corte decidiu, embora por diferentes razões, pela manutenção da concessão da medida requerida pela Enka. Inobstante isso, os membros da Corte divergiram (i) sobre a interpretação das regras de conflito de leis inglesa e (ii) sobre a lei aplicável ao contrato em questão.

De acordo com Lord Hamblen e Lord Leggatt, cuja opinião representa o entendimento majoritário da Suprema Corte, o objeto principal do recurso seria a investigação da lei aplicável à validade e escopo da cláusula compromissória, quando o contrato em que inserida é regido por um sistema legal diversos daquele do local da sede da arbitragem.

A Corte entendeu que, para realizar esse estudo, seria necessário (antes) se pronunciar sobre as regras de conexão aplicáveis. Em assim fazendo, afastou a incidência direta do Regulamento Roma I (Regulamento [CE] nº 593/2008 do Parlamento Europeu e do Conselho de 17 de junho de 2008, sobre a lei aplicável às obrigações contratuais), cujo artigo 1(2)(e) expressamente exclui do seu escopo de aplicação as cláusulas arbitrais e as de eleição de foro.[16] Para a Suprema

[16] "Artigo 1º. "Âmbito de aplicação material (...) 2. São excluídos do âmbito de aplicação do presente regulamento: (...) e) As convenções de arbitragem e de eleição de foro." A razão para essa exclusão, segundo a Suprema Corte, estaria no fato de que as cláusulas arbitrais já estariam substancialmente reguladas por outros instrumentos convencionais, tais como a Convenção de Nova Iorque de 1958 (Convenção sobre o Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras) e a Convenção Europeia sobre Arbitragem Comercial Internacional de 1961 (veja-se ENGLAND AND WALES, 2020, p. 43-49, especificamente parágrafos 133 e ss). Considerando a necessidade de uma atividade interpretativa sistemática, a Corte entendeu, entretanto, que o regulamento em questão seria *indiretamente* aplicável, uma vez que outros trechos do contrato – naturalmente dentro do escopo do Regulamento Roma I – deveriam ser considerados para determinar se as partes teriam ou não escolhido uma lei para reger a cláusula arbitral: "By the same token, the fact that other parts of the contract are within the scope of the Rome I Regulation does not prevent them from being taken into consideration in determining in accordance with the English common law rules of construction whether the parties have agreed on a choice of law to govern the arbitration clause" (ENGLAND AND WALES, 2020, p. 9, parágrafo 30).

Corte, em casos desse tipo, deveriam ser aplicadas as regras de conflitos de leis desenvolvidas pelo *Common Law*.[17] Tais regras determinam que um contrato – ou partes dele – será regido (a) pela lei escolhida expressa ou implicitamente pelas partes; ou (b) na ausência de escolha, pela lei que se mostrar mais próxima ao contrato.[18]

Para a Suprema Corte, diferentes partes do contrato podem ser regidas por diferentes leis. Tal fenômeno é amplamente conhecido como *dépeçage* e sua manifestação, admitida pelo sistema do *Common Law* inglês, pode ser resultante tanto da aplicação das regras de conexão quanto da manifestação da autonomia da vontade[19] das partes.[20] Embora possível, a Corte também considerou que, em geral, mostra-se razoável presumir que as partes pretendem ou esperam que todo o contrato seja regido por um único sistema legal, já que a aplicação de diferentes leis possui a potencialidade de resultar em "inconsistência e imprevisibilidade",[21] principalmente no que toca à validade e eficácia das obrigações. E esse raciocínio, continua, seria estendido a todas as cláusulas do contrato, inclusive à cláusula compromissória.

Ressaltou-se, no entanto, que os inconvenientes resultantes da aplicação de diferentes leis a diferentes obrigações possuem menor alcance quando se está diante de uma cláusula arbitral. A primeira razão para tal assertiva está no fato de que referida cláusula possui um objeto e uma função diversa do restante

[17] ENGLAND AND WALES, 2020, p. 8. Veja-se que tal opinião dá prevalência à *lex fori*, em detrimento das regras de conexão da lei do contrato, tal como pretendia a sociedade turca Enka e também como decidiu a Corte de Apelação (veja-se ENGLAND AND WALES, 2020, p. 9-11). O uso das regras de conexão do foro é objeto de crítica por alguns autores. Ver, por todos (BORN, 2014, p. 835). Veja-se que há doutrina que defende a aplicação de princípios na determinação da validade da cláusula compromissória, cf. NAZZINI, 2016. De outro lado, alguns autores criticam que a posição resolveria apenas parte do problema, já que não endereça a questão da interpretação da cláusula, cf. ressalva realizada por Lord Burrows na decisão em comento: "(...) there is an important difference between, on the one hand, upholding as valid an undisputed agreement which the parties have reached and, on the other hand, determining the correct interpretation or scope of the agreement where the very question at issue is what is it that the parties have agreed" (ENGLAND AND WALES, 2020, p. 74, parágrafo 199).

[18] A regra da lei "most closely connected" também se encontra positivada no artigo 4 do Regulamento Roma I, como hipótese de conexão subsidiária, quando ausente a escolha pelas partes. Para um estudo detalhado sobre o tema, principalmente a partir da perspectiva do Regulamento e das Convenções da Conferência da Haia de Direito Internacional Privado, veja-se DOLINGER, 2008.

[19] Embora as convenções de arbitragem se encontrem excluídas do seu escopo de aplicação (cf. Artigo 1(3)(b)), os Princípios sobre Lei Aplicável aos Contratos Comerciais Internacionais da Conferência da Haia de Direito Internacional Privado auxiliam no entendimento da questão, demonstrando a possibilidade de uma escolha de lei, expressa ou tácita: "Article 4 – Express and tacit choice. A choice of law, or any modification of a choice of law, *must be made expressly or appear clearly from the provisions of the contract or the circumstances*. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law" (grifos nossos).

[20] V, por todos, RIQUIER, 1992, p. 123. Veja-se, também, ARAUJO, 2020, p. 397-399.

[21] "It is generally reasonable to assume that parties would intend or expect their contract to be governed by a single system of law. To apply different systems of law to different parts of a contract has the potential to give rise to inconsistency and uncertainty. This is particularly so where questions about the validity or enforceability of contractual obligations arise" (ENGLAND AND WALES, 2020, p. 13, parágrafo 39).

do contrato, considerando que prevê um mecanismo alternativo de resolução de disputas e não propriamente *substantive rights and obligations*.[22] Já o segundo motivo, por sua vez, encontra fundamento no princípio da autonomia da cláusula arbitral.[23] Para a Suprema Corte, este segundo atributo da cláusula não significa, entretanto, que a mesma deva ser tratada, para todos os propósitos, como um contrato diverso e separado, mas sim que seja aplicado para fins de salvaguardar a sua validade e eficácia.[24]

Por isso, às partes é facultado escolher uma lei diversa, que regerá especificamente a validade e eficácia da cláusula arbitral. Na ausência de tal escolha, presume-se, entretanto, que as partes implicitamente esperavam que todo o negócio – incluindo a cláusula compromissória – fosse regido por uma única lei, escolhida expressamente.[25]

Em assim concluindo, a Suprema Corte discordou da fundamentação realizada pela Corte de Apelação, afirmando que, em geral, não influi na lei aplicável o fato de a sede da arbitragem se localizar em outro país, cujo sistema legal é diverso daquele escolhido pelas partes.[26] A razoabilidade de se considerar a lei escolhida para o contrato como aplicável à cláusula arbitral está, segundo a Corte, fundamentada em diversas considerações principiológicas, uma vez que tal interpretação (i) resulta em certo grau de previsibilidade, já que as partes saberão,

[22] ENGLAND AND WALES, 2020, p. 13, parágrafo 40.

[23] Em inglês, "the principle of separability of the arbitration agreement". Veja-se que tal princípio se encontra presente da seção 7 do Arbitration Act 1996 inglês, em cujo texto lê-se: "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

[24] "As counsel for Chub Russia emphasized, the principle of separability is not a principle that an arbitration agreement is to be treated as a distinct agreement for all purposes but only that is to be so treated for the purpose of determining its validity or enforceability" (ENGLAND AND WALES, 2020, p. 14, parágrafo 41). O princípio da autonomia da cláusula compromissória é, por isso, uma ficção jurídica. Sua função é a de garantir que a cláusula arbitral produza seus efeitos, inobstante recorrentes objeções das partes relacionadas à invalidade ou nulidade do contrato principal. Tal como destacado no caso em comento, a autonomia não significa, entretanto, que a cláusula deva ser encarada, para todos os fins, como um acordo completamente separado do contrato em que inserida. Para um aprofundamento sobre o tema, veja-se CARBONNEAU, 2000, p. 21 e ss.; ARAUJO, 2010.

[25] "Where the contract also contains an arbitration clause, it is natural to interpret such a governing law clause, in the absence of good reason to the contrary, as applying to the arbitration clause for the simple reason that the arbitration clause is part of the contract which the parties have agreed is to be governed by the specified system of law" (ENGLAND AND WALES, 2020, p. 14, parágrafo 43). Nesse sentido: "Since the arbitration clause is only one of many clauses in a contract, it might seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration clause. If the parties expressly choose a particular law to govern their agreement, why should some other law – which the parties have not chosen – be applied to only one of the clauses in the agreement, simply because it happens to be the arbitration clause?" (BLACKABY *et al.*, 2015, p. 158). Na doutrina brasileira, veja-se, por todos, GREBLER, Eduardo. Artigo V (inciso 1 "A" e "B"). A recusa de reconhecimento à sentença arbitral estrangeira com base no Artigo V, (1) alíneas "A" e "B" da Convenção de Nova Iorque (WALD; LEMES, 2011, p. 198). Veja-se também BARROCAS, 2010, p. 594.

[26] ENGLAND AND WALES, 2020, p. 16, parágrafo 46.

de antemão, que a escolha de lei terá efeitos sobre todo o contrato; (ii) gera consistência, já que um único sistema legal regula todos os direitos e obrigações das partes; (iii) evita complexidades e incertezas, considerando a dificuldade de se identificar e separar as matérias reguladas por diferentes leis; (iv) obsta a artificialidade, uma vez que o contrato é concebido como um "todo" e não como um negócio contendo outro contrato que lhe é acessório ou colateral; e (v) garante coerência, já que a cláusula arbitral é tratada como outras cláusulas, cuja validade também independe de impugnações ao contrato, tais como a cláusula de escolha de lei e a de eleição de foro.[27]

Tal como exposto no item 2, a conclusão da Corte de Apelação seguiu um caminho diverso: em casos semelhantes, a não ser que houvesse relevantes motivos para entender de modo contrário, existiria uma forte presunção de que as partes haviam implicitamente escolhido a Lei da Sede da Arbitragem para reger a cláusula compromissória. Isso se dava porque, na visão da Corte, em razão da autonomia da cláusula arbitral, uma escolha de lei para reger o contrato "te[ria] pouco ou nada a dizer sobre a escolha da lei [para a convenção de arbitragem] porque direcionada a um contrato diferente e separado".[28] Esse argumento foi frontalmente rejeitado pela Suprema Corte, para quem não derivaria do princípio da autonomia a conclusão (i) de ser a cláusula arbitral, em geral, uma convenção diferente e separada de todo o resto do contrato e (ii) que uma escolha de lei para este último não deveria comumente ser interpretada como aplicável também a cláusula arbitral. Assim, referido princípio deveria ser analisado no contexto da doutrina segundo a qual a frustração das obrigações contratuais não resultaria em uma frustração do acordo entre as partes de submeter eventuais disputas à arbitragem.[29] Por isso, a cláusula compromissória compõe o conjunto de direitos e obrigações estruturados no contrato e, dessa forma, deve ser enxergada como parte integrante deste.[30]

A Suprema Corte também enfrentou outro argumento apresentado pela Corte de Apelação. Para esta, a escolha de uma sede para a arbitragem, cujo sistema legal é diferente daquele aplicável ao contrato, indicaria que a vontade das partes seria a de se submeter a apenas duas leis: a lei do contrato e a Lei da Sede, e que, esta última regeria também a validade e eficácia da cláusula

[27] ENGLAND AND WALES, 2020, p. 18-19, parágrafo 53.

[28] "(...) 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'" (ENGLAND AND WALES, 2020, p. 21, parágrafo 61).

[29] Veja-se, no mesmo sentido, parágrafo 26 da decisão da Corte de Apelação no caso Sulamérica Cia Nacional de Seguros SA *v.* Enesa Engenharia SA [2012] EWCA Civ 638 (ENGLAND AND WALES, 2020).

[30] A Suprema Corte forneceu, ainda, como exemplo, a hipótese de cessão contratual, que inclui a cláusula arbitral e prescinde, por isso, de qualquer contrato adicional ou separado. Veja-se ENGLAND AND WALES, 2020, p. 21, parágrafo 62.

compromissória. A razão por detrás dessa interpretação estaria no fato de que a lei que rege o processo arbitral (*curial law*) também apresenta regras de direito substancial. Assim, as questões *materiais* e *processuais* da arbitragem estariam entrelaçadas.[31] Apesar de concordar que há uma proximidade entre as regras do Arbitration Act que lidam com a cláusula compromissória e as regras que tratam do processo arbitral, a Suprema Corte argumentou que esse fato não poderia resultar na conclusão de que a escolha da sede seria uma escolha implícita das partes pela lei que rege a validade da cláusula arbitral. Ainda segundo a Corte, quase todos os dispositivos da lei que fundamentariam o argumento da Corte de Apelação são de aplicação facultativa, nas hipóteses em que a cláusula compromissória é regida por uma lei estrangeira.[32]

Assim, a Suprema Corte novamente procurou demonstrar que uma escolha da sede, e, por consequência, o seu sistema legal não necessariamente significa uma escolha de lei para reger a validade e escopo da cláusula compromissória. Tal escolha representaria, no entanto, em geral, a intenção das partes de se submeter à jurisdição (de supervisão) das cortes daquele país ou até mesmo o intuito de facilitar o reconhecimento e execução de futura e eventual sentença arbitral.[33] No caso específico da lei inglesa, a Corte destacou ainda que não há nenhuma disposição que determine que, na ausência de escolha em contrário, a Lei da Sede deve ser aplicada à cláusula arbitral.[34]

A segunda fase (averiguação da escolha implícita de lei) do teste desenvolvido pela Suprema Corte comporta exceção. Para a Corte, o resultado obtido na análise da lei aplicável não poderia ser confirmado, se a lei que rege o contrato resultasse na invalidade ou ineficácia da cláusula arbitral. De acordo com o "princípio da validade", uma interpretação que confirme a validade de uma transação é preferível à outra que resulte na sua invalidade ou ineficácia.[35] Assim, é razoável

[31] "This is a sensible starting point where there is no arbitration clause with a different seat; but it ceases to have any application where there is. In such cases, whatever the AA law, the parties have necessarily chosen their relationship to be governed in some respects by two systems of law, namely the curial law and the main contract law. Secondly, the overlap between the scope of the curial law and that of the AA law strongly suggests that they should usually be the same" (ENGLAND AND WALES, 2020, p. 35, parágrafos 95-96).

[32] "The point in short is that almost all the provisions of the 1996 Act relied on to support the overlap argument are non-mandatory and, where the arbitration agreement is governed a foreign law [*sic*], by reasons of section 4(5) the non-mandatory provisions of the Act which concern arbitration agreements do not apply to it" (ENGLAND AND WALES, 2020, p. 25-26, parágrafo 73).

[33] Tal como na legislação brasileira, o Arbitration Act 1996 (s. 53) considera nacionais as sentenças arbitrais de procedimentos cuja sede seja a Inglaterra, o País de Gales ou a Irlanda do Norte.

[34] Este é o caso, no entanto, da Arbitration (Scotland) Act 2010 (s 6), que determina, na ausência de escolha das partes, a aplicação da legislação escocesa para reger a cláusula compromissória, nas hipóteses em que lá seja sediada a arbitragem.

[35] Necessário ressaltar aqui a opinião divergente de Lord Burrows, para quem as considerações quanto à validade da cláusula compromissória pouco importava para o caso concreto que, segundo ele, dizia respeito apena à interpretação; escopo da cláusula. Veja-se ENGLAND AND WALES, 2020, parágrafos 194 e ss.

presumir que a vontade das partes na conclusão do negócio jurídico era a de que todas as cláusulas do contrato, inclusive a convenção de arbitragem, produzissem efeito.[36] Na análise da Corte, essa abordagem se encontra integrada ao Direito do Comércio internacional.[37]

A Suprema Corte se pronunciou, ainda, sobre o último estágio do teste sobre a lei aplicável. Quando (i) as partes não houverem realizado qualquer escolha de lei para reger o contrato ou (ii) essa escolha resultar em invalidade ou ineficácia da cláusula compromissória, deverão as cortes recorrer ao que a Corte denominou de *rule of law*:[38] será aplicável o sistema legal que possuir maior proximidade com a cláusula arbitral. Na visão da Corte, tal sistema será o do local da sede da arbitragem, por diversas razões.[39] A primeira delas é a de que a sede representa o local em que – jurídica, mas nem sempre fisicamente – a cláusula arbitral será executada.[40] Além disso, essa interpretação se demonstra consistente com o Direito Internacional, bem como com a política legislativa inglesa.[41] Por fim, mostra-se mais de acordo com os propósitos comerciais das partes contratantes[42] e resulta em maior segurança jurídica.[43]

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[36] "The principle that contracting parties could not reasonably have intended a significant clause in their contract, such as an arbitration clause, to be invalid is a form of purposive interpretation, which seeks to interpret the language of the contract, so far as possible, in a way which will give effect to – rather than defeat – an aim or purpose which the parties can be taken to had in view" (ENGLAND AND WALES, 2020, p. 36, parágrafo 106).

[37] ENGLAND AND WALES, 2020, p. 36 e ss.

[38] "Rule of law", em contraposição ao processo interpretativo para averiguar a escolha de lei realizada pelas partes.

[39] Com relação a esse estágio, Lord Burrows e Lord Sales apresentaram posição divergente do restante da Corte. Em opinião separada, ambos se manifestaram no sentido de que, tanto havendo escolha expressa ou implícita de lei para o contrato, esta deveria se estender, pela mesma razão, à cláusula compromissória. A exceção para essa regra geral estaria no princípio da validade e nas situações em que ficasse claramente demonstrado que as partes escolheram a lei da sede para reger a cláusula arbitral, inobstante não haver nesta qualquer escolha expressa de lei (ENGLAND AND WALES, 2020, p. 100, parágrafo 257).

[40] A Suprema Corte destacou, nessa hipótese, que o *Common Law* não mais confere relevância ao local em que o contrato foi constituído, mas considera o local de execução das obrigações como o sistema legal que apresenta maior proximidade ("most closely and real connection") com o contrato: "[t]his is justified by the fact that states have na interest in regulating transactions taking place within their territory and by consequent natural assumption that the law of the territory in which a transaction is taking place will govern it in the absence of a contrary indication" (ENGLAND AND WALES, 2020, p. 41-42, parágrafo 121).

[41] Nesse sentido, o Reino Unido é parte da Convenção de Nova York, cujo Artigo V(1)(a) prevê a possibilidade de não reconhecimento de sentença arbitral estrangeira, na hipótese em que a cláusula compromissória é invalida, seja a partir da lei escolhida pelas partes seja, na sua ausência, pela lei do local em que proferida a sentença (ou sede da arbitragem). A mesma regra encontra-se presente na s. 103(2)(b) do Arbitration Act 1996.

[42] A Suprema Corte destacou que, em alguns casos, contratos são concluídos por partes de diferentes nacionalidades e mostra-se mais provável que, se fossem demandados a escolher um sistema legal, a escolha de lei seria pela sede da arbitragem, por representar este um foro neutro, e não pela lei dos seus respectivos países. Ver parágrafo 142 e ss.

[43] "Applying a general rule that, in the absence of choice, an arbitration agreement is governed by the law of the seat of arbitration (where a seat has been designated) enables the parties to predict easily and with little room for argument which law the court will apply by default" (ENGLAND AND WALES, 2020, p. 50, parágrafo 144).

Ao analisar o contrato realizado pela Enka, a Suprema Corte chegou à conclusão de que não era possível interpretar qualquer escolha de lei realizada pelas partes, tanto para o contrato quanto para a cláusula compromissória.[44] Aplicando as regras do Regulamento Roma I, os direitos e obrigações contratuais seriam regidos pela lei russa. No entanto, esse sistema legal não se estenderia à cláusula arbitral, que demandaria uma análise diversa. Seguindo os estágios do teste definido no caso Sulamérica Cia Nacional de Seguros SA *v.* Enesa Engenharia SA e ratificados pela Suprema Corte, a cláusula compromissória deveria ser regida pela lei inglesa, uma vez que as partes haviam definido Londres como a sede da arbitragem.

No que toca à medida de *anti-suit injunction*, a Corte reproduziu os argumentos empregados pela Corte de Apelação, segundo a qual a escolha das partes por uma sede representaria sua submissão à jurisdição das cortes desse local para supervisionar e auxiliar a arbitragem.[45] Além disso, destacou-se que o fato da cláusula compromissória ser regida por uma lei estrangeira em nada prejudica a jurisdição das cortes da sede, que deverão apenas verificar se houve uma violação da cláusula arbitral.[46]

Conclusão

A decisão da Suprema Corte do Reino Unido demonstra que as partes precisam observar, durante a negociação do contrato, a redação da cláusula compromissória, com os olhos voltados para a sua influência no bom desenvolvimento de uma arbitragem. Dois foram os elementos que se destacaram para a resolução da demanda: (i) a sede da arbitragem e o exercício, pelas cortes locais, do que se denominou por jurisdição de supervisão (*supervisory jurisdiction*); e (ii) a lei aplicável à cláusula compromissória, que rege a sua validade e interpretação.

[44] Também neste ponto divergiram Lord Burrows e Lord Sales, para quem as partes haviam implicitamente escolhido a lei russa para reger o contrato. Seguindo o posicionamento diverso da maioria da Suprema Corte, ambos opinaram que seria também aplicável à cláusula compromissória a lei russa. Esse fato, no entanto, não anularia a possibilidade de concessão da medida de *anti-suit injunction* pelas cortes inglesas, que deteriam a então denominada jurisdição de supervisão. Concluíram, assim, que o caso deveria retornar à Corte Comercial, que caberia analisar se as questões postas no procedimento perante a Corte de Arbitragem de Moscou violariam o escopo da cláusula arbitral do contrato em questão. Veja-se ENGLAND AND WALES, 2020, parágrafos 227 e ss.

[45] "By agreeing to arbitrate in London the parties were agreeing to submit to the supervisory and supporting jurisdiction of the English courts, including its jurisdiction to grant anti-suit injunctions" (ENGLAND AND WALES, 2020, p. 62-63, parágrafo 179). Ver, por todos, BERMANN, 2016, p. 194 e ss.

[46] "We therefore agree with the Court of Appeal that the principles governing the grant of an anti-suit injunction in support of an arbitration agreement with an English seat do not differ according to whether the arbitration agreement is governed by the English law or foreign law. Forum conveniens considerations are irrelevant and comity has little if any role to play" (ENGLAND AND WALES, 2020, p. 64, parágrafo 184).

Verifica-se, pelo julgamento analisado, que a escolha da sede tem peso relevante na concessão de medidas cautelares. Em especial, sobreleva-se a sua importância, quando se considera a necessidade de tutelar a competência do tribunal arbitral, especialmente antes de sua constituição. A depender da jurisdição a que recorrem as partes, tais medidas adquirem diferentes formas e efeitos.

No caso narrado, ficou demonstrado que seria necessário, antes de mais nada, verificar se o procedimento instaurado na Rússia violava o escopo da cláusula compromissória. Para isso, debruçaram-se as cortes no estudo da lei aplicável à convenção de arbitragem.

Para chegar à decisão final, a Suprema Corte, em sua argumentação, desenvolveu um teste em três etapas, para estabelecer a lei aplicável à cláusula compromissória. O teste funciona por meio de uma aplicação em cascata, e somente com a eliminação de uma etapa, passa-se à seguinte.

Na primeira etapa, analisa-se se as partes realizaram uma escolha *expressa* de lei para reger a cláusula arbitral. Em concluindo positivamente, será essa lei que definirá a validade e interpretação da cláusula compromissória.

No segundo estágio, ante a ausência de escolha pelas partes da lei aplicável, verifica-se se é possível apurar ter havido uma escolha *implícita* de lei. A Corte ponderou ser razoável presumir que a vontade tácita das partes seria de submeter a cláusula compromissória à mesma lei escolhida para reger o contrato. Tal presunção, no entanto, conforme exposto na decisão, mostra-se sempre relativa, e dependente da prova dos fatos produzida no curso do julgamento. É possível demonstrar que esta não representava a real intenção das partes, como na hipótese em que a lei do contrato resulta na invalidade ou ineficácia da cláusula compromissória.

Por último, não havendo uma escolha expressa de lei para a cláusula compromissória ou para o contrato, recorre-se a ao terceiro estágio do teste. Nesse, entenderam os magistrados que será necessário se valer das regras de conexão do foro. Naquela jurisdição, a Suprema Corte definiu ser aplicável a Lei da Sede da Arbitragem, por se tratar do local em que, pelo menos juridicamente, a cláusula compromissória é executada.

Como no caso concreto não foi possível identificar uma escolha expressa ou tácita de lei, e por ser Londres a sede da arbitragem, a solução encontrada foi a aplicação da lei inglesa. De acordo com esta lei, o procedimento iniciado na Rússia violava a cláusula arbitral, de modo que a Suprema Corte decidiu ser cabível a concessão da medida cautelar requerida.

The Case Enka Insaat *v.* Insurance Company Chubb and the Question of the Law Applicable to the Arbitration Agreement: between the Law of the Contract and the Law of the Seat of Arbitration

Abstract: When negotiating a contract, parties usually establish that future and eventual disputes arising out and related to the performance of their obligations shall be resolved by arbitration. Such a choice, a clear expression of the principle of party autonomy, is embedded in a contractual clause, commonly referred to as arbitration agreement. The way by which the agreement is written and, to some extent, how it is construed can, and most commonly will, result in extensive and costly disputes. In the UK, the Supreme Court has recently decided a case related to the construction of an arbitration agreement, specifically to the law applicable to its validity, scope and effectiveness. According to the Court, in the absence of an express choice made by the parties, the system of law chosen to govern the substance of the contract will apply to the validity and scope of the agreement to arbitrate. Where no such choice is expressly or implied made by the parties, it will be the law of the seat of arbitration since it represents the system of law most closely connected to the agreement. This article reviews the case-law and provides some relevant excerpts of the case.

Keywords: Arbitration Agreement. Applicable Law. Express or Implied Choice. Law Applicable to the Substance of the Contract. Law of the Seat of Arbitration.

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