

December 2023

## Arbitration - conflict of laws – applicability of arbitration clause – Anti-suit injunction [Shell Petroleum v Sunlink Energies]



The English Commercial Court granted a final anti-suit injunction in favour of Shell Petroleum ("**Shell**") against Sunlink Energies and Resources Limited ("**Sunlink**"), in relation to Nigerian court proceedings brought by Sunlink in breach of an arbitration clause in favour of London seated arbitration under the auspices of the International Chamber of Commerce ("**ICC**") (the "**Arbitration Clause**").

To determine the governing law of the Arbitration Clause, Baker J followed the Supreme Court's decision in *Enka v Chubb* [2020] UKSC 38. Although the arbitration is seated in London, the governing law of the underlying agreement is Nigerian law, and therefore the governing law of the Arbitration Clause is Nigerian law.

Sunlink argued that the Nigerian court was the correct forum on the basis that the Arbitration Clause was invalid as it referred to non-existent rules, was incapable of performance and was contrary to Nigerian public policy. Each of the grounds was dismissed by the judge. The injunction included mandatory requirements on Sunlink to take steps to withdraw the Nigerian proceedings.

*The Shell Petroleum Development Company of Nigeria Ltd v Sunlink Energies and Resources Ltd* [2023] EWHC 3135 (Comm)

## What are the practical implications of this case?

Baker J's decision reaffirmed the English commercial court's approach pro-arbitration stance and the approach laid down in *Enka v Chubb* [2020] UKSC 38, in analysing the governing law of the arbitration clause which might not necessarily be that of law of the seat of arbitration. The judgment itself also revealed the importance of obtaining admissible and credible evidence of the potential foreign law being the governing law of the arbitration clause.

The decision demonstrates that the English Court will issue anti-suit injunctions mandating defendants to take steps to discontinue or withdraw non-contractual proceedings where a seat of arbitration is designated by an arbitration clause or by an arbitration institution to be in London. The court is also prepared to award costs on an indemnity basis in such circumstances as the opposition to the anti-suit injunction have been merit less. The court here awarded Shell 85% of its costs on a summary basis.

## What was the background?

The underlying dispute arose out of a 2005 joint operating agreement (the "**JOA**") concerning oil prospecting and, subsequently, oil mining. The JOA is governed by Nigerian law and the Arbitration Clause provides for: 1) a London-seated arbitration under the "Rules of Conciliation and Arbitration of the International Chamber of Commerce effective at the time notice of arbitration is served" and 2) a tribunal comprising "retired judicial figures of standing, Queen's Counsel practising at the commercial Bar, or similar qualified Solicitors".

While asserting the ineffectiveness of the Arbitration Clause, Sunlink brought contractual claims against Shell in the courts of Nigeria. Shell is now seeking an anti-suit injunction in the English court against Sunlink in response, mandating Sunlink to take steps to discontinue or withdraw proceedings in Nigeria.

Sunlink argued that:

- 1 The "Rules of Conciliation and Arbitration" no longer existed and therefore the Arbitration Clause was inoperative;
- 2 The Arbitration Clause was incapable of performance as the JOA was a Nigerian law contract and the Arbitration Clause called for arbitrators to be retired judicial figures, Queen's Counsel at the commercial bar or similarly qualified solicitors. This they concluded meant that no arbitrator could be appointed as they would have also have had to have been practicing Nigerian lawyers.
- 3 By reason of the size of the claim (USD1 billion) the claim raised fundamental matters of public and economic policy which are not arbitrable under Nigerian law.

## What did the court decide?

Applying *Enka v Chubb* [2020] UKSC 38, Baker J held that since the JOA is governed by Nigerian law, the Arbitration Clause is governed by Nigerian law as well, despite the fact that the seat of arbitration is in London.

The court then went on to address Sunlink's arguments raised in respect of the effectiveness of the Arbitration Clause:

- 1 The fact that the current version of the ICC Rules is no longer entitled "Rules of Conciliation and Arbitration" is irrelevant since the "Rules" which the Arbitration Clause refers to should be interpreted as the ICC Rules of whatever version and of whatever title. The judge held that the suggestion that on this point of wording there was a basis to avoid an obligation to arbitration was unarguable;
- 2 The argument that the arbitrators should be both retired judges/Queen's Counsel/Solicitors and Nigerian lawyers. However, the Arbitration Clause does not require the arbitrators to be Nigerian lawyers and no evidence was adduced to suggest that this was a requirement of Nigerian law. In any event, it was not demonstrated that no such person could exist and therefore even if it were a requirement it did not render the Arbitration Clause void. The judge held there was no arguable merit in the point; and
- 3 No evidence of Nigerian law was placed before the court that the value of the dispute rendered the dispute unarbitrable. In addition there was evidence before the English court that the Nigerian court had in fact upheld Shell's application to stay the Nigerian proceedings in favour of arbitration. The grounds of the stay were that there was a valid and effective agreement to arbitrate disputes between the parties.

Regarding the form of the injunction, Baker J held that, consistent with the court's current approach (e.g. *SM Production Corp v Gaz du Cameroun SA* [2023] EWHC 2820 (Comm)), the order, in addition to restraining Sunlink from pursuing the Nigerian proceedings, should require Sunlink to take necessary steps to discontinue or withdraw such proceedings.

### Case details

- Court: King's Bench Division (Commercial Court)
- Judge: Mr Justice Andrew Baker (In Public)
- Date of judgment: 05/12/2023

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