

UK Arbitration H1 2020: 6 Months and 6 Key Messages from the English Courts, Part 1

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With an uptick in commercial wrangles expected as a result of measures taken to combat Covid-19, England is not alone in seeking to provide a welcoming jurisdiction to deal with such disputes.

In this **two-part post**, we pick out **6 key developments** in arbitration case law in England over the last 6 months to reveal the takeaways for parties considering their dispute resolution options, whether at the contracting stage or with a potential claim in mind.

In this **part one**, learn how:

1. The English Court will determine the applicable law to an arbitration agreement and hold parties to their bargain by enforcing such arbitration agreements ...
2. ...But only where clearly drafted. The Courts will not save a party from competing clauses.
3. The English Court limits when a non-party can rely on arbitration agreements.

1. English Courts will hold parties to their bargain and enforce arbitration agreements

In [Enka Insaat ve Sanayi AS v. OOO Insurance Co Chubb](#), the Court of Appeal clarified both the approach for the grant of anti-suit injunctions and the process to determine the governing law of the arbitration agreement as a separate and free standing agreement to the main (or matrix) contract. The Court of Appeal restrained Chubb from pursuing Russian court proceedings in breach of an arbitration agreement that provided for ICC arbitration seated in London.

In doing so, it found that a choice of seat contains an agreement by the parties to submit to the jurisdiction of the courts of the seat. As the court of the seat, the English court was therefore an appropriate court to grant an anti-suit injunction (an inherent aspect of its supervisory jurisdiction over arbitrations). It was not correct to consider questions of *forum conveniens* and defer to the Russian Court on the issue.

Further, the Court of Appeal imposed some “order and clarity” (its words) on the relationship between the main contract law and the law of the seat in determining the law of the arbitration agreement (AA). It set out a four-stage test:

- Is there an express choice of law in the AA?
- If not, is the express choice of law in the main contract properly construed as an express choice of law for the AA?
- If not, is there an implied choice of law? The “general rule” is that the law of the seat is by implied choice the law of the AA.
- If not, what is the system of law with the closest and most real connection to the AA?

On the facts, a definition of Applicable Law covering Russian law in an attachment to the contract containing certain defined terms was not an express choice of Russian law as the governing law of the arbitration agreement, which was instead English law as the law of the seat.

Comment: save yourself from making further case law; make an express choice of law in your arbitration agreement.

2. ...But only where clearly drafted.

In [Albion Energy v Energy Investments](#), the parties to a share purchase agreement (SPA) entered into an escrow agreement (EA) to resolve a dispute about deferred consideration payable under the SPA. The SPA contained an exclusive English court jurisdiction clause whereas the subsequent EA provided for London-seated ICC arbitration. The High Court refused to stay summary judgment proceedings brought by the seller, finding:

- It was inherently more likely that the EA arbitration agreement was intended to address the security and other ancillary obligations it created, rather than to displace the choice of jurisdiction under the SPA. In fact, the EA was stated to be “without prejudice” to the parties’ rights under the SPA.

- The arbitration agreement referred to “this letter” which suggested a focus solely on obligations created by the EA.
- The EA concerned only three of the six parties to the SPA – the arbitration clause was intended to have a localised effect to avoid certain parties being subject to the jurisdiction of the court and other related claims under the SPA being subject to arbitration.

Comment: Where there are different dispute resolution choices in a suite of documents in a complex transaction, parties need to make it clear how competing clauses are intended to interact. Trite? Maybe, but the devil is in the detail as this case demonstrates that problems continue to arise.

3. English Courts tightly limit circumstances when non-parties can rely on arbitration agreements.

Under English law, principles of agency apply to an arbitration agreement just as they do to any contract. A principal, whether disclosed or undisclosed, may enforce a contract made by its agent.

In [Filatona Trading v Navigator Equities](#), the Court of Appeal held that a disclosed and identified principal can enforce an arbitration agreement in a contract (here a share purchase agreement) entered into by their agent. This is unless the principal’s rights have been clearly excluded by the terms of the contract, whether express or implied. English Courts are rarely prepared to go further, and hold that other non-parties are bound by an arbitration agreement. Questions about variations to an arbitration agreement are again governed by the usual contractual principles.

In [Kabab-Ji SAL \(KJS\) v Kout Food Group \(KFG\)](#), one of two parties to a franchise development contract (**FDC**) had become a subsidiary of KFG. When KJS commenced an arbitration, it did so against KFG. An ICC Tribunal sitting in Paris found that KFG was bound by the arbitration agreement in the FDC.

The Court of Appeal disagreed – as a matter of English law (which it held governed the arbitration agreement) the no oral modification clauses of the FDC applied. Absent an unequivocally expressed representation amounting to an actionable estoppel, the NOM clause was not displaced by reference in the FDC to reference to an obligation of good faith and fair dealing and to the UNIDRIOT principles. KFG did not become a party by conduct where there was no written variation.

Comment: English Courts treat arbitration agreements as they do other contracts - upholding the words used. If a party wants to rely on an arbitration agreement, it is well advised (if not already a party) to become a party expressly.

In **part two**, we will cover how:

- An English seated arbitration agreement can afford the protection of the English Court to contractual debts.
- The English Court remains willing to support English and foreign seated arbitrations...by freezing orders (in the right circumstances)
- ...and by compelling non-parties to give evidence.

The above are illustrative case summaries only. If you are interested in understanding the full judgments or their relevance to your matter, please contact [Dorothy Murray](#) or your usual contact.

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