Alice
020-6259155

Case No: 2000 Folio 694

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(Commercial Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 1999

Before:

THE HON. JUSTICE TOULSON

XL INSURANCE LIMITED	**Claimant**
-v-	
OWENS CORNING	**Defendant**

Mr Jeffrey Gruder QC (instructed by Freshfields for the Claimant)
Mr Ian Hunter QC and Paul Stanley (instructed by Covington & Burling for the Defendant)

JUDGMENT: Approved by the court for handing down
(subject to editorial corrections)

Start p.9 Mr. Clagett's sentence - to end

Mr Justice Toulson:

Introduction

XL applies for an order to restrain Owens Corning from pursuing an insurance claim against XL in the Superior Court of the State of Delaware, USA, or any forum other than arbitration in London, on the grounds that the insurance policy contains a London arbitration clause and Owens Corning is acting in breach of contract by suing XL in Delaware. Owens Corning resists the application principally on the ground that the policy including the putative arbitration clause is governed by the law of the State of New York, under which Owens Corning is not acting in breach of contract by suing XL in Delaware, because under New York law the putative arbitration clause would not be recognised as enforceable.

The facts

XL is a Bermudan insurance company, based in Hamilton. Owens Corning is a Delaware corporation with its headquarters in Toledo, Ohio. It manufactures and supplies building materials and owns properties in different parts of the world.

It is common ground that XL agreed to insure Owens Corning and its subsidiaries against property damage and associated risks. The contract was negotiated and effected on Owens Corning's behalf by a broker in the Bermudan branch of Marsh & McLennan, acting as Owens Corning's agent. All communications between Marsh & McLennan and XL in relation to the arrangement of the insurance took place in Bermuda.

Before 1998 Owens Corning had insured its North American property risks in one programme, underwritten by Allendale Mutual Insurance Company ("Allendale"), and had insured its non-North American property risks under a separate programme of insurance arranged on its behalf by Marsh & McLennan. In 1998 Owens Corning decided to have a single world-wide programme of property insurance, based on Allendale's "Spectrum" policy form but allowing Marsh & McLennan to participate in the placement of coverage. The primary layer was to be up to $100m.

On 2 March 1998 Mr Gareth Davies of Marsh & McLennan e-mailed Ms Danette Pengelly, an underwriter in XL's property division, asking if XL would be prepared to write a proportion of the risk. Ms Pengelly replied that XL would be happy to issue a quotation once the policy wording had been finalised.

On 9 March 1998 Mr Davies e-mailed Ms Pengelly, saying that Marsh had a conditional order to bind coverage with effect from 15 March 1998 and setting out various conditions that needed to be met prior to binding, one of which was that the Allendale Spectrum policy form was to be used. Ms Pengelly replied, confirming XL's willingness to provide coverage in accordance with her previous indication (subject to a minimum premium of $100,000) and asking for a copy of the Allendale Spectrum policy for XL's review.

On 10 March 1998 Mr Davies sent Ms Pengelly a copy of the Allendale Spectrum policy form. After reviewing it, on 13 March 1998 Ms Pengelly faxed Mr Davies with a quotation, which included the following terms:

Property Policy Form: Allendale Spectrum Policy form subject to XL modification as outlined in the Special Conditions section below.

Policy Period: 1 May 1998 to 1 May 2001 (36 months).

Policy Occurrence Limit: $10m part of $100m...

Gross Annual Premium: $130.000 ($13.000 per million of limit)

Special Conditions: ...2. The Manuscript policy wording will be modified as follows:

A. THE APPRAISAL and SUIT AGAINST THIS COMPANY clauses will be deleted and replaced with XL's London Arbitration clause.

B. The JURISDICTION clause will be deleted. XL's Policy shall be construed in accordance with the internal regulation laws of the State of New York (USA).

XL's evidence is that it had standard arbitration and governing law clauses, well known to the brokers in Marsh & McLennan's Hamilton office including Mr Davies, to which these special conditions would have been understood as referring.

The clauses in their full form were as follows:

ARBITRATION

Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Act 1996 ("Act") and/or any statutory modifications or amendments thereof for the time being in force, by a Board composed of three arbitrators to be selected for each controversy as follows. [In summary, one arbitrator would be appointed by each party, and the third arbitrator would be appointed by the first two arbitrators, with default provisions for appointment by a judge of the High Court of Justice of England and Wales.]

The Board of Arbitration shall fix, by a notice in writing to the parties involved, a reasonable time and place for the hearing and may prescribe reasonable rules and regulations governing the course and conduct of the arbitration proceeding, including without limitation discovery by the parties.

The Board shall, within ninety (90) calendar days following the conclusion of the hearing, render its award as respects the matter or matters in controversy in writing and shall cause a copy thereof to be served on all the parties thereto, but the Board shall not set forth any reasons for its award. In case the Board fails to reach a unanimous decision, the decision of the majority of the members of the Board shall be deemed to be the decision of the Board, and the same shall be final and binding on the parties thereto. Such decision shall be a complete defense to any attempted appeal or litigation of such decision in the absence of serious irregularity under Section 68 of the Act. Without limiting the foregoing, the parties waive any right to appeal to, and/or seek collateral review of the decision of the Board of Arbitration by, any court or other body to the fullest extent permitted by the applicable law, including, without limitation, any right to make application to the court under Section 45 or to appeal under Section 69 of the Act.

GOVERNING LAW AND INTERPRETATION

This Policy shall be construed in accordance with the internal laws of the State of New York, United States except in so far as such laws:

A. pertain to regulation under the New York Insurance Law, or regulations issued by the Insurance Department of the State of New York pursuant thereto, applying to insurers doing insurance business, or issuance, delivery or procurement of policies of insurance, within the State of New York or as respects risks or insureds situated in the State of New York; or

B. are inconsistent with any provision of this Policy.

provided, however, that the provisions, stipulations, exclusions and conditions of this Policy are to be construed in an even handed fashion as between the Insured and XL. Without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issues shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either the Insured or XL and without reference to parol or other extrinsic evidence).

It was submitted on behalf of Owens Corning that on the face of the quotation sent by Ms Pengelly to Mr Davies, there is no warrant for reading special condition B as referring to XL's standard governing law clause.

Later on 13 March 1998 Ms Pengelly sent to Mr Davies a fax beginning "XL Insurance Company Limited confirms to you as the Broker of Record for the listed Named Insured that we are binding coverage as follows…", but otherwise in the form of her earlier quotation (including the same special conditions), except for a variation in the policy period (now stated to be from 15 March 1998 to 15 March 2001). It was followed by a third fax on the same day from Ms Pengelly to Mr Davies in identical terms to the second, except that the policy period was now stated to be 14 March 1998 to 14 March 1999. It would seem reasonable to infer, although it is not important, that the second and third faxes would have been sent after conversations between Ms Pengelly and Mr Davies.

More importantly, Mr Davies responded in writing to Ms Pengelly on the same day as follows:

> I can confirm that we would like to buy coverage with you for 10% of the Primary $100m of the property program of the above mentioned company, *as per your quotation.*
>
> I would be grateful if you could sign and return the attached binder as quickly as possible. If you have any questions, please do not hesitate to contact me.
>
> (Emphasis added)

The attached binder showed the period as 12 months from 14 March 1998 (the period stated in Ms Pengelly's third fax). It contained a summary of the main terms of coverage. It included reference to the "Factory Mutual Spectrum Policy" but made no reference to XL's special conditions. Ms Pengelly signed and returned the binder as requested.

On 22 April 1998 Mr Davies sent Ms Pengelly a request to remove an exclusion from the policy regarding leakage of dams and dykes.

Puzzled by the request because she could not find the exclusion in the Spectrum policy form, Ms Pengelly replied to Mr Davies:

> I was not able to find the leakage of Dams and Dykes exclusions in the captioned policy wording.
> If Allendale are providing this coverage, then so are we by virtue of the fact that we are following the underlying Allendale Spectrum form (with the only exceptions being those that are in conflict with our standard London Arbitration and NY Policy Law Interpretation wording).
> Perhaps you are confusing XL with another market.

Ms Pengelly had missed the fact that there was an exclusion of leakage of dams and dykes in the Netherlands in the wording of the binder which Mr Davies had sent to her under cover of his letter dated 13 March 1998 and she had signed. By a later e-mail Ms Pengelly confirmed that XL would not exclude coverage for leakage of dams and dykes. She also signed a revised binder, which removed the reference to that exclusion.

In September 1998 Ms Pengelly chased Mr Davies for a copy of Allendale's policy in order for XL to be able to issue its own formal policy. The Allendale policy was issued in March 1999, and on 15 September XL sent its policy to Mr Davies. The policy document stated that it followed the Allendale Spectrum policy number NB105,

dated 11 March 1999, up to a limit of liability in respect of each occurrence of $10m, with the following exceptions:

> Exceptions to the followed policy:
>
> A. THE APPRAISAL AND SUIT AGAINST THE COMPANY clauses are deleted and replaced with XL's London Arbitration clause.
> B. THE JURISDICTION clause will be deleted. XL's Policy shall be construed in accordance with the internal regulation laws of the State of New York (USA).

Attached to the document were XL's arbitration and governing law clauses as set out above.

The policy was sent to Mr Davies under cover of a letter stating:

> We trust that you will find the enclosed in good order; however, if changes or corrections are necessary please contact us immediately so proper adjustments can be made.

There was no response.

Legal proceedings

On 17 March 2000 Owens Corning began proceedings in the Superior Court of the State of Delaware against its insurers, including XL, for a declaration that they are liable to indemnify Owens Corning for certain Y2K costs.

On 7 June 2000 XL applied to me, firstly, for permission to serve on Owens Corning out of the jurisdiction a claim for declaratory and injunctive relief and, secondly, for an interim injunction to restrain Owens Corning from proceeding with their claim

against XL in Delaware pending a hearing before this court at which both parties could be represented on the question whether such an injunction should be extended. I allowed the first application (for service of these proceedings on Owens Corning) and granted a limited form of temporary injunction, restraining Owens Corning from taking steps designed to prevent XL from pursuing its claim in this court or by way of arbitration in London until a further hearing at which both parties could be represented. That hearing took place on 30 June 2000 and it has been followed by exchanges of written submissions.

Owens Corning filed factual statements from Mr Robert Mitchell (senior counsel in its legal department) and Mr Raymond Bennett (its insurance manager responsible for the placement of its property insurance) and a legal opinion from Mr Brice Clagett (a partner in a Washington, DC law firm practising in the areas of public and private international law, international arbitration and federal litigation). The factual witness statements deny that anyone at Owens Corning knew about the putative arbitration agreement until after the issue of the Delaware proceedings. That assertion is challenged by XL on the basis of statements made to XL's solicitor by Mr Davies. That conflict could not be determined on written statements, but it is in any event not necessary to resolve, because it is accepted on Owens Corning's behalf for present purposes that Mr Davies had at least ostensible authority to act as he did.

No expert evidence was served on XL's behalf in response to that of Mr Clagett. In recording that fact I imply nothing more, because Mr Clagett's statement was dated 27

June and the hearing before me was on 30 June. The thrust of the argument advanced by Mr Gruder QC on behalf of XL in relation to Mr Clagett's evidence is simply that it was wide of the mark.

The current state of the proceedings against XL in Delaware is that they have been removed from the State Court to the Federal Court. The current state of the arbitration proceedings in London is that XL has served an arbitration notice on Owens Corning and has appointed Mr Nicolas Legh-Jones QC as its arbitrator. Owens Corning's position is that it does not accept that it is obliged to arbitrate with XL in London, but it has appointed Professor Tom Baker of the University of Connecticut School of Law as its arbitrator, while reserving its objection to the jurisdiction of any arbitral tribunal.

Mr Clagett's evidence

Mr Clagett recorded that he was instructed by Owens Corning to report on the approach which a United States court would take under Chapter 2 (the "international chapter") of the United States Federal Arbitration Act 9USC §1 ("the FAA"), in evaluating an alleged agreement to submit disputes arising out of an international commercial transaction to arbitration in a non-United States forum.

He summarised the effect of the FAA as follows. Before a United States court will compel arbitration or stay litigation pending arbitration, the court must first satisfy itself of the existence of an agreement to arbitrate. The precise relationship between

state contract law and federal arbitration law is complex and the subject of divided authority, but it is at least clear that when the FAA establishes a particular substantive rule, that rule displaces any contrary state law. This is true even in the case where a contract includes a general choice of law clause which might on its face produce a different result. Such a clause does not preclude the application of federal arbitration law to the issue whether an agreement to arbitrate has been made. A specific choice of law to govern an arbitration agreement will be effective only to the extent that it is not inconsistent with the FAA.

[a] The international chapter of the FAA incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), Article II of which provides as follows:

> 1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of their defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "Agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

There are conflicting decisions of the United States Court of Appeals for different circuits on the question whether a written contract containing an arbitral clause (as distinct from a separate arbitration agreement) has to be signed by both parties or

contained in an exchange of letters in order to be an agreement in writing within the meaning of the Convention and so enforceable as a matter of federal law.

[3] In *Sphere Drake Insurance plc v Marine Towing Inc* (1994) 16F.3d 666 a marine insurance policy contained a London arbitration clause. Sphere Drake sued Marine Towing to stay litigation and compel arbitration of claims under the policy. Marine Towing argued that it was entitled to sue on the policy, notwithstanding the arbitral clause contained in it, because it was not bound by that clause, since it did not sign the insurance contract of which the arbitral clause was part. The United States Court of Appeals for the Fifth Circuit rejected that argument and held that:

> We would outline the Convention definition of "agreement in writing" to include either
> (1) an arbitral clause in a contract or
> (2) an arbitration agreement,
> (a) signed by the parties or
> (b) contained in an exchange of letters or telegrams.
>
> The insurance contract indisputably contains an arbitral clause. Because what is at issue here is an arbitral clause in a contract, the qualifications applicable to arbitration agreements do not apply. A signature is therefore not required.

[4] In *Kahn Lucas Lancaster Inc v Lark International Limited* (1999) 186 F3d 210 the United States Court of Appeals for the Second Circuit considered, but disagreed with, the court's approach in *Sphere Drake* and held that:

> the definition of "agreement in writing" in the Convention requires that such an agreement, whether it be an arbitration agreement or an arbitral clause in a contract, be signed by the parties or contained in a series of letters or telegrams.

Mr Clagett's conclusion is that it is impossible to predict with certainty whether future cases will follow the *Kahn Lucas* approach or the *Sphere Drake* approach, but he observes that *Kahn Lucas* contains the latest consideration and most thorough analysis of the issue. He says that various factors suggest that *Kahn Lucas* will be the more enduring precedent, but that weighing against those factors must be reckoned the emphatic federal policy in favour of arbitral dispute resolutions; and that, until the United States Supreme Court addresses the question, the proper interpretation of the New York Convention's writing requirement remains in doubt.

Mr Clagett's statement does not address the question whether a court applying federal law would on the facts of this case find that there was an arbitral clause in a contract or an arbitration agreement, contained in an exchange of letters.

XL's main submissions

1. Taken together, XL's arbitration clause and choice of law clause have the effect that the parties' substantive rights and obligations under the contract of insurance are governed by New York State law, but English law is the proper law of the arbitration agreement. This is so, whether XL's choice of law clause is taken to be in the shorter form set out in Ms Pengelly's form of quotation or in the longer form set out in the wording attached to XL's formal policy dated 15 September 1999. (Mr Gruder arrived at this position by degrees, having started from the position

[counsel for XL]

that New York law was the proper law of the policy including the arbitration agreement, but that English law was the curial law of the arbitration.)

2. Under English law there was plainly an arbitration agreement within the meaning of section 5 of the Arbitration Act 1996 ("the Act").

3. Even if New York law is the proper law of the arbitration clause, Mr Clagett's opinion did not address the question whether there was under New York State law an arbitration agreement between the parties, but addressed the different question whether federal law would prevent its enforcement in any court of the USA, as the lex fori, for want of compliance with the formal requirements of federal arbitration law.

4. If the international chapter of the FAA is relevant, there was an agreement to arbitrate contained in a policy of insurance concluded by an exchange of letters.

5. Under section 30 (but subject to sections 32 and 67) of the Act, it will be for the arbitral tribunal to rule whether there is a valid arbitration agreement.

6. However in the meantime it is plain on the material before the court that Owens Corning is acting in breach of an arbitration agreement in pursuing litigation against XL in Delaware.

7. In those circumstances an injunction should be granted to prevent Owens Corning from doing so: *The Angelic Grace* [1995] 1 Lloyds Rep 87.

Owens Corning's main submissions

1. On ordinary principles governing the formation of contracts, it is seriously questionable whether there was an apparent agreement between XL and Owens Corning containing XL's arbitration clause.

2. There being serious doubt about that issue, it would be wrong for this court to compel its determination by London arbitration.

3. Even if there was apparent agreement between XL and Owens Corning containing that clause, the proper law of the putative arbitration clause was the law of the State of New York, which accords supremacy in matters of international arbitration to the international chapter of the FAA.

4. It is strongly arguable that there was no written agreement within the meaning of the New York Convention as incorporated in the FAA and properly interpreted according to federal law.

5. It is therefore far from clear that Owens Corning's conduct in suing XL in Delaware would be judged a breach of contract by a United States court.

6. That issue can in any case be determined more justly and conveniently by the court in Delaware, applying US federal law, than by this court or by London arbitration. There would be no prejudice to XL in the issue being determined by the Delaware court, but there would be potential prejudice to Owens Corning if the Delaware proceedings against XL are stayed, because Owens Corning wishes to be able to proceed against all the relevant insurers in the same action.

7. In the circumstances there is no justification in principle or on a balance of convenience for the grant of an anti-suit injunction to prevent Owens Corning from pursuing its claim against XL in Delaware.

The issues

[ ] There appear to me to be four key issues:

1. Was there an apparent agreement between Owens Corning and XL containing a London arbitration clause?

2. What law governs the validity of the putative arbitration agreement and/or the question which tribunal should determine its validity?

3. If and insofar as the FAA is relevant, what is its effect?

4. How should the court's discretion be exercised?

1. Was there an apparent agreement between Owens Corning and XL containing a London arbitration clause?

Leaving aside the FAA, there is no suggestion that the law of New York differs in any way from English law in relation to ordinary principles governing the formation of contracts.

Applying those principles, it seems to me clear beyond serious doubt that there was an apparent agreement between Owens Corning (through Mr Davies) and XL which contained XL's London arbitration clause.

XL stipulated from the time of its first quotation that cover would be subject to its London arbitration clause. Far from challenging that stipulation, Mr Davies confirmed by fax on 13 March 1998 his agreement to coverage "as per your quotation".

If his fax had stopped there, there could have been no dispute that it constituted an acceptance of XL's offer. But he went on to request that Ms Pengelly should sign and return the attached binder, which she did. Mr Hunter QC submitted that it was at least reasonably arguable that the effect of Mr Davies's fax was to reject XL's arbitration clause, and to make a counter offer in the terms of the attached binder, which XL accepted.

That is in my view untenable. I see no warrant for reading the words "We would like to buy coverage with for 10% of the primary $100m of the property program of the above mentioned company as per your quotation" as a reference only to the premium. If Mr Davies intended to reject the special conditions of the quotation, and meant to achieve that objective by saying that he wished to buy coverage as per XL's quotation but enclosing for signature a form of binder which omitted those special conditions, in the hope that Ms Pengelly would miss the point, it would have been a devious way of proceeding, but there is no cause to infer that he had any such intention. The binder contained a general summary of the cover, but it cannot reasonably have been supposed by Ms Pengelly or Mr Davies that by proffering it for signature he was to be understood as rejecting the express conditions of XL's quotation, without specific mention and when he began his fax by expressing confirmation of coverage as per that quotation.

Had there been any possible misunderstanding about this, it ought to have been raised in response to Ms Pengelly's letter to Mr Davies dated 22 April 1998 (written in relation to the leakage of dams and dykes exclusion, but reiterating that XL was following the Allendale spectrum form except for those parts which were in conflict with XL's London arbitration and New York policy law interpretation wording), and when XL issued its formal policy. The fact that the matter was not raised on either occasion is strong evidence that there was no misunderstanding.

2. <u>What law governs the validity of the putative arbitration agreement and/or the question which tribunal should determine its validity?</u>

An arbitration clause in a contract is an agreement within an agreement. National laws may affect it either by an internal process, because the parties have chosen a particular national law to govern their relationship or some part of it, or by an external process, because a particular court chooses to apply some other law to it.

It is a general principle of English private international law that it is for the parties to choose the law which is to govern their agreement to arbitrate and the arbitration proceedings, and that English law will respect their choice. The extent to which there are exceptions to that general principle is not of present relevance. Parties' freedom of choice includes freedom to choose different systems of law to govern different aspects of their relationship.

On the basis that there was an apparent agreement between the parties containing XL's arbitration clause, there is an issue whether the agreement should be taken to have included the longer or shorter form of choice of law clause. Evidence of Ms Pengelly's subjective intention in using the shorter form when issuing a quotation is not admissible, but evidence is admissible as to the prior course of dealing between XL and Marsh & McLellan, from which XL alleges that a reasonable person, possessed of the knowledge of Ms Pengelly and Mr Davies, would have understood from the words used and the context that the longer form was intended. On the uncontradicted evidence before me, XL has a good arguable case that the shorter

version would have been understood as shorthand for the longer, although I cannot be sure what conclusion the arbitral panel would reach on that issue. It is therefore necessary to consider the matter on either basis, although I do not consider that it makes a critical difference to the result.

In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 357-358, Lord Mustill said:

> "It is by now firmly established that more than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration. Less exceptionally it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration: the "curial law" of the arbitration, as it is often called... Certainly there may sometimes be an express choice of a curial law which is not the law of the place where the arbitration is to be held: but in the absence of an explicit choice of this kind, or at least some very strong pointer in the agreement to show that such a choice was intended, the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible."

I take the sentence beginning with the words "Less exceptionally it may also differ" to mean that it is less exceptional to find the proper law of an arbitration clause differing from the proper law of the parent contract where the curial law differs from that of the parent contract. The same judge made a similar comment in *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A G* [1981] 2 Lloyd's Rep 446, 453:

> "It is by no means uncommon for the proper law of the substantive contract to be different from the lex fori; and it does happen, although much more rarely,

that the law governing the arbitration agreement is also different from the lex fori.

The reasons are not hard to seek. Arbitration law is all about a particular method of resolving disputes. Its substance and processes are closely intertwined. The Arbitration 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.

The heart of Mr Hunter's submissions was by their choice of law clause the parties chose New York law, which necessarily included the FAA, to govern among other things the formal validity of the arbitration clause; and that, if his submissions on the FAA are correct, the arbitration clause is invalid (or at least it is strongly arguable that it is invalid). On that approach, the effect of one of the two special conditions was to invalidate the other, or at least give rise to a difficult legal argument which could be ultimately resolved only by the Supreme Court of the United States in order to determine the validity of the arbitration clause (ironically when, on the face of the arbitration clause, the parties wished as far as possible to exclude applications or appeals to courts on points of law).

The choice of law clause has to be considered in conjunction with the arbitration clause, by which the parties chose that any dispute relating to the policy should be determined not only in London, but expressly under the provisions of the Arbitration Act 1996, with the modification that they waived any right to apply to the court under

section 45 for the determination of a question of law arising in the course of the proceedings and any right of appeal under section 69 on a point of law.

The shorter form of choice of law clause provided that the policy was to be construed in accordance with the internal regulation laws of New York. I take the reference to internal regulation laws to exclude New York conflict of law rules. In the absence of any reason to conclude otherwise, a provision that a contract is to be construed in accordance with a particular system of law would be taken as a choice of that law to govern all aspects of that contract. But for reasons to which I have adverted and will return, New York law cannot have been intended to govern all aspects of the arbitration clause.

The longer form of choice of law clause provided that the policy should be construed in accordance with the internal laws of the State of New York, except (among other things) insofar as such laws are inconsistent with any provision of the policy.

In *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50, 65, it was held that under English law an arbitration agreement, like any other contract, must be governed by some system of private law. That has been qualified by section 46 of the Act, which now provides that an arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute or, if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal. That section was intended to validate

"honourable engagement" and similar clauses often used in contracts containing arbitration clauses and, would apply, for example, to the "evenhanded" proviso at the end of XL's longer form of choice of law clause. However it is unnecessary to discuss that section further for present purposes, because there is in any event nothing to preclude parties from agreeing that a system of law shall govern one part of their agreement but not another part, so long as the parts are severable (by which I mean that they are not so interconnected as to be incapable of being governed by separate laws). An arbitration clause in a contract is severable, and there is therefore nothing to prevent parties to it from agreeing that the proper law of the parent agreement shall not apply to it if it would be invalid according to that law. The proper law of a contract cannot be left floating until some later event causes it to crystallise (*E I Du Pont de Nemours & Co v Agnew* [1987] 2 Lloyd's Rep 585,592), but that would not be the situation.

The parties cannot have intended by either form of choice of law clause that all aspects of the arbitration agreement should be governed by New York law, for that would be inconsistent with the stipulation in the arbitration clause that any dispute should be determined in London "under the provisions of the Arbitration Act 1996" (other than sections 45 and 69). When, for example, the arbitration clause provided that an award should be a complete defence to any attempted appeal or litigation of the decision in the absence of serious irregularity under section 68, it cannot have meant that such irregularity should be judged otherwise than by English law.

Was English law to govern not merely the arbitral procedure in the narrowest sense, but also the jurisdiction of the arbitral tribunal and the formal validity of the arbitration agreement?

A relevant feature of the Act is its definition in section 5 of the formal requirements of a valid arbitration agreement, which are less stringent than those of the FAA and which the present arbitration clause undoubtedly satisfies. The agreement has to be in writing, but section 5(2) provides that there is an agreement in writing if the agreement is made in writing (whether or not it is signed by the parties), or if the agreement is made by exchange of communications in writing, or if the agreement is evidenced in writing.

A second relevant feature of the Act is that under section 30 the arbitral tribunal may rule on its own substantive jurisdiction, which expressly includes whether there is a valid arbitration agreement.

Sections 5 and 30 are not mandatory provisions (see section 4 and schedule 1), but the arbitration clause did not vary or exclude them, as it excluded applications and appeals under sections 45 and 69. Nor do I read the choice of law clause (in either form) as a choice for the purposes of section 4 (5) that New York law should apply in respect of the subject matter of some or all of the non-mandatory provisions of the Act which the parties did not exclude or vary. That would have been most unusual and, if intended, I would have expected it to be made explicit.

I conclude that by stipulating for arbitration in London under the provisions of the Act (other than sections 45 and 69) the parties chose English law to govern the matters which fall within those provisions, including the formal validity of the arbitration clause and the jurisdiction of the arbitral tribunal; and by implication chose English law as the proper law of the arbitration clause (although that final step is further than is necessary for the purpose of determining this application).

3 If and insofar as the FAA is relevant, what is its effect?

On the conclusions which I have reached, the question does not arise.

For the reasons which I have given, my firmly held view is that an agreement incorporating XL's arbitration clause was made between Miss Pengelly and Mr Davies in their exchange of correspondence. I have no evidence that the United States court considering the matter under the FAA would arrive at the same conclusion, but I have no evidence that it would not.

4 How should the court's discretion be exercised?

Two factors persuade me that I ought to grant an injunction to restrain Owens Corning from proceeding with litigation against XL in Delaware at least until the outcome of the arbitration.

The first factor is that the prosecution of that litigation against XL is in my view a clear breach of an agreement between them that any such dispute should be determined by arbitration in London.

In *The Angelic Grace* [1995] 1 Lloyds Rep 87,96, Millett LJ said:

> "In my judgment, when an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are to far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in *Continental Band NA v Aeakos Compania Naviera SA* [1994]1 WLR 588. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction, is of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case.

I can see no good reason not to exercise the jurisdiction in this case. I recognise the inconvenience to Owens Corning of not being able to sue all their insurers in the same proceedings, but that is a consequence of having different contracts with them. It is not a good reason for depriving XL of its contractual rights.

Mr Hunter submitted that the Delaware court would provide a mechanism by which the issue of the validity of the arbitration clause could be fairly determined between the parties, and that it is better that it should be so resolved than by the mechanism of an anti-suit injunction, which involves a degree of interference with foreign court procedures.

The grant of an anti-suit injunction involves by definition a degree of interference with foreign court procedures, because that is its object. But if the English court is satisfied that litigation in another country would be a breach of contract to arbitrate the dispute in London, the grant of an injunction involves no disrespect or unfriendliness towards the foreign court, but merely an insistence on parties respecting their own contractual obligations. Moreover, the argument that the Delaware court would provide an apt forum for the determination of the validity of the arbitration clause appears to me to be wrong, and I hasten to add that I say that without disrespect to the Delaware court.

This brings me to the second factor which in my view militates in favour of granting an injunction in this case.

The effect of Mr Clagett's evidence is that any Unites States court faced with an application to enforce an international arbitration agreement must apply the FAA, regardless of any choice of law by the parties. This provides an example of a national law being applied to an arbitration agreement by an external process.

The Delaware court, as I understand it, would not be concerned to identify by what law the parties have chosen that the putative arbitration agreement should be governed. On the hypothetical assumption that it were to reach the same conclusion as I have reached on that issue, it would nevertheless be bound to apply the provisions of the FAA, not because the parties intended them to apply but because United States

federal law would compel it to do so. If it then arrived at the conclusion under the FAA for which Owens Corning contend, it would proceed to hear the action. If I am right in the conclusions which I have reached, it would be manifestly unjust to expose XL to that situation.

Conclusion

Under the arbitration clause and the provisions of the Act, it will be for the arbitral tribunal to rule on the validity of the arbitration agreement, if Owens Corning challenges its jurisdiction on that ground, unless the matter is referred to the court for determination under section 32. I am satisfied that in the meantime justice requires that an injunction should be granted restraining Owens Corning from continuing with its litigation against XL in Delaware.