**The “presumption” of English law: a case note on *Iranian Offshore Engineering and Construction Company v Dean Investment Holdings S.A. et al* [2019] 1 WLR 82**

Introduction

1. In *Iranian Offshore Engineering and Construction Company v Dean Investment Holdings S.A. et al* [2019] 1 WLR 82 Baker J gave an important ruling on an issue regarding the Claimant’s reliance on the “presumption” or “evidential assumption” under English law that in the absence of satisfactory evidence of foreign law, the court will apply English law.
2. The basic rule at the heart of the debate was set out as Rule 25(2) of *Dicey, Morris & Collins, “The Conflict of Laws”* (15th Ed) (“*Dicey*”) and reads as follows:

“*(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.*

*(2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case.*”

Background

1. Briefly stated, the relevant background to the issue was as follows:
   1. the Claimant (“IOEC”) had pleaded its claim under English law *without* any reference to Iranian law;
   2. the two represented Defendants (“D5/D6”) had served a defence stating that Iranian law applied to certain matters, but they went no further than that in pleading Iranian law;
   3. subsequently, and from the first CMC, IOEC expressly stated that it was relying upon the so-called “presumption”; and
   4. none of the parties had ever pleaded any actual provisions of Iranian law or sought permission to adduce expert evidence on foreign law.
2. Considering the background of the case in a wider context – i.e., not limited to the facts of this case - the judgment shines a light on a matter that often arises in the Commercial Court and in practice, but which is rarely considered in any depth. Practitioners frequently have to consider at the pleading stage whether to positively plead and prove a foreign applicable law versus relying on the “presumption”. Choosing to rely upon the “presumption” may be for a variety of reasons, for example: (a) because the foreign law is disadvantageous; (b) to avoid the costs of researching and proving the foreign law; and/or (c) because the foreign law is very similar to English law.
3. If the defendant refuses to accept the “presumption”, then the defendant may plead and prove what it asserts to be the applicable foreign law. The claimant will then, in the ordinary course, apply to amend its claim so as to address the foreign law either as its primary or alternative case. On the contrary, if the defendant does not plead and seek to prove any foreign law, practitioners might have assumed that there was no issue regarding the applicable law and that the matter would proceed on the basis that English law applied.
4. In the present case, D5/D6 did not expressly plead or seek to prove the foreign law (which IOEC accepted was the applicable law in respect of certain aspects of the claim). Instead, they intended to raise as an issue at trial that English law should not be applied pursuant to the “presumption”. The aim being to defeat IOEC’s claims on the somewhat technical basis that Iranian law governed certain claims; it would be inappropriate to apply English law by default; it was for IOEC to plead and prove the principles of Iranian law that governed its claims; and IOEC had not sought to do that, so its claims would fail. D5/D6 relied in particular on two authorities, namely *Belhaj v Straw* [2013] EWHC 4111 (QB); [2017] AC 964 and *Global Multimedia International Ltd v Ara Media Services* [2007] 1 All ER (Comm) 1160.
5. Faced with this position and given the advanced stage of the proceedings, IOEC (represented by Graham Dunning QC, Jern-Fei Ng QC and Adam Woolnough of ECC) sought a ruling in advance of the trial to confirm that the “presumption” would apply at trial.

Judgment

1. Baker J held for IOEC. It was not necessary for a claimant to plead the existence of, or an intention to rely at trial upon, the rule of English law that, in the absence of satisfactory evidence of foreign law, the court would apply English law to a case to which foreign law applied. He held that it goes without saying that it will apply -otherwise it would not be the default rule that it is - unless reason not to apply it be demonstrated. He therefore concluded that subject to any successful application by the defendants to amend the pleadings for trial, English law would be applied to the case at trial.
2. The Judge noted that a claimant might of necessity plead some matter of foreign law if without the plea it would not have a cause of action. A claimant might also choose to base its claim upon a foreign law. But where the claimant neither needs nor chooses to plead foreign law in order to plead a viable cause of action, it is not required to do so.
3. A contention that it was inappropriate to determine the claim by reference to English law, so that it would fail come what might, was a reasoned denial of liability. If a defendant therefore wished to contend at trial that the default rule did not apply, it was for the defendant to plead that as a reasoned denial of liability, setting out the matters particular to the claim said to render it inappropriate to judge it by reference to English law, which could, but would not necessarily, include relevant propositions of foreign law. If the defendant did not do so, then no such contention would be open to it at trial, unless it could make a late amendment or obtain an indulgence at trial to rely on an unpleaded case, or unless the court raised the point of its own motion at trial.
4. Baker J held that this conclusion was in line with CPR r.16.5(2)(a). It is for a defendant, if it wishes to raise such a contention, to plead that it is inappropriate to determine the claim by reference to English law and to particularise why that is said to be the case.

Comment

1. The judgment provides clarity in relation to an issue that arises frequently in commercial litigation. It supports a ‘cards on the table’ approach which is consistent with the overriding objective. If either party wants to rely upon a foreign law, then it must plead and prove that foreign law. If neither party does so, then English law has a default rule which has the effect that English law will be applied. It is not then open to a defendant to ambush the claimant late in the day by arguing that, despite not seeking to put foreign law in issue and despite not pleading any particulars as for why the “presumption” should not apply, the claim must fail because the claimant has failed to plead and prove its cause of action under the applicable foreign law.
2. The Judgment is also notable for the basis upon which this result was achieved, in particular, the reference to the pleading obligations that fall upon the defendant under CPR r.16.5(2)(a).
3. Moreover, as regards the two authorities particularly relied upon by D5/D6, the Judge held that in the *Global Multimedia* case there was a confusion between (a) the need to plead (and prove) propositions of foreign law, if relied on, and (b) whether there is a need to rely on (and therefore to plead and prove) foreign law in the first place. He held that a similar confusion affected *Belhaj v Straw*,unless the very striking and unusual circumstances of that case are kept in mind. Instead, he preferred the approach and analysis of Arden LJ (as she then was) in *OPO v MLA* [2015] EMLR 4 and *Brownlie v Four Seasons Holdings Inc* [2016] 1 WLR 1814.
4. Practitioners should be aware that prior to this case the exceptions to the default “presumption” were poorly defined. Paragraph 9-029 of Dicey highlighted the unsatisfactory state of the conflicting and vague authorities on when the “presumption” ought not apply. It stated that “*[t]he conclusion is that there are cases in which the default application of a rule of English law is simply too problematic to be appropriate, but that apart from the fact that a court should not ‘invent’ a rule of English law to be applied in default of proof of foreign law, no sharp line exists to define the limits of the principle that in default of sufficient proof, foreign law will be taken to be the same as English law.*”
5. This judgment does not attempt to resolve that issue. What it does do is provide clarity and certainty for both claimants and defendants as to how and when the “presumption” applies and the procedurally proper approach towards challenging any reliance on the “presumption” in normal commercial cases.

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