

Stop - or go? Injunctions and Arbitration

by Graham Dunning QC¹, Master's Lecture, 13 March 2008

Ladies and Gentlemen, it was a great honour to be asked by Michael Stephens to present the 2008 Master's lecture. But I must confess that I did hesitate momentarily when I realised that the day on which I would be required to deliver the lecture would be my 50th birthday.

My subject this evening is one much discussed in the field of international arbitration. It is the grant of injunctions by the English Courts in relation to arbitration. I distinguish between two situations. The first is where there is an application to the Court to *restrain an arbitration*, either in England or abroad. This may be termed an "anti-arbitration" injunction. Such injunctions are often sought on the basis, for example, that there has not been any agreement to arbitrate. The second is where there is an application to the Court to *restrain court proceedings*, either in this country or abroad, in favour of having the dispute resolved in arbitration. This is usually called an "anti-suit" injunction.

Although quite different, both situations raise similar legal and policy considerations. In particular, they lead us to focus on the central importance of the concept of the "seat" of the arbitration, the place in which an arbitration has its legal roots.

First, I shall address "anti-arbitration" injunctions.

It has been the law for some time that, although the Court has a statutory power to restrain arbitration (under s.37 of the Supreme Court Act 1981), it should be cautious in the exercise of this power. Prior to the Arbitration Act 1996, the Courts were sometimes asked to interfere with arbitrations. This could occur, for example, where the existence of the relevant arbitration agreement was under challenge in parallel Court proceedings in England or abroad.

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Occasionally, the Court might take the view that the Respondent should not be sued in arbitration, pending determination of the related Court proceedings concerning the validity of the arbitration agreement. This happened in the 19th century case of *Kitts v Moore*².

However, even before the 1996 Act, the Court often refused to interfere with the arbitration and refused to grant an injunction. Thus, for example, *The “Ithaka”*, a decision of the Court of Appeal in the 1930s³. One party alleged that it had made an agreement (including an arbitration clause) under duress. It brought proceedings in Turkey to invalidate the agreement. It was refused an injunction to stop the arbitration pending the decision of the Turkish Court. The Court of Appeal held that the arbitration was valid on its face and the applicant needed to show that the continuation of the arbitration would be vexatious and oppressive if it were to be persuaded that an injunction should be granted.

The “Oranie” and The “Tunisie” was another Court of Appeal decision, this time in the 1960s⁴. Here, there had been some delay in making the application during which time the arbitration had been continuing. The Court held that an applicant could not “blow hot and cold” about an arbitration. It could not have an injunction if it had delayed applying or if it could not show that continuance of the arbitration would be vexatious and oppressive.

The Choko Star was a further decision of the Court of Appeal⁵. Again, the Court refused an injunction. It pointed out that in this area it is not simply a matter of satisfying the usual test for an interim injunction, the low *American Cyanamid* threshold of a “serious issue to be tried”. Instead, the correct approach should take account of the fact that the arbitral tribunal can quite properly examine its own jurisdiction when a point is raised as to whether it has

² [1895] 1 QB 253

³ (1939) 64 Ll.L.Rep 259

⁴ [1966] 1 Lloyd’s Rep 477

⁵ [1987] 1 Lloyd’s Rep 508

jurisdiction over the matters in the reference. The Court referred to a decision of Devlin J some 30 years earlier⁶, where he said:

“It is clear that at the beginning of an arbitration one side or the other may challenge the jurisdiction of the arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine the matter finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question to be held over until it is determined by some court which had power to determine it ... they are not obliged to take either of those courses. They are entitled to enquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because they cannot do that – but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not.”

It was not easy to discern any clear principle from the relatively isolated decisions that I have mentioned. But clearer principles were introduced in 1981 by the House of Lords in the ***Bremer Vulkan*** case. In that famous case, the House ruled that the Courts have no inherent power at common law to supervise arbitrations. Therefore, any interference by the Courts in the arbitral process normally has to be based on the existence of a specific legal right to be enforced or protected by the Court⁷.

The Court’s lack of any inherent supervisory power over arbitrations has been underlined by the Arbitration Act 1996. The legislation now emphasizes the limited scope for intervention by the Court in the arbitral process. It also provides statutory reinforcement of the concept of the separate validity of an arbitration agreement, regardless of the validity of the matrix contract in which it is found. This reinforcement is found in s.7 of the Act. The position as

⁶ ***Christopher Brown v GOWHRG*** [1954] 1 QB 8

⁷ ***Bremer Vulkan v South India Shipping*** [1981] AC 909, 979B-F and 980C.

regards Court interference with an English seated English arbitration has been put on a statutory footing and it is even more restricted than it was before. This is not least because as was stated in the *Cetelem* case⁸:

“... a central and important purpose of the 1996 Act was to emphasize the importance of party autonomy and to restrict the role of the courts in the arbitral process. In particular the Act was intended to ensure that the powers of the Court should be limited to assisting the arbitral process and should not usurp or interfere with it”.

This central purpose of the Act is reflected in one of the guiding principles, set out in Section 1 of the Act, namely that, *“in matters governed by this Part the court should not intervene except as provided by this Part”* (section 1(c)). In recent years, the English Courts have paid great heed to this principle.

Where the basis for seeking an anti-arbitration injunction is that the tribunal lacks jurisdiction, particular account has to be taken of the fact that, not only does s.7 of the Act give statutory reinforcement to the concept of the separate validity of the arbitration agreement, but also the Act gives arbitral tribunals an express statutory power to decide their own jurisdiction. Section 30 is a version of the internationally recognised doctrine of “Kompetenz-Kompetenz”. The great advantage of this doctrine is, according to the DAC Report (which introduced the arbitration bill):

“that it avoids delays and difficulties when a question is raised as to the jurisdiction of the tribunal. Clearly the tribunal cannot be the final arbiter of a question of jurisdiction, for this would provide a classic case of pulling oneself up by one’s own bootstraps, but to deprive the tribunal of a power (subject to Court review) to rule on jurisdiction would mean that a recalcitrant party could delay valid arbitration proceedings indefinitely by making spurious challenges to its jurisdiction”⁹.

⁸ *Cetelem SA v Roust Holdings* [2005] 1 WLR 3555 at 3571B

⁹ Departmental Advisory Committee on Arbitration Law, February 1996, paras 137-139

Moreover, under the form of Kompetenz-Kompetenz enacted by Section 30, any decision made by the tribunal under its statutory power is final, unless and until successfully appealed¹⁰.

The statutory scheme for dealing with questions of arbitral jurisdiction relating to English arbitrations is essentially contained in Sections 30-32, 67 and 72 of the Act. The primary forum in which matters of arbitral jurisdiction should be decided is before the arbitral tribunal itself. The tribunal has power to decide its own jurisdiction (s.30). The Court can only get involved in the following circumstances. First, if the parties all agree to the Court deciding the question of jurisdiction under s.32. Second, after an award has been made on a challenge under s.67. Third, if the applicant comes to Court before taking any step in the arbitration and asks for a determination under s.72.

It has been established that the Court cannot or should not get involved in any circumstances other than those prescribed in this statutory scheme¹¹. Therefore, unless there is such doubt about jurisdiction to enable the Court to step in under s.72, or unless the parties agree to having the issue decided straightaway in Court, there should be no intervention and no injunction.

Alleged lack of jurisdiction is not always the basis of an attempt to restrain an arbitration. This is evidenced by one of the most recent attempts to restrain the pursuit of a domestic arbitration, which was another battle in the long-running *Elektrim v Vivendi* dispute¹². Here, the application was founded on an argument that an LCIA tribunal sitting in a London arbitration ought not to proceed with its arbitration, which had been commenced in 2003, until after there had been a determination in another arbitration between some of the same parties, which had been commenced in 2006 under ICC rules in Zurich. The subject matter of that

¹⁰ *Primetrade AG v Ythan Ltd* [2006] 1 Lloyd's Rep 457, para 58

¹¹ See *ABB Lummus v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24; *Vale do Rio v Bao Steel* [2002] 2 Lloyd's Rep 1

¹² [2007] 2 Lloyd's Rep 8

second arbitration included the question of whether the claim that was being pursued in the earlier London arbitration had been compromised. The key and somewhat surprising feature of the case was that the claimant in both arbitrations was Vivendi. Vivendi was both pursuing a claim in the 2003 London arbitration and asserting in the 2006 Zurich arbitration that its claim had been settled. Vivendi was thus claiming inconsistent relief in the two arbitrations; on the one hand, it was pursuing the ICC arbitration for relief on the basis that the disputes had been settled, while, on the other hand, it was pursuing the LCIA arbitration for relief on the basis that the disputes had not been settled.

Even in these unusual circumstances, the Court decided that it could not intervene and it declined to grant an injunction against Vivendi. The Court followed the approach normally applied where an application is made to restrain foreign proceedings, namely of asking whether or not, the pursuit of the arbitration either (1) infringed a legal or equitable right or (2) was properly characterised as vexatious and oppressive. The Court held that neither of these two requirements was satisfied and so an injunction was refused. The Court pointed out that, following *Bremer Vulcan*, the English Court has no power to supervise domestic arbitrations at an interlocutory stage. It also pointed out that, even before the 1996 Act, it had been established that there is no scope to ask the Court to compel the arbitrators to take a particular interlocutory course. The Court supported its decision by noting that the 1996 Act restricts the Court's right to intervene with regard to interlocutory matters to *either* removing an arbitrator under s.24 if there has been something amounting to improper conduct *or* intervening post-award if there has been a serious irregularity within the closed list of situations set out in s.68.

So far as restraining a *foreign* arbitration is concerned, the authorities establish that the statutory power to restrain foreign Court or arbitral proceedings should be exercised only if one of the two requirements that I have mentioned is satisfied; that is to say either the claimant has a legal or equitable right to restrain the foreign proceedings, or the bringing or pursuit of

the foreign proceedings involves vexatious, oppressive or otherwise unconscionable conduct on the part of the defendant¹³.

In the case of a foreign arbitration, there will necessarily be a foreign seat and a foreign curial law. That fact is an additional and potent reason why the English Court should not intervene and should leave the party disputing the arbitration to do so, not in the English Court, but before the tribunal and, if necessary, in the local Court at the seat.

This factor was stressed recently by the Court of Appeal in the *Weissfisch* case, which concerned an unusual attempt to have the English Court restrain an arbitration taking place in Geneva¹⁴. The applicant argued that the sole arbitrator did not have jurisdiction; that the arbitration agreement in question was void; and that the arbitrator (who was an English solicitor resident in England) should be enjoined from continuing with the Swiss arbitration, including being prevented from even taking any decision of his own as to whether he should continue with the arbitration. The respondents, on the other hand, who included the sole arbitrator, argued that the English Court should not intervene. They maintained that it should be left to the tribunal to decide these issues under the doctrine of *Kompetenz-Kompetenz* in Switzerland, subject to ultimate review by the relevant Swiss supervisory court applying Swiss law.

In an important ruling, a strong Court of Appeal (including both the Lord Chief Justice and the Master of the Rolls) accepted the respondents' argument. They agreed with the first instance judge that the obvious forum for any challenge to the arbitration was Switzerland, the courts there having supervisory jurisdiction over the arbitration. In the Court's opinion, the natural consequence of the parties' arbitration agreement, with its choice of Swiss law and Geneva as the seat, was that any issues as to the validity of the arbitration agreement fell to be resolved in Switzerland according to Swiss law.

¹³ See *South Carolina v Assurantie NV* [1987] AC 24, the statement of general principles at 39H–40E, per Lord Brandon.

In my view, this decision is undoubtedly correct. If (as is the case under the 1996 Act in respect of an English arbitration) the Court ought not to become involved to prevent a domestic tribunal from exercising its statutory power under s.32 to decide its own jurisdiction (unless the respondent has applied immediately under s.72), then *a fortiori*, the English Court should not normally get involved with an arbitration with a foreign seat, in respect of which the English Court has no supervisory jurisdiction. In the case of an arbitration with a foreign seat, the English Court ought not normally to interfere at all, and certainly not where adequate procedures exist under the curial law.

I pause here to observe that it is entirely normal for the Courts at the place that is the seat of an international arbitration to assume supervisory jurisdiction over the arbitration, including issues of arbitral jurisdiction and any challenges to the award. This is the position under the 1996 Act; supervisory jurisdiction on the part of the English courts is based on the “seat” of the arbitration being in England and Wales or Northern Ireland¹⁵. This is also the position in most developed jurisdictions. It is based on a shared international perception that the local court is the most appropriate to regulate and review arbitrations that the parties have chosen to base in its territory. It is also based on the scheme of the New York Convention. Under that scheme, control of arbitral proceedings, as well as of the final award, is restricted to the courts at the seat of the arbitration and (with respect to awards only) to the courts where enforcement is sought by a successful party¹⁶. It is only if the winning party commences enforcement proceedings in a place other than the seat that an award can come to be examined before courts elsewhere, and then only to see whether there exist the strictly limited circumstances laid down in the Convention for refusal of enforcement.

¹⁴ *Weissfisch v Julius* [2006] 1 Lloyd’s Rep 716. See also *A v B (No.1)* and *A v B (No.2)* [2007] 1 Lloyd’s Rep 237 and 358

¹⁵ see Section 2(1)

¹⁶ see e.g. Article V.1(e), which contemplates an award being set aside, or suspended, by a “*competent authority of the country in which ... that award was made*”.

Any interference by Courts with this basic allocation of jurisdiction and functions threatens the system of international commercial arbitration that has grown up over the last 40 years or so. That is why attempts by the Courts in places such as India and Pakistan to assume supervisory jurisdiction over foreign arbitration awards - and I have very much in mind the decision in January of this year by the Supreme Court of India in the *Venture Global Engineering v Satyam Computer Services* case - have been the subject of fierce criticism. These attempts contravene the scheme of the New York Convention and the principle that it is the Courts at the 'seat' of an arbitration which have supervisory jurisdiction over it.

Allocation of control of arbitrations based on the concept of "seat" has long been recognised under English law. Some 20 years ago, the late Kerr LJ said¹⁷:

"... every arbitration must have a 'seat' or locus arbitri or forum which subjects its procedural rules to the municipal law there in force ... Prime facie, i.e. in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also the law of the 'seat' of the arbitration. The lex fori is then the law of X and, accordingly, X is the agreed forum of the arbitration. A further consequence is then that the Courts which are competent to control or assist the arbitration are the Courts exercising jurisdiction at X."

Despite what I have said, there may be some very rare factual situations in which the Court can hold that pursuit of a foreign arbitration is so vexatious and oppressive that it will injunct a foreign arbitration. Two recent cases, falling on either side of the line so far as this is concerned, are the *Intermet* case and the *Albon* case¹⁸.

¹⁷ *Nav Amazonica v Cie Internat. De Seguros* [1988] 1 Lloyd's Rep 116, 119-120

¹⁸ *Intermet FZCO v Ansol Ltd* [2007] EWHC 226 (Comm) and *Albon v Naza Motor Trading Sdn Bhd* [2008] 1 Lloyd's Rep.1.

In the *Internet* case, there was an attempt to restrain a Zurich arbitration. The applicant argued that the Zurich arbitration was duplicative of issues being tried in separate proceedings in an English Court action, and should be restrained. The judge disagreed. She held that not only had the applicants participated in the Zurich arbitration and delayed too long before making the application but that, although there was some factual overlap, the essential issues in the arbitration and in the court proceedings were different so that it could not be said that the arbitration was vexatious and oppressive.

On the other hand, a rare example of a case in which the Court will intervene in respect of a foreign arbitration is the Court of Appeal decision in the *Albon* case. The Court granted an injunction restraining pursuit of an arbitration in Malaysia, pending a determination by the English Court as to whether the joint venture agreement which contained the relevant arbitration agreement had been forged by one of the parties. On those bare facts, the decision might seem surprisingly interventionist. Why did the Court not leave it to the arbitral tribunal to determine the validity of the arbitration agreement and whether or not it had been forged? To have done so would have been consistent with the recent decision of the House of Lords in *Fiona Trust v Privalov*¹⁹.

However, when one examines the particular facts of the *Albon* case, it is apparent that there were crucial circumstances that took the case well outside the norm. The claimant had first begun court proceedings in England. There was a good arguable case that his signature on the relevant agreement had not only been forged but also had been placed there *after* the English Court proceedings had been commenced and in a specific attempt to defeat them. Most importantly of all, it was agreed by the two parties that the English Court - and not the Malaysian arbitral tribunal - should determine the forgery issue. Given these circumstances, and in particular the latter point which amounted to an expressly agreed derogation from the scope of the arbitration agreement, the decision that continuation of the Malaysian arbitration in the meantime would be vexatious and oppressive was not that surprising.

¹⁹ [2007] 2 CLC 553

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I now turn to consider the second situation: anti-suit injunctions *in support of* arbitration.

Since well before the 1996 Act, the English Courts have exercised a jurisdiction to grant anti-suit injunctions in support of arbitration, both on an interlocutory and on a final basis. In the *West Tankers* case²⁰ Lord Phillips described the jurisdiction in this way:

*“The Courts of the United Kingdom have for many years exercised the jurisdiction to restrain foreign court proceedings as Colman J did in this case: see **Pena Copper Mines Ltd v Rio Tinto Co Ltd** (1911) 105 LT 846. It is generally regarded as an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration. It promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court”*

The leading modern decision is that of the Court of Appeal in *The “Angelic Grace”*²¹. The rationale of the jurisdiction is that, once a dispute has arisen that falls within the scope of an arbitration agreement, there is an obligation to arbitrate the dispute which is akin to other types of contractual obligation. If a party to an arbitration agreement brings court proceedings in breach of the arbitration agreement, he is depriving the other party of its contractual entitlement to arbitrate the dispute in question in a situation where *ex hypothesi* damages are likely to be an inadequate remedy. Therefore, unless the applicant comes to the court unjustifiably late, or unless there is some other concrete reason why as a matter of discretion an injunction ought not to be granted, the Court will normally order an injunction so as to enforce the contractual right to arbitration. In *The “Angelic Grace”* Millett L.J. said:

“In my judgment, where 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

²⁰ *West Tankers Inc v Ras Riumione Adriatica di Sicurta SpA*, [2007] 1 Lloyd’s Rep 391

²¹ [1995] 1 Lloyd’s Rep 87

English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced.”

The jurisdiction to support arbitration by granting anti-suit injunctions has been extended to situations where an injunction is granted against a person who was not an original party to the arbitration agreement but is claiming through or under someone who was. In *DVA v Voest Alpine*²², the respondent in question was a Brazilian insurer to whom the assured’s rights of suit had been transferred upon payment of the insurance claim. The Court of Appeal held that, although the insurer was not a party to the arbitration agreement, nevertheless equity required that any claim by the insurer must be pursued by way of London arbitration proceedings. Accordingly, an anti-suit injunction was granted against it. Hobhouse L.J. said:

“... the rights which the insurance company has acquired are rights which are subject to the arbitration clause. The insurance company has the right to refer the claim to arbitration, obtain if it can an award in its favour from the arbitrators, and enforce the obligation of the time charterers to pay that award. Likewise, the insurance company is not entitled to assert its claim inconsistently with the terms of the contract. One of the terms of the contract is that, in the event of dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without also recognizing the obligation to arbitrate. ... The insurance company is failing to recognise the equitable rights of time charterers. The equitable remedy for such an infringement is the grant of an injunction. ”

In recent years, however, an obstacle has appeared, potentially preventing the Courts from following this approach where the legal proceedings to be restrained are taking place in a European country that has jurisdiction over the matter by reason of EC Regulation 44/2001 (the Judgments Regulation).

²² [1997] 2 Lloyd’s Rep 279

This problem was exemplified in the *Through Transport* case²³. A claim was brought in the Finnish courts by subrogated insurers against a P&I Club under a local direct action statute, although under the P&I policy insurance claims had been agreed to be subject to London arbitration. At the request of the P&I Club, the first instance English Court granted an anti-suit injunction restraining the insurers from pursuing the proceedings in Finland. The Court of Appeal agreed with the judge at first instance that the claim under the Finnish statute was, from an English conflict of laws point of view, to be characterised as contractual, and that therefore English law (the law applicable to the P&I cover) applied to it. It upheld the grant of declaration. But, in the exercise of a fresh discretion which had arisen in light of two European Court cases after the first instance decision, *Erich Gasser v MISAT* and *Turner v Grovit*²⁴, it decided that it would not grant an anti-suit injunction against the Finnish claimant. A curious feature of the case is that the Court did not have its attention drawn to its own previous decision in the *DVA* case.

The same issue came before the Court again in the *West Tankers* case²⁵. Here, a subrogated claim was brought in the Courts of Syracuse in Sicily, in circumstances where the relevant contract provided for arbitration in London. The contract was governed by Italian law, whereas the arbitration agreement was governed by English law. The English first instance Court held that in these circumstances English law was applicable to the question of whether the subrogated insurers were bound to bring their claim in accordance with the arbitration clause in London. Applying the *DVA* case, it held that under English law the insurers were obliged to refer their claim to arbitration in London. It therefore granted an injunction restraining the Italian proceedings.

²³ *Through Transport Mutual v New India Assurance Co Ltd (No.1)* [2004] 1 Lloyds Rep 206 (Moore-Bick J); [2005] 1 Lloyd's Rep 67 (CA)

²⁴ [2005] QB 1 and [2005] 1 AC 101 respectively

²⁵ *West Tankers Inc v Ras Riunione Adriatica and others* [2005] 2 Lloyd's Rep 257 (Colman J).

Given the conflict between the two previous Court of Appeal decisions, the case went on appeal direct to the House of Lords²⁶. But the House did not decide the matter. Instead, it referred to the European Court the question of whether an injunction should be granted in respect of court proceedings in another European country that has jurisdiction under the Judgments Regulation.

Currently, the matter rests with the European Court. In the meantime, it is unclear whether anti-suit injunctions in support of arbitration are, or are not, obtainable in respect of proceedings in European countries. Lords Hoffman, Steyn and Mance all expressed a preference for the view that the grant of anti-suit injunctions in support of arbitration should be regarded as entirely outside the scope of, and therefore unaffected by, the Judgments Regulation. They argued that when parties agree arbitration they have a free choice as to which “seat” to choose for their arbitration, and, if they choose a seat that offers support for the arbitral process by means of anti-suit injunctions against competing court proceedings, then that choice should be respected and given full effect. It is very much an open question, however, as to whether the European Court will share their view.

Other open questions that have arisen in respect of anti-suit injunctions in support of arbitration in recent years include: on what precise legal basis, and at what point in time, is it possible for the Court to intervene (as opposed to leaving it to the arbitral tribunal to grant appropriate anti-suit relief)? These issues were highlighted by the important decision of the Court of Appeal in the *Cetelem* case²⁷. The Court decided that in considering the power to grant interim injunctions in support of arbitration under s.44 of the 1996 Act two situations must be distinguished; urgent and non-urgent situations. In the latter situation, the Court can intervene only with the consent of the arbitral tribunal or the opposing party (which is unlikely to be granted). In the former situation, the Court can grant an interim injunction for a limited purpose only, namely “preserving evidence or assets”. It might have been thought that

²⁶ Under the “leapfrog” procedure (s.12 of the Administration of Justice Act 1969). [2007] 1 Lloyd’s Rep 391

²⁷ *Cetelem v Roust Holdings Ltd*, fn.8

this limitation precluded an anti-suit injunction altogether. But the phrase “preserving assets” has been given a sufficiently wide meaning to include preserving a contractual right to arbitrate by restraining pursuit of court proceedings in breach of an arbitration agreement. Nevertheless, following the *Cetelem* decision, the possibility of obtaining injunctions under s.44 is more restricted than had previously thought to be the case.

There is also another important point. Under s.44 the Court can grant only interim, and not final, injunctions. On the other hand, both final and interim injunctions can be granted under s.37 of the Supreme Court Act 1981. But there is significant uncertainty in respect of s.37. It seems logical to suppose that applications for interim relief under s.37 may have the s.44 requirements applied to them by way of analogy. As the Master of the Rolls said in *Cetelem*:

“the relationship between the powers of the court under s.37 of the SCA and s.44 of the 1996 Act will at some stage require detailed consideration because there is tension (to put it no higher) between the apparently wide powers conferred on the court by s.37 and the much narrower powers conferred on the court by s.44” (para 74).

In subsequent cases such as the *Vivendi* case (supra) and *Starlight Shipping v Tai Ping Insurance*²⁸, first instance Courts have touched on this issue. They have decided that they can proceed for the time being on the assumption that the operation of s.37 is not precluded altogether by the existence of s.44. But the inter-relationship between the two provisions remains uncertain and will have to be explored in future cases.

The last decision that I am going to mention is reported simply as *C v D*²⁹. Despite its anonymity, it is a very important case, decided by the Court of Appeal. An injunction application was made after an arbitration had taken place in London and an award had been made. The disputed contract was subject to New York law and the losing party in the arbitration proposed to apply to a Federal Court in New York for *vacatur* of the award on the

²⁸ [2008] 1 Lloyd’s Rep 230

²⁹ [2008] 1 Lloyd’s Rep 239

basis that the decision contained in the award was in “manifest disregard” of New York law. The winning party asked the Court to grant an anti-suit injunction against the proposed U.S. proceedings on the basis that, having chosen to arbitrate with a seat in England, the parties had restricted themselves to those remedies available for challenging an award in the English Courts, those being the courts of the seat. Except on enforcement proceedings brought by the winning party, the losing party was not entitled to ask the courts of some other place to intervene.

The Court specifically approved the dictum in a similarly anonymous case, *A v B (No.2)*³⁰, of Mr Justice Colman, who gave this annual lecture two years ago. In this dictum, he underlined the critical significance of the choice of seat. He said:

“an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator’s jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration”.

In adopting Mr Justice Colman’s reasoning, the Court stressed the exclusive supervisory role of the courts at the seat of the arbitration, which has been my central theme this evening.

I would add just one concluding comment. The jurisdiction exercised in *C v D* to grant an injunction in a post-award situation so as to protect an award from challenge in a jurisdiction other than the seat is a potentially powerful weapon in the fight against parties who seek to take advantage of what may be termed “rogue courts”. As I mentioned earlier, the Indian Supreme Court has defied the international consensus concerning the New York Convention with its recent decision in the *Venture Global Engineering* case. It has once again asserted a jurisdiction to control arbitrations with a seat outside India, and hence to set aside foreign awards, with which it ought not to interfere. If the Indian Courts persist in this approach, there

³⁰ [2007] 1 Lloyd’s Rep 237, para 111

are likely to be many anti-suit injunctions granted by the English Courts in the foreseeable future.