In Memoriam: Michael Mustill and the Channel Tunnel Case

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The arbitration world lost a giant when Michael Mustill departed in April of this year, just a few days short of his eighty-fourth birthday. A man of enormous intellect and wit, with a fine capacity for sincere friendship, this fine Yorkshireman enriched us through contributions as lawyer, judge, scholar and mentor.

Lord Mustill sat as judge successively on the High Court of London, the English Court of Appeal and the British House of Lords, the last of which morphed into the Supreme Court of the United Kingdom. After retirement from the bench, his service as arbitrator touched a wide spectrum of disputes, implicating his expertise in both private and public law. His treatise on commercial arbitration shines for a robust analysis of arbitration law[1], as does the innovative and seriously brilliant exploration of what the "new lex mercatoria" might (or might not) comprise[2]. As Honorary President of the Cambridge University Law Society, Michael served his *alma mater* and the wider academic community.

Among his judicial pronouncements on international arbitration, several will be "worth a detour" as the Michelin Guide sometimes says of an exceptionally good gourmet restaurant. In this connection, we might stop to consider the House of Lords decision in the *Channel Tunnel* case[3], for which Lord Mustill delivered the majority speech. Apart from the most stubbornly self-assured among us, few readers can fail to be intrigued by his analysis of the vexing question of when courts in one country should play a part in overseas arbitrations.

The case finds its genesis in the body of water separating England and France, known as "La Manche" on the French side and the "English Channel" for those speaking the language of Shakespeare. Connecting the Atlantic Ocean to the North Sea at the Straights of Dover (Pas de Calais in the tongue of Molière), these briny depths historically provided the British with an enhanced sense of safety from military invasion, albeit at some cost to efficient commerce with the Continent. In 1988, after extensive debate on both sides of the water,

1 Michael J. Mustill & Steward C. Boyd, *Commercial Arbitration* 2d Edition 1989; updated Companion Volume 2001).

2 Michael Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, 4 Arbitration International 86 (1988), adjusted with amendments from Liber Amicorum for Lord Wilberforce, Oxford University Press (1987).

3 Channel Group v Balfour Beatty Ltd. [1993] Adj.L.R. 01/21, presented after this note.

work began on a tunnel to join the two nations. The monumental project saw completion six years later, ultimately spanning 31 miles (50 kilometers) in length.

The construction contract included a dispute resolution clause which provided for ICC arbitration in Belgium. The litigants expressly designated not one, nor two, but three different legal systems to govern their relationship, with contract recitals calling for the arbitrators to apply "principles common to both English law and French law" absent which the agreement was to be construed by "general principles of international trade law as have been applied by national and international tribunals"[4].

As often happens in such projects, differences of opinion arose about the fair correlation between services performed and money owed. The concessionaire, chosen to build and to operate the tunnel, disagreed with the construction companies hired to do the work. Not surprisingly, the latter argued that fundamental changes in the character in their tasks made the original price inadequate.

The concessionaire sought an injunction in English courts to restrain the construction companies from suspending work pending resolution of the dispute. Although Lord Mustill admitted that an English court did indeed have power to grant the injunction, he concluded that such power should not be exercised in the circumstances of that case. In the presence of a heavily-negotiated dispute resolution clause, not a routine standard form contract, Mustill reasoned as follows.

> The parties chose an indeterminate "law" to govern their substantive rights; an elaborate process for ascertaining those rights; and a location for that process outside the territories of the participants. This conspicuously neutral "anational" and extra-judicial structure may well have been the right choice for the special needs of the Channel Tunnel venture. But whether it was right or wrong, it is the choice which the parties have made. The appellants now regret that choice. **** Notwithstanding that the court can and should in the right case provide reinforcement for the arbitral process by granting interim relief I am quite satisfied that this is not such a case and that to order an injunction here would be to act contrary both to the general tenor of the construction contract and to the spirit of international arbitration.[5]

Any reminiscence of such a great man should include a personal vignette. During one of Michael's visits to Boston we took in a baseball game together.

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4 Clauses 67 and 68, Construction Contract dated 13 August 1986, cited at paragraphs 26-28 of Lord Mustill's speech.

5 Paragraph 100 of Lord Mustill's speech. At the time the case was decided, the relevant issues were governed by the Arbitration Acts of 1950 and 1975. Later, the 1996 Arbitration Act was adopted with Section 2(4), providing that "[t]he court may exercise a power conferred by any provision of this Part …for the purpose of supporting the arbitral process where (a) no seat of the arbitration has been designated or determined, and (b) by reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so."

Our local Red Sox were playing their sworn rivals, the New York Yankees. Michael revealed that during his army service he sometimes narrated games for American troops serving in England. With frightening precision, he imitated the sound effects for a host of baseball plays: pop fly to the outfield; runner caught out while sliding into second base; a line drive; and even a home run by a right-handed hitter clearing the left field wall at Fenway Park. Enough to cause envy in the very best radio announcers. He will be missed.

Michael Mustill and the Channel Tunnel Case

Channel Group *v.* Balfour Beatty Ltd. [1993] Adj.L.R. 01/21

Judgement of the House of Lords before Lord Keith of Kinkel, Lord Goff of Chieveley, Lord Jauncey of Tullichettle, Lord Browne-Wilkinson and Lord Mustill : 21st January 1993.

LORD KEITH OF KINKEL

1. My Lords, for the reasons given in the speech to be delivered by my noble and learned friend, Lord Mustill, which I have had the opportunity of considering in draft and with which I agree, I would dismiss this appeal. I would add that I also agree with the observations contained in the speech of my noble and learned friend, Lord Browne-Wilkinson.

LORD GOFF OF CHIEVELEY

2. My Lords, for the reasons given by my noble and learned friend, Lord Mustill, I, too, would dismiss the appeals. I also wish to express my agreement with the point raised by my noble and learned friend, Lord Browne-Wilkinson. Like him, I am concerned that the jurisdiction to grant an injunction, which is unfettered in the statute, should be rigidly confined to exclusive categories by judicial decision.

LORD JAUNCEY OF TULLICHETTLE

3. My Lords, I have the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Mustill. I agree with him, and for the reasons which he gives, I, too, would dismiss the appeal.

LORD BROWNE-WILKINSON

4. My Lords, I have read and agree with the speech of my noble and learned friend, Lord Mustill. For the reasons which he gives I, too, would dismiss the appeal.

5. I add a few words of my own on the submission that the decision of this House *in Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210 would preclude the grant of any injunction under section 37(1) of the Supreme Court Act 1981, even if such injunction were otherwise appropriate. If correct, that submission would have the effect of severely curtailing the powers of the English courts to act in aid, not only of foreign arbitrations, but also of foreign courts. Given the international character of much contemporary litigation and the need to promote mutual assistance between the courts of the various jurisdictions which such litigation straddles, it would be a serious matter if the English courts were unable to grant interlocutory relief in cases where the substantive trial and the ultimate decision of the case might ultimately take place in a court outside England.

6. Section 37(1) of the Supreme Court Act 1981 provides: "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases where it appears to the court to be just and convenient to do so".

7. Despite the breadth of these words, in the *Siskina* this House laid down certain limits on the powers which it confers. In that case, the plaintiffs were seeking leave to serve the defendants out of the jurisdiction. The only ground on which the plaintiffs could rely under R.S.C., Ord. 11 was the then sub-rule (i) viz. that the writ claimed an injunction against the defendants dealing with their assets within the jurisdiction. Since the contract in question contained a foreign exclusive jurisdiction clause, the only injunction capable of being granted by the English courts in the ordinary course of events would have been an interlocutory injunction. In that context, Lord Diplock said, at p. 256: "*The words used in sub-rule (i) are terms of legal art. The sub-rule speaks of 'the action' in which a particular kind of relief, 'an injunction' is sought. This presupposes the existence of a cause of action on which to found 'the action.' A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action".*

8. This passage, read in isolation, suggests that there are only two limits on the general power conferred by section 37 viz. (1) that the court must have personal jurisdiction over the defendants in the sense that they can be duly served either personally or under Order 11 (other than sub-rule (i)); and (2) that the plaintiffs have a cause of action under English law.

9. However it was submitted for the respondents that two other passages in Lord Diplock's speech impose a third requirement, viz. (3) that the interlocutory

injunction must be ancillary to a claim for substantive relief to be granted in this country by an order of the English court.

10. It was said that this third limit is to be found in two other passages in Lord Diplock's speech, at pp. 254 and 256: *"[Section 37], speaking as it does of interlocutory orders, presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary".*

> *"To come within [sub-rule (i)] the injunction sought in the action must be part of the substantive relief to which the plaintiff's cause of action entitles him; and the thing that it is sought to restrain the foreign defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by a final judgment for an injunction."*

11. On the basis of that alleged third requirement, the respondents contended that since the contract in the present case contains a foreign arbitration clause as a result of which the Arbitration Act 1975 requires the action to be stayed, the court has no power to grant an interlocutory injunction. Although the respondents have been validly served (i.e., there is jurisdiction in the court) and there is an alleged invasion of the appellants' contractual rights (i.e., there is a cause of action in English law), since the final relief (if any) will be granted by the arbitrators and not by the English court, the English court, it is said, has no power to grant the interlocutory injunction.

12. In my judgment that submission is not well founded. I can see nothing in the language employed by Lord Diplock (or in later cases in this House commenting on the *Siskina*) which suggest that a court has to be satisfied, at the time it grants interlocutory relief, that the final order, if any, will be made by an English court. The two passages I have quoted refer to the substantive relief being relief which the English court has "*jurisdiction to grant*" and to rights "*enforceable here*": see also, at p. 256f "*some legal or equitable right which it has jurisdiction to enforce by final judgment*". These are words which indicate that the relevant question is whether the English court has power to grant the substantive relief not whether it will in fact do so. Indeed, in many cases it will be impossible, at the time interlocutory relief is sought, to say whether or not the substantive proceedings and the grant of the final relief will or will not take place before the English court. My noble and learned friend, Lord Mustill, has demonstrated in his speech that in the context of arbitration proceedings whether it is the court or the arbitrators which make such final determination will depend upon whether the defendant applies for a stay. The same is true of ordinary litigation based on a contract having an exclusive jurisdiction clause: the defendant may not choose to assert his contractual right to have the matter tried elsewhere. Even more uncertain are cases where there is a real doubt whether the English court or some foreign court is the forum conveniens for the litigation: is the English court not to grant interlocutory relief against a

defendant duly served and based on a good cause of action just because the English proceedings may subsequently be stayed on the grounds of forum non conveniens?

13. I therefore reach the conclusion that the *Siskina* does not impose the third limit on the power to grant interlocutory injunctions which the respondents contend for. Even applying the test laid down by the *Siskina* the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body.

14. Finally I should make it clear that I have merely been considering the effect of the decision in the *Siskina* on the assumption that it correctly states the law. The tests it laid down in absolute terms have already received one substantial modification: see *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557; *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58. Moreover, in *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.* [1987] A.C. 24, Lord Goff of Chieveley (with whom Lord Mackay of Clashfern agreed) reserved the question whether the law as laid down by the *Siskina* (as subsequently modified) was correct in restricting the power to grant injunctions to certain exclusive categories. With respect, I share the same doubts as are there expressed and reserve the question for consideration when it arises.

LORD MUSTILL

15. My Lords, since this is a long judgment I will state at the outset my answers to the questions posed in argument, before developing the reasons.

1. Should the action brought by the appellants against the respondents be stayed?

I consider that the action can and should be stayed pursuant to the inherent jurisdiction of the court to inhibit proceedings brought in breach of an agreed method of resolving disputes. I thus arrive at the same conclusion as the Court of Appeal, but by a different route. It is therefore unnecessary to decide whether, as held by the Court of Appeal, the court would also have power to stay the action under section 1 of the Arbitration Act 1975. I nevertheless briefly state reasons for concluding, with some hesitation, that such a power does exist in the circumstances of the present case.

2. Is there in fact any dispute between the parties with regard to the subject matter of the action? In common with the Court of Appeal I conclude that this question should be answered in the affirmative.

3. Does the court have power to grant an injunction to prevent the respondents from ceasing work under an agreement dated 13 August 1986 ("the construction contract")? The Court of Appeal held that no such power is conferred by section 12(6)(h) of the Arbitration Act 1950, and I agree.

The Court of Appeal also held that the court had no power to grant the injunction under section 37(1) of the Supreme Court Act 1981. As I understand it the Court of Appeal would in any event have declined to uphold the grant of an injunction. For my part I consider that such a power does exist, but that it should not be exercised in the circumstances of the present case. Again, therefore, I reach the same conclusion as the Court of Appeal but by a different route. In the result I would dismiss the appeals.

I – INTRODUCTION

1 The contract

16. The appellants are the concessionaires under a concession granted by Her Majesty's Government and the Government of the French Republic for the construction and operation of the Channel Tunnel.

17. The respondents are a joint venture of: (a) "Translink", the members of which are five British construction companies, the first to fifth respondents, who are themselves carrying on business in joint venture; and (b) the sixth respondents, G.I.E. Transmanche Construction, the members of which are five French construction companies, the seventh to eleventh respondents.

18. Under an agreement dated 13 August 1986 ("the construction contract") the appellants employed the respondents to design and commission the Tunnel.

19. The works to be carried out under the construction contract are divided into: (a) target works, (b) lump sum works, (c) procurement items. The target works broadly comprise the boring and lining of the three tunnels. That work is more or less complete.

20. The lump sum works essentially comprise: (a) the design and construction of the terminals at each end of the tunnels; and (b) the design, supply, installation and commissioning of mechanical and electrical fixed equipment in the tunnels and terminals ("fixed equipment").

21. There is provision in the contract for variation of the works. Clause 51 of the conditions of contract allows the appellants to "make any variation of the form, quality or quantity of the works or any part thereof that may, in [its] opinion, be desirable" and provides that no such variation will in any way vitiate or invalidate the contract. The clause provides that the appellants and

the respondents should seek to agree the terms of the variation; if no agreement is reached, the appellants may confirm the order, and, subject to certain exception, the respondents must then comply.

22. When the contract was signed, it was envisaged that the tunnel would eventually require a cooling system, but that it would not be required at the opening. Accordingly, the lump sum works originally included provision for the design of such a system, but not the supply of the mechanical works forming the system itself. Later it became apparent that a cooling system would be needed, even at the opening. Accordingly, the appellants issued a Variation Order nº 3 for the provision of such a system. The order was confirmed in April 1988. Thereupon the cooling system itself became part of the fixed equipment and the lump sum works.

23. The present dispute arose, *inter alia*, because the parties failed to agree the price for the variation and because of the discontinuance of an interim agreement to pay the respondents on a cost plus basis: see below. The contract contains a number of provisions for the assessment and payment of sums due under it. In particular, clause 60(2) of the conditions of contract provides for the contractor to submit monthly statements including (in respect of the lump sum works) an estimate of the likely value of lump sum works to be executed in that and the following month. Clause 60(3) provides for the employer to review the contractor's statement and to issue a "*certificate of advance payment*" stating in relation to each of the items set out in the contractor's statement, what in the employer's opinion is the proper figure. Clause 60(3) then provides that the amount stated as payable in the certificate of advance payment shall be payable on the first banking day of the next month.

24. Clause 52 of the conditions of contract provides for the valuation of variations to the works, by reference to the rates or prices set out in the contract or in the breakdown of the lump sum price approved under the contract; if none are applicable, the rates or prices are to be agreed between the parties or – failing agreement – fixed by the employer at such rates or prices as in its opinion shall be reasonable and proper.

25. Clause 52(5) provides that if the contractor does not accept any rate or price fixed by the employer under clause 52 as reasonable and proper, the dispute shall be referred to a panel of experts for determination under clause 67.

26. Clause 67 provides as follows: "*Settlements of disputes*

> *"(1) If any dispute or difference shall arise between the employer and the contractor during the progress of the works (but not after the issue of the maintenance certificate for the whole of the works or the last of such certificates under clause 62(1) or after abandonment of the works or termination or alleged termination of the contract), then, subject to article 6(4) clauses 73(5) and 74(4) and the*

rules of the procedure for the calling in of the performance bond in schedule 25, such dispute or difference shall at the instance of either the employer or the contractor in the first place be referred in writing to and be settled by a panel of three persons (acting as independent experts but not as arbitrators) who shall unless otherwise agreed by both the employer and the contractor within a period of 90 days after being requested in writing by either party to do so, and after such investigation as the panel think fit, state their decision in writing and give notice of the same to the employer and the contractor. The panel shall be constituted in the manner set out in clause 67(6).

"(2) The contractor shall in every case continue to proceed with the works with all due diligence and the contractor and the employer shall both give effect forthwith to every such decision of the panel (provided that such decision shall have been made unanimously) unless and until the same shall be revised by arbitration as hereinafter provided. Such unanimous decision shall be final and binding upon the contractor and the employer unless the dispute or difference has been referred to arbitration as hereinafter provided.

"(3) Subject to article 6(4) of the contract agreement, if: (i) either the employer or the contractor be dissatisfied with any unanimous decision of the panel given under clause 67(1), or (ii) the panel shall fail to give a unanimous decision for a period of 90 days, or such other period as may be agreed by both the employer and the contractor, after being requested by either party to do so, or (iii) any unanimous decision of the panel is not given effect in accordance with clause 67(2) then either the employer or the contractor may within 90 days after receiving notice of such decision or within 90 days after the expiration of the said period of 90 days or such other period as may be agreed by the employer and the contractor (as the case may be) notify the other party in writing that the dispute or difference is to be referred to arbitration. If no such notice has been given by either party to the other within such periods, the panel's decision shall remain final and binding upon the parties.

"(4) All disputes or differences in respect of which a notice has been given under clause 67(3) by either party that such dispute or difference is to be referred to arbitration and any other dispute or difference of any kind whatsoever which shall arise between the employer or the Maitre d'Oeuvre and the contractor in connection with or arising out of the contract, or the execution of the works or after their completion and whether before or after the termination, abandonment or breach of the contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed under such Rules. The employer and the contractor shall each nominate and appoint one arbitrator and the third arbitrator shall be appointed by the International Chamber of Commerce. The seat of such arbitration shall be Brussels. Save as provided in clause 67(3), the said arbitrator/s shall have full power to open up, revise and review any decision, opinion, direction, certificate or valuation of the employer and/or the Maitre d'Oeuvre. Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the panel for the purpose of obtaining his said decision. No decision given by the panel in accordance with the foregoing provisions shall disqualify a

member of the panel from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute or difference referred to the arbitrator/s as aforesaid.

"(5) The reference to arbitration may proceed notwithstanding that the works shall not then be or be alleged to be complete, provided always that the obligations of the employer and the contractor shall not be altered by reason of the arbitration being conducted during the progress of the works."

27. The provision just quoted refers to the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("I.C.C."). The English text of these Rules (the corresponding French version is not before your Lordships' House) provides as follows:

"Article 8.5

"Before the file is transmitted to the arbitrator ... the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator."

"Article 24 ...

"1. The arbitral award shall be final. 2. By submitting the dispute to the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived the right to any form of appeal insofar as such waiver can be validly made."

28. Clause 68 of the contract is to the following effect:

"The construction, validity and performance of the contract shall in all respects be governed by and interpreted in accordance with the principles common to both English law and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals. Subject in all cases, with respect to the works to be respectively performed in the French and in the English part of the site, to the respective French or English public policy (ordre public) provisions."

29. It is common ground that the first stage of the procedure – reference to the panel of experts under clause 67(1) – is not itself an arbitration within the Arbitration Act 1975, but that the second stage is an arbitration.

2 The dispute

30. Variation Order nº 3 was issued on 16 November 1987 and confirmed as an order under clause 51 on 29 April 1988, and the parties entered into discussions as to the price payable in respect of that variation. The extent of the work was not fully defined. In December 1989, the respondents indicated that the programme required them to order pipeline materials in the very near future, and the respondents asked that the appellants fund the committed cost

of procurement on an interim basis pending final agreement on the total sales value. The appellants agreed to this expressly on the basis that it was an interim measure until a final price was settled. Prior to March 1991, the respondents therefore billed, and the appellants paid, on a cost plus basis.

31. The parties were unable to reach agreement regarding the price of Variation Order nº 3. By the end of 1990, the parties' estimates (in 1985 values) were respectively £112m. (the respondents) excluding the cost of additional delay and disruption, and £78m. (the appellants), inclusive of delay and disruption, in each case excluding building and civil works.

32. Therefore, by letter dated 19 March 1991, the appellants informed the respondents that they would no longer continue with the interim arrangement and indicated that they would thenceforth issue certificates of advance payment based on its estimates of value. The appellants stated that they were willing to discuss the matter further but that in the event that agreement was not possible the appellants would have no option but to fix a rate pursuant to the contract.

33. From then on, the appellants issued its monthly certificates and made their monthly payments on the basis of their own estimates of value. Between the beginning of March and the end of September 1991, seven such monthly payments were made. The respondents sought payment on the basis of their own estimates of value, thereby making clear that they did not accept the appellants' valuation. Neither side referred the difference on valuation to the panel for determination by it under clause 67.

34. By the end of July 1991 the respondents had made a submission to the appellants claiming a right to a "*reasonable sum*" in respect of the whole of the fixed equipment works.

35. By September 1991, the cumulative difference between the sums applied for by the respondents (excluding sums relating to delay and disruption) and those paid by the appellants amounted to about £17m. (in 1985 values). The respondents claimed to have been approaching a point at which the amount certified would not even cover the costs which they were incurring by, and that this point was ultimately reached in November 1991. The appellants claim that this is not correct.

36. By letter dated 3 October 1991, the respondents required: (a) that the appellants agree to respondents proposed figure for the construction of the Sangatte buildings (part of the cooling system works excluded from the estimates); and (b) that the appellants pay the respondents in full in accordance with the amounts applied for in respect of all cooling works, pending the final valuation of Variation Order nº 3.

37. Unless the appellants agreed to these requirements in writing at close of business on Monday, 7 October 1991 the respondents would "be obliged to

suspend all work relating to the cooling system." The letter went on to draw the appellants' attention to "the very serious consequences" which would ensue, and it itemised some of them. The matter was widely publicised in the French press and media on 7 and 8 October 1991.

38. After correspondence between the parties in the week commencing 7 October 1991, the respondents wrote on 14 October 1991 effectively confirming their position. On the same day, the appellants issued the present proceedings for an injunction to restrain the respondents from carrying out that threat. The respondents did not then, and did not thereafter suspend the cooling system works.

39. Meanwhile the respondents had submitted a claim to the appellants to the effect that there had been such a fundamental change to the character of the works that the originally agreed lump sum price was no longer applicable, and that they were accordingly entitled to be paid a reasonable price for the fixed equipment works on a cost plus basis. This claim led to a panel reference resulting, nearly four months after the decision of the Court of Appeal in the present action, in a ruling that unless the parties could reach an agreement on interim funding the appellants should make large extra monthly payments for the fixed equipment. Having received this favourable award the respondents intimated to the appellants that they did not intend to suspend works on the cooling system. However, on 23 April 1992 the appellants lodged a request for arbitration with the I.C.C. seeking to set aside the decision of the panel. This led to an award made by the arbitrators on 30 September 1992 which set aside the decision of the panel and substituted a provision for the retention by the respondents, for the account of the appellants, of the amounts thus far paid by the appellants pursuant to the decision of the panel.

The litigation

40. The writ in the present action was issued by the appellants on 14 October 1991. The relief claimed was as follows:

> *"(a) an injunction restraining the defendants and each of them, by themselves, their servants or agents in breach of their obligations under an agreement in writing dated 13 August 1986 made between the plaintiffs and the defendants ('the contract') from suspending work relating to the cooling system; (b) Costs; (c) Such further or other relief as to the court seems just."*

41. Three days later the appellants issued an application in the Commercial Court for:

> *"(1) an injunction restraining the defendants and each of them, by themselves, their servants or agents in breach of their obligations under an agreement in writing dated 13 August 1986 made between the plaintiffs and the defendants ('the contract') from suspending work relating to the cooling system."*

42. On the same day the respondents issued a cross-application to stay all further proceedings in the action pursuant to section 1 of the Arbitration Act 1975. There followed in short order an exchange of eleven affidavits, supported by hundreds of pages of exhibits. These prepared the ground for a hearing before Evans J. at the conclusion of which on 27 November 1991 the judge read a prepared judgment, leading to an order that: 1. upon the present respondents undertaking not to suspend work on the cooling system without giving the appellants 14 days' notice, no order should be made on Eurotunnel's application for an injunction. Without this undertaking Evans J. would have granted an injunction. 2. The application by the respondents for a stay of the action was refused.

43. There followed an appeal by the respondents, which was heard by the Court of Appeal (Neill, Woolf and Staughton L.JJ.) during three days commencing on 18 December 1991. On 22 January 1992 the Court of Appeal [1992] Q.B. 656 handed down written judgments, of which the leading judgment was that of Staughton L.J. Reversing the judgment of Evans J. the court stayed the action. It also refused an injunction.

44. I pause to draw attention to these dates. At the conclusion of his judgment Staughton L.J. paid tribute to the quality of the arguments, and the way in which all papers had been prepared. I would like to echo this and to add my own appreciation of the full and careful judgments delivered. As will appear, I find that after an exchange of printed cases, full oral argument and ample time for reflection I am led to differ from these judgments in certain respects. Nevertheless, I respectfully suggest to your Lordships that to carry this complex and difficult matter through from the commencement of the proceedings to the conclusion of judgment in the Court of Appeal within the period of three months reflects the greatest credit on all concerned.

The legislative background

45. The centre of the dispute is section 1 of the Act of 1975:

"(1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings. (2) This section applies to any arbitration agreement which is not a domestic arbitration agreement; and neither section 4(1) of the Arbitration Act 1950 nor section 4 of the Arbitration Act (Northern Ireland) 1937 shall apply to an arbitration agreement to which this

section applies... . (4) In this section 'domestic arbitration agreement' means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a state other than the United Kingdom and to which neither – (a) an individual who is a national of, or habitually resident in, any state other than the United Kingdom; nor (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any state other than the United Kingdom; is a party at the time the proceedings are commenced."

46. Next, there is section 12(6)(h) of the Act of 1950:

"(6) The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of ... (h) interim injunctions or the appointment of a receiver; as it has for the purpose of and in relation to an action or matter in the High Court ..."

47. Reference was also made in argument to section 25 of the Civil Jurisdiction and Judgments Act 1982:

"(1) The High Court in England and Wales or Northern Ireland shall have power to grant interim relief where – (a) proceedings have been or are to be commenced in a contracting state other than the United Kingdom or in a part of the United Kingdom other than that in which the High Court in question exercises jurisdiction; and (b) they are or will be proceedings whose subject-matter is within the scope of the 1968 Convention as determined by article 1 (whether or not the Convention has effect in relation to the proceedings). ... (3) Her Majesty may by Order in Council extend the power to grant inter relief conferred by subsection (1) so as to make it exercisable in relation to proceedings of any of the following descriptions, namely – (a) proceedings commenced or to be commenced otherwise than in a contracting state; (b) proceedings whose subject-matter is not within the scope of the 1968 Convention as determined by article 1; (c) arbitration proceedings... . (5) An Order in Council under subsection (3) which confers power to grant interim relief in relation to arbitration proceedings may provide for the repeal of any provision of section 12(6) of the Arbitration Act 1950 or section 21(1) of the Arbitration Act (Northern Ireland) 1937 to the extent that it is superseded by the provisions of the Order... . (7) In this section 'interim relief,' in relation to the High Court in England and Wales or Northern Ireland, means interim relief of any kind which that court has power to grant in proceedings relating to matters within its jurisdiction, other than – (a) a warrant for the arrest of property; or (b) provision for obtaining evidence."

No order in council has yet been made under section 25(3)(c).

48. Finally I must refer to section 37(1) of the Supreme Court Act 1981: "*The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so*".

II – THE APPLICATION FOR A STAY

49. There are two ways in which the respondents seek to uphold the grant of a stay. First, on the ground that the dispute is between parties "*to an arbitration agreement to which this section applies*," and that the dispute between them is "*in respect of any matter agreed to be referred, "* within the meaning of section 1 of the Act of 1975, so that the court is obliged to stay the action. Secondly, because this is an appropriate case in which to exercise the inherent power of the court to stay proceedings brought before it in breach of an agreement to decide disputes in some other way. Whilst proposing both solutions Mr. Pollock for the respondents showed little warmth for the second; no doubt because it offered his clients a remedy which was discretionary, in contrast to the mandatory stay under section 1. Nevertheless, I am satisfied that this is the correct route, and that the court not only possesses a discretion to grant a stay in cases such as the present, but also that this is a remedy which ought to be exercised in the present case.

50. First, as to the existence of the power to stay proceedings in a case which comes close to section 1 of the Act of 1975, and yet falls short either because of some special feature of the dispute-resolution clause, or because for some reason an agreement to arbitrate cannot immediately, or effectively, be applied to the dispute in question. It is true that no reported case to this effect was cited in argument, and in the only one which has subsequently come to light, namely *Etri Fans Ltd. v. N.M.B. (U.K.) Ltd.* [1987] 1 W.L.R. 1110, the court whilst assuming the existence of the power did not in fact make an order. I am satisfied however that the undoubted power of the court to stay proceedings under the general jurisdiction, where an action is brought in breach of agreement to submit disputes to the adjudication of a foreign court, provides a decisive analogy. Indeed until 1944 it was believed that the power to stay in such a case derived from the arbitration statutes. This notion was repudiated in *Racecourse Betting Control Board v. Secretary for Air* [1944] Ch. 114, but the analogy was nevertheless maintained. Thus, *per* MacKinnon L.J., at p. 126: "*It is, I think, rather unfortunate that the power and duty of the court to stay the action [on the grounds of a foreign jurisdiction clause] was said to be under section 4 of the Arbitration Act 1889. In truth, that power and duty arose under a wider general principle, namely, that the court makes people abide by their contracts, and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined".*

51. So also, in cases before and after 1944, *per* Atkin L.J. in *The Athenee* (1922) 11 Ll.L.Rep. 6 and Willmer J. in *The Fehmarn* [1957] 1 W.L.R. 815, 819, approved on appeal [1958] 1 W.L.R. 159, 163. I see no reason why the analogy should not be reversed. If it is appropriate to enforce a foreign jurisdiction clause under the general powers of the court by analogy with the discretionary power

under what is now section 4(1) of the Act of 1950 to enforce an arbitration clause by means of a stay, it must surely be legitimate to use the same powers to enforce a dispute-resolution agreement which is nearly an immediately effective agreement to arbitrate, albeit not quite. I would therefore hold that irrespective of whether clause 67 falls within section 1 of the Act of 1975, the court has jurisdiction to stay the present action.

52. My Lords, I also have no doubt that this power should be exercised here. This is not the case of a jurisdiction clause, purporting to exclude an ordinary citizen from his access to a court and featuring inconspicuously in a standard printed form of contract. The parties here were large commercial enterprises, negotiating at arms length in the light of a long experience of construction contracts, of the types of disputes which typically arise under them, and of the various means which can be adopted to resolve such disputes. It is plain that clause 67 was carefully drafted, and equally plain that all concerned must have recognised the potential weaknesses of the two-stage procedure and concluded that despite them there was a balance of practical advantage over the alternative of proceedings before the national courts of England and France. Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their compaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking quite beside the point.

53. Since this conclusion is sufficient to uphold the decision of the Court of Appeal to stay the action it would be possible now to pass to the next issue. Since, however, provisions in the same general shape as clause 67 are common in the construction industry, and since the meaning of section 1(1) of the Act of 1975 has been the subject of elaborate argument, it is right to make some observations on the question whether (as the Court of Appeal has held) the court has, independently of any inherent power, both the right and the duty to stay the action under section 1. The subject is not easy, but limitations of space forbid a full discussion.

54. I first recall the words of the subsection: "*If any party to an arbitration agreement ... commences any legal proceedings ... in respect of any matter agreed to be referred ... the court ... shall make an order staying the proceedings".*

55. Most of the argument on this subsection was confined to the words "an arbitration agreement." These words are not clear, and there is substantial force in the submission that clause 67 is not (in the words of section 7 of the Act of 1975) "*an agreement ... to submit to arbitration present or future differences",* but an agreement to submit such differences to resolution by a panel of experts,

the arbitrators providing no more than a contingent form of appeal – such as the Commercial Court would provide in a reference falling within the Arbitration Act 1979. Whilst acknowledging the force of this argument, if the words of the section were the only source of uncertainty I would have been prepared without undue difficulty to hold that clause 67 is "*an arbitration agreement.*" What has given me much more reason to hesitate is the nature of the relief which the court is empowered and bound to accord, when an action is brought which falls within section 1(1): namely, "an order staying the proceedings". The problem can best be illustrated by reference to the words of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, which was the impetus for the enactment of the English legislation. Article II.3 provides as follows: "*The court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed*".

56. What springs to mind at once is that the application of this formula to clause 67 requires the court to do the impossible, namely to refer the dispute to the arbitrators, whereas it is to the panel of experts that the matter must first be sent if it is to be sent anywhere at all. If the English legislation had followed the Convention, as strictly speaking it should have done, it would have been hard to resist the conclusion that the duty to stay does not apply to a situation where the reference to the arbitrators is to take place, if at all, only after the matter has been referred to someone else.

57. In the end I have come to the conclusion that the different wording of the Act does not compel this conclusion. The Convention envisages a procedure, somewhat similar to the former English practice, now largely in disuse, where the order of the court called into being a reference to arbitration to which both parties were at once compulsorily remitted. Instead, the Act requires and empowers the court to do no more than stay the action, thereby cutting off the plaintiff's agreed method of enforcing his claim. It is then up to the plaintiff whether he sets an arbitration in motion, but if he chooses not to do so he loses his claim.

58. My Lords, this is a real, not simply a verbal, distinction and I have come to believe that it results from a deliberate choice by the legislature between the two different ways of giving effect to an arbitration agreement. The idea of a compulsory reference was mooted before the great reforms of the 1850s, but was rejected in favour of the discretionary stay embodied in section 11 of the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125). This choice was perpetuated, not only in the Arbitration Act 1889 (52 & 53 Vict. c. 49) but also in the Arbitration Clauses (Protocol) Act 1924, the purpose of which was to give effect to the League of Nations Protocol of 4 September 1923, notwithstanding

that the latter (like its successor of 1958) required the courts of the member state, not simply to stay the action, but to refer the matter to arbitration. Later, we see the same contrast between the New York Convention and the Act of 1975. In the light of the history which I have sketched I believe that this was not an accident of drafting, which might require the Act of 1975 to be interpreted in the same sense as the underlying Convention, but the outcome of a deliberate choice. If so, there is no reason to read section 1(1) as meaning anything other than what it says, and since it is perfectly possible to stay the action without referring the matter to arbitration, my principal difficulty in applying section 1(1) to clause 67 is resolved.

59. Thus, I would be willing to hold, in company with the Court of Appeal, that the respondents are entitled to a stay under the Act of 1975, but prefer to reach the same practical result by what seems to me the simpler and more natural route by way of the inherent jurisdiction.

60. I must add by way of footnote that the House was much pressed during argument by examples of various forms of clause, against which one or other conclusion was to be tested. Valuable though these were as a means of focusing attention, I shall not explore them here, partly because it could be impossible to do justice to them within a reasonable compass, but more importantly because it is inappropriate to rule on issues which are not now for decision. I will however state that I have found nothing in them which raises doubts as to the conclusion just expressed, and that all of them seem capable of a practical solution by the deployment of either the power under section 1(1), as thus understood; or the inherent power to stay; or both powers successively; or the admittedly rather delphic words "*null and void, inoperative or incapable of being performed ...*" in section 1(1).

III – THE EXISTENCE OF A DISPUTE

61. The appellants submit that even if section 1 of the Act of 1975 applies to clause 67, a stay should nevertheless be refused because "*there is not in fact any dispute between the parties with regard to the matter agreed to be referred*". In summary, they say that there is only one ground upon which the respondents could even attempt to justify their stance in threatening to stop work whilst at the same time purporting to keep the contract in existence, namely that the matter falls within the civilian doctrine of "*l'exception d'inexecution*"; that it is common ground that this doctrine is capable of exclusion by express provision in the contract; and that such an express exclusion is to be found in the words of clause 67(2), which provide that "*the contractor shall in every case continue to proceed with the works with all due diligence ...*" Thus, according to the appellants, the respondents really have no case at all, and since they have no case there cannot be any "*dispute between the parties with regard to the matter agreed to be referred*".

62. It will be recalled that this qualification on the right of the defendant to a mandatory stay had its origin in the MacKinnon committee report, Report of Committee on the Law of Arbitration (1927) (Cmd. 2817), under the chairmanship of MacKinnon J., paragraph 43 of which read*: "Our attention has been called to a point that arises under the Arbitration Clauses (Protocol) Act 1924. Section 1 of that Act in relation to a submission to which the protocol applies deprives the English court of any discretion as regards granting the stay of an action. It is said that cases have already not infrequently arisen, where (e.g.) a writ has been issued claiming the price of goods sold and delivered. The defendant has applied to stay the action on the ground that the contract of sale contains an arbitration clause, but without being able, or condescending, to indicate any reason why he should not pay for the goods, or the existence of any dispute to be decided by arbitration. It seems absurd that in such a case the English court must stay the action, and we suggest that the Act might at any rate provide that the court shall stay the action if satisfied that there is a real dispute to be determined by arbitration".*

63. In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the court under R.S.C., Ord. 14, to give summary judgment in favour of the plaintiff where the defendant has no arguable defence. If the plaintiff to an action which the defendant has applied to stay can show that there is no defence to the claim, the court is enabled at one and the same time to refuse the defendant a stay and to give final judgment for the plaintiff. This jurisdiction, unique so far as I am aware to the law of England, has proved to be very useful in practice, especially in times when interest rates are high, for protecting creditors with valid claims from being forced into an unfavourable settlement by the prospect that they will have to wait until the end of an arbitration in order to collect their money. I believe however that care should be taken not to confuse a situation in which the defendant disputes the claim on grounds which the plaintiff is very likely indeed to overcome, with the situation in which the defendant is not really raising a dispute at all. It is unnecessary for present purposes to explore the question in depth, since in my opinion the position on the facts of the present case is quite clear, but I would endorse the powerful warnings against encroachment on the parties' agreement to have their commercial differences decided by their chosen tribunals, and on the international policy exemplified in the English legislation that this consent should be honoured by the courts, given by Parker L.J. in *Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd.* [1990] 1 W.L.R. 153, 158-159, and Saville J. in *Hayter v. Nelson* [1990] 2 Lloyd's Rep. 265.

64. Approaching the matter in this spirit I must ask whether the only matter embraced in the writ, namely the question whether the respondents should return to work, is the subject of a dispute. The fact that there are numerous areas of dispute on the events leading up to the respondents' threat

to leave the site does not of course mean in itself that there is a dispute about the central issue, namely whether the doctrine of *"l'exception d'inexecution"* has been ousted and if so whether the facts justified its application. That the doctrine is a part of the international trade law which is made applicable to the contract by clause 68 is common ground, and it is also common ground (at least for the purposes of these proceedings) that the doctrine is capable of being excluded by consent. Beyond this, however, the parties are sharply at odds, and so also are their experts on foreign law. It is suggested that the court has sufficient material, in the shape of the experts' affidavits, to decide the matter here and now for itself. I am quite unable to agree. Whether the panel and the arbitrators will need help from expert witnesses, or whether they will feel able to use their own knowledge and experience to decide the point on their own, I do not know. What does seem to me absolutely clear on this is that an English court could not properly conclude in the light of affidavit evidence alone that the appellants' claim is so unanswerable that there is nothing to arbitrate. There would have to be cross-examination of the experts, and once one reaches this point it is perfectly obvious that the qualifying words in section 1 do not apply, and that there is no reason to withhold a stay.

IV – INTERIM RELIEF UNDER SECTION 12(6) OF THE ACT OF 1950

65. Thus far, the question has been whether the appellant's claim for a final injunction should be allowed to proceed to trial in the High Court. If it should, the exercise of the discretion to grant an interlocutory injunction pending trial will be governed by well established rules, and no questions of principle will arise. If, however, as I believe to be the case the action should not in the absence of some unforeseen future difficulty in the operation of clause 67 be permitted to go forward, a difficult and important question will arise concerning the power of the court to order the respondents back to work pending the decision of the panel or, as the case may be, the arbitrators. The appellants base their claim for an injunction first on the special powers conferred by section 12(6)(h) of the Act of 1950 and secondly on the general power of the court to grant an injunction under section 37(1) of the Supreme Court Act 1981. These different foundations for the claim raise entirely different issues, which call for separate consideration.

66. The main problem with the claim based on section 12(6)(h) is to decide whether this provision has any application at all to an arbitration agreement of the type contained in clause 67 of the construction contract. The respondents say that it has none, because the clause contemplates a foreign arbitration which is outside the scope of this particular part of the Act of 1950. The Court of Appeal accepted this contention. If the respondents are wrong on this point it will be necessary to consider whether the discretion created by

section 12(6) should be exercised in a special way in relation to arbitrations conducted abroad.

67. 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. The construction contract provides an example. The proper substantive law of this contract is the law, if such it can be called, chosen in clause 68. But the curial law must I believe be the law of Belgium. 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.

68. In all these instances one or more national laws may be relevant because they are expressly or impliedly chosen by the parties to govern the various aspects of their relationship. As such, they govern the arbitral process from within. But national laws may also apply ab extra, when the jurisdiction of the national court is invoked independently of any prior consent by the parties. An obvious case exists where the claimant, in face of an arbitration agreement, brings an action before a national court which must apply its own local law to decide whether the action should be stayed, or otherwise interfered with. Equally obvious is the case of the national court which becomes involved when the successful party applies to it for enforcement of the arbitrator's award. But a national court may also be invited, as in the present case, to play a secondary role, not in the direct enforcement of the contract to arbitrate, but in the taking of measures to make the work of the chosen tribunal more effective. Here, the matter is before the court solely because the court happens to have under its own procedural rules the power to assert a personal jurisdiction over the parties, and to enforce protective measures against them. Any court satisfying this requirement will serve the purpose, whether or not it has any prior connection with the arbitral agreement or the arbitration process. In the present case, the English court has been drawn into this dispute only because it happens to have territorial jurisdiction over the respondents, and the means to enforce its orders against them. The French court would have served just as well, and if the present application had been made in Paris we should have found the French

court considering the same questions as have been canvassed on this appeal, but from a different perspective.

69. The distinction between the internal and external application of national arbitration laws is important. In my opinion, when deciding whether a statutory or other power is capable of being exercised by the English court in relation to clause 67, and if it is so capable whether it should in fact be exercised, the court should bear constantly in mind that English law, like French law, is a stranger to this Belgian arbitration, and that the respondents are not before the English court by choice. In such a situation the court should be very cautious in its approach both to the existence and to the exercise of supervisory and supportive measures, lest it cut across the grain of the chosen curial law.

70. Thus, in the present instance I believe that we should approach section 12 of the Act of 1950 by asking: can Parliament have intended that the power to grant an interim injunction should be exercised in respect of an arbitration conducted abroad under a law which is not the law of England? For an answer to this question one must look to the origins of section 12, which lie in section 2 of the Arbitration Act 1889. This provided*: "2. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act ..."*

71. The Schedule comprised a list of nine statutory implied terms. Two of these (paragraphs (a) and (b)) related to the constitution of the arbitral tribunal. Those imposed by paragraphs (c), (d) and (e) were concerned with the time for making the award. Paragraph (f) dealt compendiously with the examination of the parties on oath, with production of documents, and with the general duty to "do all other things which during the proceedings on the reference the arbitrators or umpire may require." Paragraph (g) empowered the arbitrators to examine on oath witnesses other than the parties. Paragraph (h) stipulated that the award was to be final and binding, and paragraph (i) empowered the arbitrators to make orders for costs, and to tax or settle the amount of costs.

72. It seems to me absolutely plain for two reasons that Parliament cannot have intended these provisions to apply to a foreign arbitration. The first reason is that the chosen mechanism was to make these provisions into implied terms of the arbitration agreement, and such terms could not sensibly be incorporated into an agreement governed by a foreign domestic arbitration law to whose provisions they might well be antithetical: see, for example, the provisions concerning the administration of oaths, discovery and orders for costs.

73. Secondly, section 2 of the Act of 1889, unlike section 12 of the Act of 1950, was concerned exclusively with the internal conduct of the arbitration, and not at all with any external powers of the court. I can see no reason why Parliament should have had the least concern to regulate the conduct of an arbitration carried on abroad pursuant to a foreign arbitral law. Furthermore, it

was expressly stipulated in section 28 that the Act of 1889 should not extend to Scotland or Ireland. It is absurd to suppose that Parliament should have intended that the same French arbitration should at the same time be subject to implied terms under English law but not under the law of Scotland. I do not believe that in such a situation either law was intended to apply.

74. When we turn to the Act of 1934, which introduced a miscellaneous series of amendments, we find that the list of statutory implied terms relating to the powers of the arbitrators, contained in the Schedule to the Act of 1889, was enlarged by the addition of powers to order specific performance and make an interim award. In addition, section 8 provided that in relation to the matters set out in this Schedule to the Act of 1934*: "(1) The court shall have, for the purpose of and in relation to a reference, the same power of making orders ... as it has for the purpose of and in relation to an action or matter in the court ..."*

75. The powers listed in the Schedule were the same as those now set out in section 12(6) of the Act of 1950. Quite plainly the reference to "the court" was to the English court, and when one looks at the items in the list (such as the ordering of discovery and interrogatories) it is easy to see that they were concerned with powers which the English court would never at that time even have thought of exercising in relation to actions in a foreign court. This being so, I can see no reason why the legislature should have wished to make the powers available to the court in respect of a foreign arbitrations. Indeed it appears paragraphs 30 and 31 of the MacKinnon committee's report that notwithstanding the width of its terms of reference the committee chose not to deal with foreign arbitrations.

76. In these circumstances, if the present case had arisen in 1949 the court would I believe have held without difficulty that the relevant Parts of the Acts of 1889 and 1934 did not apply to foreign arbitrations. The Act of 1950 was a consolidating statute which merely rearranged and in some instances reworded the existing legislation, and it cannot have had the effect of enlarging the categories of arbitration to which the former legislation applied. In these circumstances I consider that none of the terms of the Act of 1950, of which the provisions cited from the Acts of 1889 and 1934 were the precursors, apply to foreign arbitrations and that since these include section 12(6) the power conferred by section 12(6)(h) to grant an interim injunction is not available to the court in respect of foreign arbitrations such as the present.

V – AN INJUNCTION UNDER SECTION 37 OF THE SUPREME COURT ACT 1981

77. I turn to the claim for an interlocutory injunction under section 37(1) of the Supreme Court Act 1981. The focus of the inquiry now shifts from the numerous types of remedy under section 12 of the Act of 1950 which are specially designed for the narrow purpose of promoting the efficacy of the

arbitral process, to a single remedy which is not so designed and which is capable of employment in a wide variety of situations, many far removed from the present. By definition, the making of an order under section 12 cannot be inconsistent with the spirit of the arbiration agreement or with the policy of the court to enforce such agreements, although in making use of its powers under the section the court must be careful not to meddle unduly in matters which properly belong to the arbitrator. Under section 37(1) by contrast the arbitration clause is not the source of the power to grant an injunction but is merely a part of the facts in the light of which the court decides whether or not to exercise a power which exists independently of it. Accordingly it does not follow that even in a situation where, if section 12(6) applied to the arbitration in question, the court would be justified in making an interim order under section 12(6)(h), the court would be equally justified, or would even have the power, to do so under section 37(1). In the present case the respondents contend that in a situation where the interlocutory injunction claimed is ancillary to an action which the court has stayed it has no power to grant an injunction even if it considers that to do so would be in the interests of justice. Alternatively, the respondents contend that even if such a power does exist it should be exercised with great caution, and that the conditions for its exercise do not exist in the present case. The Court of Appeal sustained the first of these grounds of objection, to which I now turn.

1 The power to grant an injunction

78. (1) The respondents begin with an argument of general principle. Although the words of section 37(1) and its forebears are very wide it is firmly established by a long history of judicial self-denial that they are not to be taken at their face value and that their application is subject to severe constraints. This process has culminated in a chain of decisions in your Lordships' House: *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210; *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557; *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58 and *South Carolina Insurance Co. v. Assurantie* Maatschappij *"De Zeven Provincien" N.V.* [1987] A.C. 24. These are too well known to need rehearsal, and it is sufficient for present purposes to quote from the speech of Lord Brandon of Oakbrook in the *South Carolina* case, at pp. 39-40:

> *"The first basic principle is that the power of the High Court to grant injunctions is a statutory power conferred on it by section 37(1) of the Supreme Court Act 1981, which provides that 'the High Court may by order (whether interlocutory or final) grant an injunction in all cases in which it appears to the court to be just and convenient to do so.' That provision is similar to earlier provisions of which it is the successor, namely, section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 and section 25(8) of the Supreme Court of Judicature Act 1873. The second basic principle is that, although the terms of section 37(1)*

of the Act of 1981 and its predecessors are very wide, the power conferred by them has been circumscribed by judicial authority dating back many years. The nature of the limitations to which the power is subject has been considered in a number of recent cases in your Lordships' House: Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210; Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557; and British Airways Board v. Laker Airways Ltd. [1985] A.C. 58.

The effect of these authorities, so far as material to the present case, can be summarised by saying that the power of the High Court to grant injunctions is, subject to two exceptions to which I shall refer shortly, limited to two situations. Situation (1) is when one party to an action can show that the other party has either invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2) is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable. The third basic principle is that, among the forms of injunction which the High Court has power to grant, is an injunction granted to one party to an action to restrain the other party to it from beginning, or if he has begun from continuing, proceedings against the former in a foreign court. Such jurisdiction is, however, to be exercised with caution because it involves indirect interference with the process of the foreign court concerned".

79. In reliance on this line of authority the respondents maintain that the English court can never grant an injunction in support of a cause of action which the parties have agreed shall be the subject of an arbitration abroad, and a fortiori where the court has itself halted the proceedings in England, in furtherance of its duty under section 1 of the Act of 1975, so that the agreed method of adjudication shall take place. In support, the respondents call up the tentative expression of opinion by Bingham L.J. *in Nissan (U.K.) Ltd. v. Nissan Motor Co. Ltd.* (unreported), 31 July 1991; Court of Appeal (Civil Division) Transcript nº 848 of 1991, to the effect that interim relief in the shape of an interlocutory injunction cannot be granted in a case such as the present since the defendant is not properly before the court.

80. My Lords, I cannot accept this argument. I prefer not to engage the question whether the law is now firmly established in terms of Lord Brandon's statement, or whether it will call for further elaboration to deal with new practical situations at present unforeseen. For present purposes it is sufficient to say that the doctrine of the *Siskina*, put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action. If the underlying right itself is not subject to the jurisdiction of the English court, then that court should never exercise its power under section 37(1) by way of interim relief. If this is a correct appreciation of the doctrine, it does not apply to the present case. Let us take the matter by stages.

81. First, there is the situation where a contract entirely English in all its aspects is subject to an agreement for arbitration in London. This agreement, being a "domestic" arbitration agreement, may be enforced by a discretionary stay under section 4(1) of the Act of 1950. Here, it is quite clear that the presence of the clause does not deprive the court of jurisdiction over a dispute arising under the contract. If an action is brought to enforce the contract, and either the defendant does not apply for a stay, or the court decides in its discretion not to grant one, the action proceeds in exactly the same way as if the arbitration clause did not exist. Moreover even if the court does choose to grant a stay the court retains its jurisdiction over the dispute. If all goes well this jurisdiction will never be exercised, but if the arbitration breaks down the court is entitled to resume seizing of the dispute and carry it forward to judgment. (Authority for these propositions is scarcely necessary, but mention may be made of *Doleman & Sons v. Ossett Corporation* [1912] 3 K.B. 257 and *Hamlyn & Co. v. Talisker Distillery* [1894] A.C. 202). It follows that the conditions for the grant of an interlocutory injunction are satisfied, since the purpose of the injunction is to support a cause of action which is justiciable before the English court.

82. The example may now be changed a little, so as to postulate that one of the parties is a national of a state other than the United Kingdom. The arbitration agreement now ceases to be "domestic," and the stay is no longer discretionary under the Act of 1950 but mandatory under the Act of 1975. Does this make any difference? None, in my opinion, for the cause of action is still potentially justiciable by the English court, and will in fact be adjudicated upon if the defendant does not apply for a stay, or if the circumstances are such as to bring into play the exceptions in section 1 of the Act of 1975, or if something happens at a later stage which demands the lifting of any stay which has been granted and the resumption of the action before the court. Here again the restrictions on the grant of an interlocutory injunction do not apply.

83. Let us now make a further change, and postulate an arbitration agreement which calls for arbitration abroad. This may indeed have an indirect effect on the availability of injunctive relief. Very often it happens that where there is an arbitration agreement between foreign parties the English court has jurisdiction only because the agreement stipulates that the arbitration shall be held in London, thereby justifying the inference of English law as the substantive proper law of the contract, and hence giving the court jurisdiction over the cause of action under Ord. 11, r. 1(1)(d)(iii). If the seat of the arbitration is abroad this source of jurisdiction is cut off, and the inhibitions created by the *Siskina* authorities will preclude the grant of an injunction. Nevertheless, if the facts are such that the court has jurisdiction in some way other than the one just described I can see no reason why the additional foreign element should make any difference to the residual jurisdiction of the court over the dispute, and hence to the existence of the power to grant an injunction in support. So also in the present case. If the respondents had really wanted to find out as a matter

of urgency whether they were entitled to carry out their threat to stop work they might perhaps have decided that it was better to press for a speedy trial in the Commercial Court, rather than wind up the cumbersome method of clause 67, and hence abstained from asking for a stay. In such a case there could be no doubt about the power of the court to grant an injunction. Similarly if clause 67 had for some reason broken down and the parties had been forced to resume the action. I am unable to see why the fact that the action is temporarily, and it may very well be permanently, in abeyance should adversely affect the powers of the court, although of course it may make all the difference to the way in which those powers should be exercised.

84. For these reasons I consider that although the commencement of the action was a breach of the arbitration agreement, and that in this sense the respondents were not "*properly*" before the court, this does not bring into play the limitations on the powers of the court established by *the Siskina* line of cases. I should add that the same result must have followed if the appellants had done what they promised to do, and submitted their disputes to the panel and the arbitrators, rather than to the court. The power exists either in both cases or in neither and the appellants' breach of the arbitration agreement in bringing an action destined to be stayed cannot have conferred on the court a power to grant an injunction which it would not otherwise possess. The existence of a pending suit is thus an irrelevance.

85. (2) This brings me to the respondents' next argument, that since in section 25(3) of the Act of 1982 Parliament has created the opportunity to confer powers on the court to grant interim relief including interlocutory injunctions in support of arbitrations, and has not yet brought such powers into effect, the court should never in the absence of such legislation presume to exercise whatever powers in this respect may already be conferred by the general law. I cannot agree. We are concerned here with powers which the court already possesses under section 37 of the Act of 1981. The only question is whether the court ought permanently and unconditionally to renounce the possibility of exercising such powers in a case like the present. I am unable to see why the fact that Parliament is contemplating the specific grant of interim powers, not limited to interlocutory injunctions, in support of arbitrations but has not yet chosen to do so should shed any light on the powers of the court under existing law. It may be that if and when section 25 is made applicable to arbitrations, the court will have to be very cautious in the exercise of its general powers under section 37 so as not to conflict with any restraint which the legislature may have imposed on the exercise of the new and specialised powers. Meanwhile, however, although the existence of these new powers in reserve may well be one of the factors which lead the court to be very cautious about granting relief in the cases of the present kind, it is another matter to hold that the court should cut itself altogether off from the possibility of a remedy, and I would not be prepared to go so far.

86. (3) I would return a similar answer to the argument which assumes that (as I have already suggested) section 12(6)(h) of the Act of 1950 does not apply to foreign arbitrations, and reasons from this to the conclusion that the general powers of the court to grant injunction are equally inapplicable in such a case. At the time many years ago when the forebears of section 12(6) were conceived the world of international arbitration was very different from what it is today, and the possibility that national courts of one country might have a useful albeit subordinate role to play in an arbitration conducted in another country might well have appeared too implausible to call for a specific provision. The fact that the specialist powers conferred by the Arbitration Acts are not available in a case such as the present does not entail that the general powers of the court can never be deployed: although, again, this is undoubtedly a powerful reason why the courts should approach their use with great caution.

87. (4) Next, the respondents call in aid the long-established principle, endorsed by Lord Diplock in *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] A.C. 909, 979, that the English court has no general supervisory power over the conduct of arbitrations more extensive than the powers conferred by the powers of the Arbitration Acts. My Lords, this principle is an essential element in the balance of the partnership which exists under English law between the arbitral process and the courts, and I say nothing to shed any doubt whatever upon it. In my judgment however it does not bear upon the present appeal.

88. In the first place, the attempt in *Bremer Vulkan* to enjoin the further conduct of the arbitration, on the ground of excessive delay, foundered on the absence of any legal or equitable right of the plaintiffs to be enforced or protected, and was thus another case in the *Siskina* line of authority; whereas in the present case, for the reasons already stated, the appellants do assert a cause of action under the construction contract justiciable under English courts. Secondly, the injunction claimed in *Bremer Vulkan* would have involved a direct interference by the court in the arbitral process, and thus an infringement of the parties' agreement that the conduct of the dispute should be entrusted to the arbitrators alone, subject only to the limited degree of judicial control implicit in the choice of English law, and hence of English statute law, as part of the curial law of the contract. The purpose of interim measures of protection, by contrast, is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.

89. For similar reasons I am unable to agree with those decisions in the United States (there has been no citation of authority on this point from any other foreign source) which form one side of a division of authority as yet unresolved

by the Supreme Court. These decisions are to the effect that interim measures must necessarily be in conflict with the obligations created assumed by the subscribing nations to the New York Convention, because they "*bypass the agreed upon method of settling disputes:*" see *McCreary Tire & Rubber Co. v. CEAT S.P.A.* (1974) 501 F.2d 1032, 1038. I prefer the view that when properly used such measures serve to reinforce the agreed method, not to bypass it.

1 A PROCEDURAL DIFFICULTY

90. Finally, I must refer to a problem of procedural mechanics, quite unconnected with the ideals of international arbitration. It is this. If the court stays an action brought in breach of an arbitration clause, how can it grant an injunction in an action which is no longer before it? No difficulty arises where the stay is discretionary, under section 4(1) of the Act of 1950 or under the inherent powers of the court, since the court can grant the injunction first before electing to impose a stay. This is what happened in *Foster and Dicksee v. Hastings Corporation* (1903) 87 L.T. 736, a case very similar to the present on the facts. This expedient seems however less defensible where the court is obliged by statute to render up its control of the dispute as soon as the defendant so requires.

91. Puzzling as this question undoubtedly seems at first acquaintance, I believe on reflection that the answer is straightforward. Once again, it is helpful to approach the matter by stages. Let us take first the case where the English court, before which no proceedings have been brought except for interim relief, makes an order under section 25 of the Act of 1982 in support of an action brought in the courts of a foreign state. Here, it is obvious that the court is not making an order in an English action. By granting the order, the court does not engage itself at all in the resolution of the dispute, but merely seeks to make the resolution of the dispute by the foreign court more effective. It is a free-standing item of ancillary relief. Next, let it be assumed that the foreign proceedings take the shape of an arbitration, rather than litigation. Once again, if the English court grants an interlocutory injunction by way of interim protection under section 37 of the Act of 1981 it is not playing any part in the decision of the dispute, but is simply doing its best to ensure that the resolution by the arbitrators is fruitful. Common sense and logic suggest that the analysis must be the same where the application for the interlocutory injunction is associated with the commencement of an action which the court is obliged to stay. Common sense, because it cannot be right that by starting the action the plaintiff automatically forfeits any right to ancillary relief to which he would otherwise be entitled. Logic, because the purpose of the stay is to remove from the court the task of deciding the substantive dispute, so that it can be entrusted to the chosen tribunal. This is what the court is bound to do, by virtue of the New York Convention. But neither the arbitration agreement nor the Convention contemplate that by transferring to the arbitrators the substance

of the dispute, the court also divests itself of the right to use the sanctions of municipal law, which are not available to the arbitrators, in order to ensure that the arbitration is carried forward to the best advantage.

92. I thus see no difficulty in principle in an order which combines a mandatory stay with an interlocutory injunction by way of interim relief.

93. For these various reasons I consider, here differing from the Court of Appeal, that the court does have power in the present case to grant the injunction for which the appellants contend, notwithstanding that their action has been stayed. Whether this is a power which the court ought to exercise in the circumstances of the present case is an entirely different matter.

2 The exercise of the discretion

94. On the assumption that the court does have power to grant the appellants an injunction, a decision on whether the power should be exercised requires the making of certain assumptions.

95. The first assumption must hold good whatever course your Lordships' House decides to follow. Since the action is now stayed, the appellants' only justification for claiming interim relief is that it is needed to render more efficacious the clause 67 procedures, and any decision favourable to the appellants which may emerge from them. We must therefore assume that the appellants' next step will be to set about at once pursuing the same remedy, or type of remedy, through the medium of clause 67 as they sought in the action. Only one item of substantive relief was claimed by the writ, and although this was cast in negative form it was in substance a claim for a final mandatory injunction: or, what seems to me the same thing, an order for specific performance of the respondents' obligation to work continuously on the contract. Absent any evidence of Belgian law, we must also assume that this is an order which the panel and arbitrators would have power to make, if minded to do so. How long the proceedings will take is impossible to predict, apart from saying that if the appellants had gone straight to the panel in October 1991 rather than starting an action, the clause 67 proceedings would no doubt have been comfortably finished by now. At all events, we should in my opinion assume that if the panel rules in favour of the appellants the respondents will appeal to the arbitrators, and that a final ruling on the claim is not likely to emerge for some considerable time.

96. We must also make assumptions about what will happen on the alternative hypotheses that the injunction is and is not granted. As to the latter, since the respondents have never qualified their threat to withdraw from work unless their financial demands are met, we must assume that 15 months after the threat was first made, at a time when the entire tunnel project is 15 months nearer to completion, the respondents will at once stop work and thereby

imperil even further the financial viability of a troubled enterprise, risking an immense liability in damages if they are subsequently found to have asserted a right which they did not possess. Some scepticism on this score is inevitable, but since the parties are still at odds about the availability of interim relief to prevent the respondents from carrying out their threat, I can see no choice but to assume that the threat is not just empty bluster, but is one which the respondents will carry out if free to do so.

97. If, on the other hand, an injunction is granted pending a final resolution of the dispute the completion of the clause 67 procedures is bound to take a considerable time; during which, we must assume, the work under the construction contract will be approaching a conclusion.

98. Amidst all these assumptions, there is one hard fact which I believe to be conclusive, namely that the injunction claimed from the English court is the same as the injunction to be claimed from the panel and the arbitrators, except that the former is described as interlocutory or interim. In reality its interim character is largely illusory, for as it seems to me an injunction granted in November 1991, and a fortiori an injunction granted today, would largely pre-empt the very decision of the panel and arbitrators whose support forms the raison d'être of the injunction. By the time that the award of the panel or arbitrators is ultimately made, with the respondents having continued to work meanwhile it will be of very modest practical value, except as the basis for a claim in damages by the respondents: although exactly how modest, it is impossible on the present evidence to say.

99. In these circumstances, I do not consider that the English court would be justified in granting the very farreaching relief which the appellants claim. It is true that mandatory interlocutory relief may be granted even where it substantially overlaps the final relief claimed in the action; and I also accept that it is possible for the court at the pre-trial stage of a dispute arising under a construction contract to order the defendant to continue with a performance of the works. But the court should approach the making of such an order with the utmost caution, and should be prepared to act only when the balance of advantage plainly favours the grant of relief. In the combination of circumstances which we find in the present case I would have hesitated long before proposing that such an order should be made, even if the action had been destined to remain in the High Court. These hesitations are multiplied by the presence of clause 67. There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or

other decision-makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter consideration must prevail. The court has stayed the action so that the panel and the arbitrators can decide whether to order a final mandatory injunction. If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide.

100. Any doubts on this score are to my mind resolved by the choice of the English rather than the Belgian courts as the source of interim relief. Whatever exactly is meant by the words "*competent judicial authority*" in article 8.5 of the I.C.C. Rules, the Belgian court must surely be the natural court for the source of interim relief. If the appellants wish the English court to prefer itself to this natural forum it is for them to show the reason why, in the same way as a plaintiff who wishes to pursue a substantive claim otherwise than in a more convenient foreign court: *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460, 476e. They have not done so. Apparently no application for interim relief has been made to the court in Brussels. It is perhaps just permissible to take notice that the contemporary Belgian law of arbitration differs from the law of other European countries, but beyond this I would certainly not be willing to go since, most remarkably, no evidence of Belgian law is before the court. If the appellants had wished to say that the Belgian court would have been unable or unwilling to grant relief, and that the English court is the only avenue of recourse, it was for them to prove it, and they have not done so. Moreover, even if evidence to this effect had been adduced I doubt whether it would have altered my opinion. This is not a case where a party to a standard form of contract finds himself burdened with an inappropriate arbitration clause to which he had not previously given his attention. I have no doubt that the dispute-resolution mechanisms of clause 67 were the subject of careful thought and negotiation. The parties chose an indeterminate "law" to govern their substantive rights; an elaborate process for ascertaining those rights; and a location for that process outside the territories of the participants. This conspicuously neutral, "a*national*" and extra-judicial structure may well have been the right choice for the special needs of the Channel Tunnel venture. But whether it was right or wrong, it is the choice which the parties have made. The appellants now regret that choice. To push their claim for mandatory relief through the mechanisms of clause 67 is too slow and cumbersome to suit their purpose, and they now wish to obtain far reaching relief through the judicial means which they have been so scrupulous to exclude.

Notwithstanding that the court can and should in the right case provide reinforcement for the arbitral process by granting interim relief I am quite satisfied that this is not such a case, and that to order an injunction here would be to act contrary both to the general tenor of the construction contract and to the spirit of international arbitration.

Appeal dismissed with costs. (A. R.)

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