Trinity Term
[2013] UKSC 35
On appeal from: [2011] EWCA Civ 647

JUDGMENT

Ust-Kamenogorsk Hydropower Plant JSC (Appellant) *v* AES Ust-Kamenogorsk Hydropower Plant LLP (Respondent)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Toulson

JUDGMENT GIVEN ON

12 June 2013

Heard on 1 and 2 May 2013

Appellant
Lord Goldsmith QC
Sophie Lamb
(Instructed by Debevoise & Plimpton LLP)

Respondent
Toby Landau QC
Jessica Wells
(Instructed by Allen & Overy LLP)

LORD MANCE (with whom Lord Neuberger, Lord Clarke, Lord Sumption and Lord Toulson agree)

Introduction

1. An agreement to arbitrate disputes has positive and negative aspects. A party seeking relief within the scope of the arbitration agreement undertakes to do so in arbitration in whatever forum is prescribed. The (often silent) concomitant is that neither party will seek such relief in any other forum. If the other forum is the English court, the remedy for the party aggrieved is to apply for a stay under section 9 of the Arbitration Act 1996.

2. The issue on this appeal is whether, if the other forum is a foreign jurisdiction outside the European régime of the Brussels Regulation (EC) No 44/2001 and the Lugano Convention, the English court has any and if so what power to declare that the claim can only properly be brought in arbitration and/or to injunct the continuation or commencement of the foreign proceedings. (It is clear that injunctive relief in relation to foreign proceedings within the Brussels/Lugano space is impermissible under the Regulation and Convention: *West Tankers Inc v Allianz SpA (formerly RAS Riunione Adriatica di Sicurta SpA) (The Front Comor)* (Case 185/07) [2009] 1 AC 1138.

3. By order dated 16 April 2010, Burton J granted the respondent, Aes Ust-Kamenogorsk Hydropower Plant LLP ("AESUK"), such a declaration together with an injunction in relation to the bringing of proceedings against it by the appellant, Ust-Kamenogorsk Hydropower Plant JSC ("JSC"): [2010] 2 All ER (Comm) 1033. By order dated 1 July 2011 the Court of Appeal dismissed JSC's appeal against the judge's order: [2012] 1 WLR 920.

4. The perhaps unusual feature is that AESUK has not commenced, and has no intention or wish to commence, any arbitration proceedings. Its contention is simply that JSC should not pursue or be free to pursue court proceedings against it. If JSC commences arbitration proceedings, then no doubt AESUK will defend them.

Background

5. AESUK is the current grantee and lessee of a 25 year concession granted by agreement dated 23 July 1997 entitling it to operate an energy producing hydroelectric plant in Kazakhstan. From 1997 to 2007, the concession was held by its parent or affiliate company, Tau Power BV. JSC is the current owner and grantor of the concession, having succeeded to the concession's original owner and grantor, the Republic of Kazakhstan.

6. The concession agreement is governed by Kazakh law (clause 31), but contains a London arbitration clause (clause 32). It was common ground below and it remains common ground, at least for the purposes of this appeal, that this clause is governed by and to be construed in accordance with English law. It is therefore unnecessary to consider authority in this area such as *C v D* [2007] EWCA Civ 1282, *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 and *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm).

7. The arbitration clause provides in summary that, subject to provisions contained in clauses 17.8 and 17.9, any dispute or difference arising out of or in connection with any matter or thing in relation to the provisions of the concession agreement and the transactions contemplated by the parties that cannot be resolved by negotiation should be settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC") to be conducted in London.

8. Relations between the owners and holders of the concession have for some years been fraught. Burton J summarised the history in paras 5 to 10 of his judgment, and it is unnecessary to repeat it here. Some salient facts suffice.

9. First, during the period when it owned the concession, the Republic of Kazakhstan brought proceedings in Kazakhstan against AESUK's predecessors in title, Tau Power BV, and on 8 January 2004 obtained from the Kazakh Supreme Court a ruling that the arbitration clause was invalid. This was on two grounds: that the arbitration agreement included tariff disputes, which would put such disputes beyond the control of the Republic contrary to its public policy; and that the reference in clause 32 to the Rules of the ICC was not a reference to the ICC and left the arbitral body unspecified.

10. Burton J and the Court of Appeal held that they were not bound by the Kazakh court's conclusions in relation to an arbitration agreement subject to

English law, and that neither ground was sustainable. Tariff disputes were in fact outside the arbitration agreement, by reason of the reference to clauses 17.8 and 17.9, under which they fell to be dealt with by an expert; and the reference in clause 32 to the ICC was plainly sufficient to mean that any arbitration was to be by the ICC. There is no appeal to this Court in relation to these matters.

11. On 12 June 2009 JSC brought proceedings against AESUK in the Specialist Inter-District Economic Court of East Kazakhstan Oblast ("the Economic Court"), alleging that AESUK had failed to supply information concerning concession assets pursuant to a request duly made under the concession agreement. AESUK's application to stay these proceedings under the arbitration clause was dismissed on 28 July 2009 on the ground that the clause had been annulled by the Supreme Court's ruling of 8 January 2004.

12. On 31 July 2009 AESUK issued proceedings before the English Commercial Court claiming declarations that the arbitration clause was valid and enforceable and a without notice interim anti-suit injunction restraining JSC from pursuit of the proceedings before the Economic Court. AESUK's attempt to rely on this injunction in the Kazakh courts was rejected by the Economic Court on 5 August 2009 and on an appeal to the East Kazakhstan Regional Court on 11 September 2009. Both the Economic Court and the Regional Court also held that JSC was entitled to the information which it had requested.

13. Meanwhile on 21 August 2009 the interim injunction granted by the English Commercial Court was continued by consent pending a challenge by JSC to the jurisdiction of the English courts and amended to provide that JSC would withdraw its request for information the subject of the Kazakh proceedings. However, despite being requested, JSC did not undertake either that it would not resubmit a request for information or that it would not commence further proceedings in Kazakhstan. Hence, the continuation of the present proceedings, leading to Burton J's and the Court of Appeal's judgments and orders.

Burton J's order

14. The order dated 16 April 2010 giving effect to Burton J's judgment declares in paragraph 2 that JSC "cannot bring", and orders in paragraph 3 that JSC "is restrained from bringing" "the claim, the subject matter of the [Kazakhstan proceedings], or any other claim arising out of or in connection with any matter or thing in relation to the provisions of the Concession Agreement …., save only for [excepted matters], otherwise than by commencing arbitration proceedings in the International Chamber of Commerce in London and pursuant to its Rules." By its

order dated 1 July 2011 giving effect to its judgment, the Court of Appeal simply dismissed the appeal against Burton J's order.

15. In its terms and form, Burton J's order was and is a final order, as to both the declaration and the injunction which it granted. Indeed, in para 1 of his judgment, Burton J recorded that he was being asked to give "final relief" on AESUK's arbitration claim form, and in the final para 54 to 56 of his judgment, referring back to para 21, he concluded that AESUK was entitled to the grant of "(limited) final declaratory and injunctive relief". In these paragraphs, he made clear that he regarded an injunction in the wording of his later order as "limited" in a way which would avoid any concern about "usurpation or ouster" of the jurisdiction of the arbitrators, if any arbitration were to take place, and would give "the opportunity …. for any proper challenge to be made to the jurisdiction of the arbitrators or the applicability of the arbitration clause".

16. Rix LJ, giving the main judgment in the Court of Appeal with which his colleagues agreed, addressed the nature of the order made by commenting (para 108) that it might possibly be said that a binding declaration as to the existence of the arbitration agreement trespassed on the theoretical possibility that an arbitral tribunal might one day have to grapple with that very issue, that he did not himself think that it would do, but that he "need not decide that question here, for the judge has been cautious not to give such a declaration and the operator [AESUK] as respondent in this appeal has not sought to go further than the judge has gone".

17. Before the Supreme Court, both sides have in their submissions treated the judge's order as a final order; and so in terms it is. Neither side has sought to have the order, if it stands, corrected or qualified. Appeals lie against orders, and parties are entitled and correct to take orders at their face value. Burton J's order was in terms a final order declaring that certain claims could only properly be pursued in arbitration, and restraining their pursuit in any other forum. If an arbitration were to be commenced, by either side, in the future, it would not, under Burton J's order, be open to the respondent to object to its commencement or to the jurisdiction of the arbitral tribunal by submissions which contradicted the terms of the declaration made and injunction ordered by Burton J. The Supreme Court can and should consider the order on that basis. Further, if the court has, consistently with the scheme of the Arbitration Act 1996, power to make any sort of declaration about arbitral jurisdiction, then Rix LJ was, in my view, right that there is no objection to its being a final and binding declaration.

The issue

18. The issue is therefore whether the English court has power to declare that the claim can only properly be brought in arbitration and/or to injunct the continuation or commencement of proceedings brought in any other forum outside the Brussels/Lugano régime. Although Lord Goldsmith in his oral submissions laid some emphasis on the primacy of the declaratory relief claimed by AESUK and ordered by Burton J, in my opinion the claim and order for injunctive relief are more important. Before the court could order final injunctive relief, it had to conclude that there was a binding and applicable arbitration agreement – as JSC's own case in fact correctly stated at para 67. The order for injunctive relief carried by itself the basis of an issue estoppel in any future proceedings, precluding JSC from denying the existence or validity of such an agreement.

19. The rival submissions regarding the court's power turn primarily on the scope and effect of the Arbitration Act 1996. Mr Toby Landau QC for AESUK advances a simple case. Independently of that Act, the court has a general inherent power to declare rights and further, under section 37 of the Senior Courts Act (formerly 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".

20. Despite its generality, there are statements limiting the application of section 37 to two situations: (a) where one party can show that the other party has 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, and (b) where one party to any action has behaved, or threatens to behave, in a manner which is unconscionable: *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24, 40B-D, per Lord Brandon, with whose speech Lord Bridge and Lord Brightman agreed without qualification. Lord Mackay and Lord Goff voiced a reservation as to whether section 37 should be so limited, and Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 362B left the point open. It is unnecessary to say more about this here, since, on Mr Landau's case, the first situation applies. JSC has invaded or is threatening to invade AESUK's legal right not to be sued in Kazakhstan. Absent any contrary reason, there is, AESUK submits, no reason why the court should not exercise both its declaratory powers and its powers under section 37. To do so would support the commitment to arbitration contained in the arbitration clause. In contrast, JSC – although it invokes the supposed policy interests of international users of London arbitration – opposes the deployment of such powers in order to frustrate the arbitration clause.

The negative aspect of an arbitration agreement and exclusive choice of court clause

21. At points in his submissions, Lord Goldsmith QC, representing JSC, suggested that any negative obligation inherent in an arbitration agreement is a mere ancillary to current or intended arbitral proceedings. As a matter of interpretation of a straightforward agreement to arbitrate disputes in a particular forum (like that in this case: para 7 above), there is no basis for any such limitation. The negative aspect of an arbitration agreement is a feature shared with an exclusive choice of court clause. In each case, the negative aspect is as fundamental as the positive. There is no reason why a party to either should be free to engage the other party in a different forum merely because neither party wishes to bring proceedings in the agreed forum. Nor is there any basis for treating the Arbitration Act 1996 as affecting the *interpretation* of an arbitration agreement in this respect, although it is JSC's case that the effect of the Act is to preclude the court from granting *relief* to enforce the negative aspect of an arbitration agreement unless and until arbitral proceedings are on foot or proposed (see para 29 et seq below).

22. The case-law also contains no support for JSC's argument that the negative aspect of an arbitration agreement is enforceable only when an arbitration is on foot or proposed. It is true that in most of the cases an arbitration was on foot, but none of the statements of principle identify this as relevant or critical. The case-law is worth considering more closely not only to make this good, but also as background to a consideration of JSC's submissions on the effect of the Arbitration Act.

23. Both prior to the Arbitration Act 1996 and indeed subsequently - until the present case - the negative aspect was well recognised, and it was well established that the English courts would give effect to it, where necessary by injuncting foreign proceedings brought in breach of either an arbitration agreement or an exclusive choice of court clause. Further, such relief was treated as the counterpart of the statutory power to grant a stay of domestic proceedings to give effect to an arbitration agreement. A stay is not made conditional upon arbitration being on foot, proposed or brought. If there is power under section 37 to injunct the commencement or continuation of foreign proceedings, no reason is evident why the exercise of this power should depend upon such a condition. In each case it is, on the face of it, for either party to commence any arbitration it wishes at any time, or not to do so.

24. In *Pena Copper Mines Ltd v Rio Tinto Co Ltd* (1911) 105 LT 846, an English law contract provided for any matter in difference to be referred to arbitration under the Arbitration Act 1889 (and for an award to be a condition

precedent to any liability in respect thereof), but Rio Tinto began Spanish court proceedings. No arbitration was on foot. The Pena company expressed itself "perfectly willing to refer" any dispute to arbitration, but that does not mean that it proposed to do so itself and no such condition was imposed upon it. After referring to the statutory power to stay which would have existed had Rio Tinto commenced English court proceedings, the Court of Appeal ordered Rio Tinto to desist from the Spanish proceedings. The arbitration clause involved, in Cozens Hardy MR's words, "probably an express negative, but …. certainly an implied negative", a contract "that they will not sue in a foreign court" (pages 850-851), and Rio Tinto's conduct in suing in Spain was, in Fletcher Moulton LJ's words, "certainly contrary to their contractual duties" (page 852). That an award was a condition precedent to any liability cannot have been decisive.

25. By the 1990s it had come to be thought that the power to injunct foreign proceedings brought in breach of contract should be exercised "only with caution", because English courts "will not lightly interfere with the conduct of proceedings in a foreign court": see eg *Sokana Industries Inc v Freyre & Co Inc* [1994] 2 Lloyd's Rep 57, 66, per Colman J. But in *Aggeliki Charis Cia Maritime SA v Pagnan SpA (The "Angelic Grace")* [1995] 1 Lloyd's Rep 87, where the parties had agreed to arbitrate all disputes in London (an award not being a condition precedent to liability) and owners commenced such an arbitration while charterers sued in court in Venice, the Court of Appeal held, citing *Pena Copper* and other authority, that courts ought not to feel diffident about granting an anti-suit injunction, if sought promptly. Without it the claimant would be deprived of its contractual rights in a situation where damages would be manifestly an inadequate remedy. The time had come, in Millett LJ's words, "to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution". An injunction should be granted to restrain foreign proceedings in breach of an arbitration agreement "on the simple and clear ground that the defendant has promised not to bring them". The principle was endorsed in the context of exclusive choice of court clauses by the House of Lords in *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 All ER 749, a decision recognising (para 24) that strong reasons are required to outweigh the prima facie entitlement to an injunction. In that case, a claim for fraud conspiracy was brought against Mr Donohue in New York in breach of an agreement providing for the exclusive jurisdiction of the English courts. Mr Donohue was refused an anti-suit injunction because strong reasons (in the form of alleged participation in the alleged fraud of other New York defendants not party to any exclusive jurisdiction agreement) existed why the New York proceedings should continue. But the consideration that Mr Donohue had not commenced English proceedings on the substance of the matter played no part in the reasoning. Indeed the House recognised that he would continue to have a prima facie right to recover any damage he suffered in consequence of the continuation of the New York proceedings against him contrary to the exclusive jurisdiction clause: paras 36 and 48 per Lord Bingham and Lord Hobhouse.

26. Lord Hobhouse also encapsulated the principle in *Turner v Grovit* [2001] UKHL 65; [2002] 1 WLR 107, when he said:

> "25 …. Under English law, a person has no right not to be sued in a particular forum, domestic or foreign, unless there is some specific factor which gives him that right. A contractual arbitration or exclusive jurisdiction clause will provide such a ground for seeking to invoke the right to enforce the clause. The applicant does not have to show that the contractual forum is more appropriate than any other; the parties' contractual agreement does that for him. …..
>
> …..
>
> 27 The applicant for a restraining order must have a legitimate interest in making his application and the protection of that interest must make it necessary to make the order. Where the applicant is relying upon a contractual right not to be sued in the foreign country (say because of an exclusive jurisdiction clause or an arbitration clause), then, absent some special circumstance, he has by reason of his contract a legitimate interest in enforcing that right against the other party to the contract."

27. In the *West Tankers* case at first instance ([2005] EWHC 454 (Comm), paras 13, 59 and 72), Colman J referred to *The "Angelic Grace"* and *Donohue v Armco*, when granting a permanent injunction restraining the pursuit of the Italian legal proceedings which he had held to be in breach of a London arbitration agreement. That aspect of the decision was not questioned when the matter came before the Court of Appeal and the House of Lords, where Lord Hoffmann said, [2007] 1 Lloyd's Rep 391, para 10:

> "By section 37(1) of the Supreme Court Act 1981 the High Court has jurisdiction to grant an injunction (whether interlocutory or final) 'in all cases in which it appears to the court to be just and convenient to do so'. The English courts have regularly exercised this power to grant injunctions to restrain parties to an arbitration agreement from instituting or continuing proceedings in the courts of other countries: see *The Angelic Grace* [1995] 1 Lloyd's Rep 87."

He went on to refer to the court's power to grant an interim injunction under section 44, to which I revert below. The interpretation subsequently given to the Brussels Regulation by the Court of Justice in *West Tankers* (Case C-185/07) now

means that an English court can no longer enforce contractual rights (or prevent oppression of the sort found to exist in *Turner v Grovit*) by injuncting a party within its jurisdiction from commencing or continuing proceedings in a foreign court within the Brussels/Lugano regime. But that limitation is irrelevant in this case.

28. Unless the Arbitration Act 1996 requires a different conclusion, the negative aspect of a London arbitration agreement is therefore a right enforceable independently of the existence or imminence of any arbitral proceedings.

The scheme of the Arbitration Act 1996

29. JSC submits that it is contrary to the terms, scheme, philosophy and parliamentary intention of the Arbitration Act 1996 for an English court to determine that foreign proceedings involve a breach of an arbitration agreement or issue either declaratory or injunctive relief on that basis other than when arbitral proceedings are on foot or proposed and only then under the provisions of the Act. The Arbitration Act contains "a complete and workable set of rules for the determination of jurisdictional issues". The general rule is that the arbitral tribunal should consider jurisdictional issues in the first instance – with "the only exception to that general rule for a party *asserting* arbitral jurisdiction to be found in section 32". Unless and until one or other party commences an arbitration, the court should keep a distance. Any more general power contained in section 37 has been superseded by the Act, or should at least no longer be exercised.

30. During the hearing before the Supreme Court there was discussion as to the extent to which JSC was submitting that there was no longer any jurisdiction to rely on section 37, or simply that it would be wrong in principle to do so, in a context such as the present. This discussion arose because, in the Court of Appeal, different counsel then appearing for JSC was, for good or bad reason, concerned that JSC should not "descend into the arena of discretionary arguments" and, as he saw it, "risk submitting to the jurisdiction" (para 91 of the judgment of Rix LJ). Counsel therefore confined his submissions to "statutory or principled objection[s] to the jurisdiction" of the court (para 94). The Supreme Court is content to accept that this leaves it open to JSC to argue now both that there is no longer any jurisdiction to exercise the power otherwise contained in section 37 and, alternatively, that it would be wrong in principle to do so in the present context, absent perhaps very special circumstances not here present.

31. JSC points out correctly that the 1996 Act embodies, (from Mustill and Boyd, Commercial Arbitration: (2001) Companion Volume to 2nd Ed, preface endorsed by Lord Steyn) "a new balancing of the relationships between parties,

advocates, arbitrators and courts which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature": *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 AC 221, para 17. The Act was also a response to "international criticism that the Courts intervene more than they should in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation as the means for resolving their disputes": Report on Arbitration of the Departmental Advisory Committee ("DAC") 1996 (with Lord Justice Saville as its chair), paragraphs 20-22. This criticism was addressed by the third of the general principles with which the Act, unusually, begins:

> "1. General principles.
>
> The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

32. JSC's submissions in this area give rise to two questions. The first is the extent to which it is correct to regard the 1996 Act as a complete and workable set of rules for the determination of all jurisdictional issues in all situations. The other is what is meant by the word "should" in section 1(c). As to the first, section 1(c) is limited to "matters governed by this Part", and it is clear that the drafters of the Act were not attempting a complete code of arbitration law. The DAC Report 1996 stated expressly that "The Bill does not purport to provide an exhaustive code on the subject of arbitration", but that they had "sought to include what we consider to be the more important common law principles, whilst preserving all others, in so far as they are consistent with the provisions of this Bill (see clause 81)". Clause 81 became section 81, reading

> "Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part in particular, any rule of law as to—

(a) matters which are not capable of settlement by arbitration;

(b) the effect of an oral arbitration agreement; or

(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy".

The DAC Report instances confidentiality as another subject deliberately left outside the scope of the Act.

33. The use of the word "should" in section 1(c) was also a deliberate departure from the more prescriptive "shall" appearing in article 5 of the UNCITRAL Model Law. Article 5 reads that "In matters governed by this Law, no court shall intervene except where so provided in this Law". Article 5 had been the subject of forceful critique in *A New Arbitration Act?*, the 1989 report on the UNCITRAL Model Law by the DAC at a time when its chair was Lord Justice Mustill, who had also represented the United Kingdom at UNCITRAL. Even in matters which might be regarded as falling within Part 1, it is clear that section 1(c) implies a need for caution, rather than an absolute prohibition, before any court intervention.

34. It is in these circumstances that the question now arises whether it is consistent with the 1996 Act for the English court to determine whether there is a valid and applicable arbitration agreement covering the subject matter of actual or threatened foreign proceedings and, if it holds that there is, to injunct the commencement or continuation of the foreign proceedings. JSC points to sections 32 and 72 of the Act as the means by which a challenge to the jurisdiction may, under certain conditions, be pursued during an arbitration and to section 67 as the means by which an award may be challenged for lack of jurisdiction. It submits, that, if AESUK convoked an arbitral tribunal, the arbitrators could rule on their jurisdiction under section 30, their ruling could be tested under sections 32, 67 and/or 72 and the court could in the meantime be asked to give interim relief under section 44.

Sections 30, 32 and 72 and Kompetenz-Kompetenz

35. Section 30 provides that an arbitral tribunal may rule on its own substantive jurisdiction:

"30 Competence of tribunal to rule on its own jurisdiction.

> (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
>
> (a) whether there is a valid arbitration agreement,
>
> (b) whether the tribunal is properly constituted, and
>
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.
>
> (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part."

Section 30 reflects the principle of "Kompetenz-Kompetenz", discussed in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763. In short, any tribunal convoked to determine a dispute may, as a preliminary, consider and rule upon the question whether the dispute is within its substantive jurisdiction, without such ruling being binding on any subsequent review of its determination by the court under sections 32, 67 or 72 of the 1996 Act. However, a tribunal cannot by its preliminary ruling that it has substantive jurisdiction to determine a dispute confer upon itself a substantive jurisdiction which it does not have. Absent a submission specifically tailored to embrace them (as to which there is no suggestion here), jurisdictional issues stand necessarily on a different footing to the substantive issues on which an award made within the tribunal's jurisdiction will be binding.

36. In *Dallah*, I put these points as follows (para 24):

> "…. Arbitrators (like many other decision-making bodies) may from time to time find themselves faced with challenges to their role or powers, and have in that event to consider the existence and extent of their authority to decide particular issues involving particular persons. But, absent specific authority to do this, they cannot by their own decision on such matters create or extend the authority conferred upon them."

Lord Collins said (para 84) that it does not follow, from the general principle that a tribunal has power to consider its own jurisdiction:

> "that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it. Nor does it follow that the question of jurisdiction may not be re-examined by the supervisory court of the seat in a challenge to the tribunal's ruling on jurisdiction. Still less does it mean that when the award comes to be enforced in another country, the foreign court may not re-examine the jurisdiction of the tribunal."

37. Section 32 enables the court to determine any question as to the substantive jurisdiction of a tribunal "on the application of a party to arbitral proceedings", provided that the application is made by agreement of all the other parties or, subject to the court being satisfied of various matters, with the tribunal's permission. Section 44 provides for the court to have "for the purposes of and in relation to arbitral proceedings", and on the application of a party or proposed party to the proceedings, the same power of making orders about certain listed matters as it has for purposes of and in relation to legal proceedings. The listed matters include the making of an interim injunction, but, save in case of urgency, the court is only to act on an application made under section 44 with the permission of the tribunal or the agreement of the other parties to the arbitral proceedings.

38. Section 72 permits a party alleged to be a party to arbitral proceedings but who takes no part in them to take his jurisdictional challenge directly to the court without waiting for the tribunal to address the matter.

39. In support of its submissions, JSC relies upon cases in which commercial judges have refused to permit the pursuit of court proceedings for a declaration as to the existence of a binding arbitration clause brought by a claimant in current or proposed arbitration proceedings: *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24; *Vale do Rio Doce Navegaceo SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 All ER (Comm) 70. In *Vale do Rio*, Thomas J observed that it could not have been the intention that a party to a disputed arbitration agreement could obtain the decision of the courts on its existence without being subject to the restrictions contained in section 32 by the simple step of not appointing an arbitrator (para 53). Although he concluded (para 60) that the court had no "jurisdiction" to allow the application, earlier, in noting the change from "shall" to "should" in section 1(c), he had said that "it is clear that the general intention was that the court should usually not intervene outside the specific circumstances specified in Part 1 of the 1996 Act" (para 52).

40. These cases have no direct bearing on the present situation. Here, no arbitration proceedings are on foot and AESUK does not intend or wish to institute any. Sections 30, 32, 44 and 72 of the Act are all in terms inapplicable. No arbitration tribunal exists to determine its own competence under section 30. The principle of Kompetenz-Kompetenz – or, in an anglicised version suggested by Lord Sumption, jurisdiction-competence – makes sense where a tribunal is asked to exercise a substantive jurisdiction and hears submissions at the outset as to whether it has such a jurisdiction. Even then, the court has the last word in establishing whether the substantive jurisdiction actually exists. But the principle has no application where no arbitration is on foot or contemplated. On JSC's case, a party wishing relief in relation to foreign proceedings brought or threatened contrary to an arbitration agreement, must however commence, or should be required to undertake to commence, an arbitration against the other party who is rejecting the existence or application of any arbitration agreement. Further, the only substantive relief that JSC could suggest might be sought in such an arbitration would be an order, within the power afforded by section 48(5)(a) of the 1996 Act, not to commence or continue any foreign proceedings; and the efficacy of any such order as arbitrators might make, in any such arbitration, if they held that they had jurisdiction, would depend upon the court determining for itself that the tribunal had jurisdiction, and then enforcing the tribunal's order under either section 44 or section 66 of the Act with the backing of the court's contempt jurisdiction.

41. In these circumstances, there is, in my opinion, every reason why the court should be able to intervene directly, by an order enforceable by contempt, under section 37. To do so cannot be regarded, in the DAC's words, as "intervene[ing] in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation as the means for resolving their disputes". On the contrary, JSC has complete freedom of choice in relation to the arbitration agreement. In denying that the court has any relevant jurisdiction, JSC is seeking to benefit by AESUK's reliance on an arbitration agreement, while itself denying its existence. A party is entitled to benefit by the existence of an arbitration agreement, but normally only by asserting it, e.g. by commencing an arbitration or applying for a stay under section 9. Those must however be the last things that JSC is willing to do.

42. As to section 32, there is no party to arbitral proceedings who could apply to the court to determine any question of arbitral jurisdiction, and there are no other parties or tribunal with whose consent or permission any such application would have to be made and no tribunal whose substantive jurisdiction could be the subject of such an application.

Section 44

43. Similarly, the court's powers listed in section 44 are exercisable only "for the purposes of and in relation to arbitral proceedings" and depend upon such proceedings being on foot or "proposed": see section 44(3). That alone is sufficient in my opinion to lead to a conclusion that section 44 has no bearing on the question whether section 37 empowers the court to restrain the commencement or continuation of foreign proceedings in the light of an arbitration agreement under which neither party wishes to commence an arbitration.

44. I should however say something further about JSC's submission that section 44(2)(e) embraces the granting of an interim injunction to restrain the pursuit of foreign proceedings during a current or proposed arbitration. The careful limitation of the court's power to "the granting of an interim injunction" militates, he argues, against the existence of any general power to injunct foreign proceedings under section 37, even on an interim basis in relation to current or proposed arbitral proceedings, let alone on a permanent basis in their absence.

45. It is helpful to set out section 44 in full:

> "Court powers exercisable in support of arbitral proceedings.
>
> (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
>
> (2) Those matters are—
>
> (a) the taking of the evidence of witnesses;
>
> (b) the preservation of evidence;
>
> (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in
>
> the proceedings—

(i) for the inspection, photographing, preservation, custody or detention of the property, or

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;

and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d) the sale of any goods the subject of the proceedings;

(e) the granting of an interim injunction or the appointment of a receiver.

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.

(7) The leave of the court is required for any appeal from a decision of the court under this section."

46. Section 44(2) is the modern successor to the First Schedule to the Arbitration Act 1934 and section 12(6) of the Arbitration Act 1950 - section 44(2)(e) corresponds with paragraph 8 of the First Schedule and section 12(6)(h) of the 1950 Act. The matters listed in section 44 are all matters which could require the court's intervention during actual or proposed arbitral proceedings. The power to grant an interim injunction is expressed in general terms, but is limited, save in cases of urgency, to circumstances in which either the tribunal permits an application to the court or all the other parties agree to this in writing. There is no power to grant a final injunction, even after an award. There is authority (not requiring review on this appeal) that section 44(3) can include orders urgently required pending a proposed arbitration to preserve or enforce parties' substantive rights - eg an order to allow inspection of an agent's underwriting records or to submit a proposed transfer to a central bank: see *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] 2 Lloyd's Rep 438; *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618; [2005] 1 WLR 3555. Such orders can be said to be "for the purposes of and in relation to arbitral proceedings". But orders restraining the actual or threatened breach of the negative aspect of an arbitration agreement may be required both where no arbitration proceedings are on foot or proposed, and where the case is not one of urgency (and so not within section 44(3)). They enforce the negative right not to be vexed by foreign proceedings. This is a right of a different character both to the procedural rights with which section 44 is mainly, at least, concerned, and to the substantive rights to which the *Hiscox* and *Cetelem* cases hold that it extends.

47. In *Starlight Shipping Co v Tai Ping Insurance Co Ltd (The "Alexandros T")* [2007] EWHC 1893 (Comm); [2008] 1 All ER (Comm) 593, Cooke J addressed the inter-relationship of section 44 of the 1996 Act and section 37 of the Senior Courts Act 1981 in a context where proceedings were being pursued in China in apparent breach of an arbitration agreement and where arbitral proceedings were also current. He treated both sections as potentially available, adding that the matters relevant under section 44 could also bear on, though not govern in the same way, the exercise of the general discretion under section 37 (para 29). He considered that "the contractual right to have disputes referred to arbitration" must be an "asset" falling within section 44(3). In the upshot, he gave interim relief under section 44, on the basis that the matter was urgent under section 44(3) because the arbitral tribunal would not be able to issue an award restraining the claimants in the Chinese proceedings from pursuing such proceedings speedily enough or, therefore, effectively under section 44(5). At the same time, he also made an interim order under section 37, pointing out inter alia that "The difference between an order of this court and that of the arbitrators is that remedies for contempt are available if an order of this court should be breached" (para 31).

48. The better view, in my opinion, is that the reference in section 44(2)(e) to the granting of an interim injunction was not intended either to exclude the Court's general power to act under section 37 of the 1981 Act in circumstances outside the scope of section 44 of the 1996 Act or to duplicate part of the general power contained in section 37 of the 1981 Act. Where an injunction is sought to restrain foreign proceedings in breach of an arbitration agreement - whether on an interim or a final basis and whether at a time when arbitral proceedings are or are not on foot or proposed - the source of the power to grant such an injunction is to be found not in section 44 of the 1996 Act, but in section 37 of the 1981 Act. Such an injunction is not "for the purposes of and in relation to arbitral proceedings", but for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed. Colman J in *Sokana Industries Inc v Freyre & Co Inc* [1994] 2 Lloyd's Rep 57 was correct on this point when he held that the court's power to make orders "for the purpose of and in relation to a reference" in section 12(6) of the Arbitration Act 1950 did not include the granting of relief consisting of either a final or an interim injunction to restrain an alleged breach of a London Chamber of Commerce arbitration agreement consisting in the commencement of proceedings in Florida.

49. There was no power to serve the proceedings out of the jurisdiction on the defendants in *Sokana Industries* because it was not made "under the Arbitration Act 1950 or …. 1979". The current position is in my opinion different. Although Part 62 of the Civil Procedure Rules is divided into Parts, including Part I, headed "Claims under the 1996 Act" and Part II, headed "Other Arbitration Claims", the text of these Parts indicates in my view that Part I relates to circumstances in which, if there were an arbitration, it would be subject to the 1996 Act, rather than to the old law, and that it covers matters relating to an arbitration agreement, independently of any arbitral proceedings. Thus, CPR62.2 provides:

> "(1) In this Section of this Part 'arbitration claim' means –
>
> (a) any application to the court under the 1996 Act;
>
> (b) a claim to determine –
>
> (i) whether there is a valid arbitration agreement;
>
> (ii) whether an arbitration tribunal is properly constituted; or

what matters have been submitted to arbitration in accordance with an arbitration agreement;

(c) a claim to declare that an award by an arbitral tribunal is not binding on a party; and

(d) any other application affecting –

(i) arbitration proceedings (whether started or not); or

(ii) an arbitration agreement."

Under CPR62.5, governing service out of the jurisdiction, the court may give permission to serve an arbitration claim form out of the jurisdiction if

"(b) the claim is for an order under section 44 of the 1996 Act; or

(c) the claimant –

(i) seeks some other remedy or requires a question to be decided by the court affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award; and

(ii) the seat of the arbitration is or will be within the jurisdiction or the conditions in section 2(4) of the 1996 Act are satisfied."

50. I regard these provisions as wide enough to embrace a claim under section 37 to restrain foreign proceedings in breach of the negative aspect of an arbitration agreement. In circumstances where an arbitration claim includes under CPR62.2(d) "any other application affecting (i) arbitration proceedings (whether started or not); or (ii) an arbitration agreement", the requirement in CPR62.5(c)(ii) that "the seat of the arbitration is or will be within the jurisdiction" must be read as satisfied if the seat of any arbitration, if any were to be commenced or proposed under the arbitration agreement, would be within the jurisdiction. In so far as Thomas J in *Vale do Rio* considered (para 59) that the predecessor to CPR62.2 (the then CPR PD 49G) included provisions equivalent to the present CPR62.2(1)(b),(c) and (d) "out of an abundance of caution …. to spell out the terms of the 1996 Act (or just possibly to cater for an oral arbitration agreement)",

I would respectfully disagree. Thomas J was in any event concerned with a point on the construction of the 1996 Act, which as he correctly said could not possibly be affected by the view taken of CPR PD 49G. His statement that the language might "just possibly" cater for an oral arbitration agreement itself opens the possibility, which I think correct, that the drafters were not confining themselves to issues, regarding arbitration agreements, arising under the provisions of 1996 Act.

51. I add only that in the present case, although leave was in fact obtained under CPR PD 6B, paragraph 3.1(2) and CPR62.5(1)(b) and (c), the court would appear also to have had jurisdiction to give leave for service out of the jurisdiction under CPR PD 6B(6)(c), on the ground that, treating the arbitration agreement as the "contract", the claim was "made in respect of a contract where the contract …. (c) is governed by English law".

Section 9

52. Returning to the scheme of Part I of the 1996 Act, the principal focus is on the commencement, conduct, consequences and court powers with regard to an actual or proposed arbitration. In addition, Part I starts with sections 1 to 8 identifying the nature and certain features of the arbitration agreements to which it applies while sections 9 to 11 deal with stays of domestic legal proceedings where such an agreement exists. Section 9 runs contrary to JSC's general case, since it represents a situation in which the court, rather than the arbitral tribunal, rules in the first instance on arbitral jurisdiction, and does so bindingly. The Court of Appeal in *Fiona Trust and Holding Corp v Privalov* [2007] EWCA Civ 20; [2007] 1 All ER (Comm) 891, para 36 and Lightman J in *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd (No 3)* [2007] EWHC 665 (Ch); [2007] 2 All ER 1075, paras 14 to 20 correctly so held.

53. However, JSC relies upon section 9, as supplementing its case on the general scheme of the 1996 Act and on the particular implications of sections such as sections 30, 32, 67 and 72, in another respect. Given that the court under section 9 determines the existence or otherwise of arbitral jurisdiction conclusively and at the outset, JSC points out that this is expressly provided by the Act. In contrast, the Act makes no reference to, and so it submits implicitly excludes, any power to injunct the commencement or continuation of foreign proceedings.

54. I do not accept JSC's case on this point. Section 9 reflects, in domestic law, the requirement in article II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations 1958) that:

> "II.3. 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."

Nothing in the New York Convention requires Contracting States to have in their law any equivalent power to that which section 37 includes in respect of foreign proceedings in breach of an arbitration agreement. The silence in Part 1 is in this respect unremarkable.

Section 37 of the Senior Courts Act 1981

55. More generally, JSC's case depends upon a conclusion that the Arbitration Act 1996 either limits the scope, or as a matter of general principle qualifies the use, of the general power contained in section 37, so that it is no longer permissible to deploy section 37 to injunct foreign proceedings begun or threatened in breach of an arbitration agreement. Again, I cannot accept JSC's case.

56. Section 37 is a general power, not specifically tailored to situations where there is either an arbitration agreement or an exclusive choice of court clause. To adopt words of Lord Mustill in the *Channel Tunnel* case, [1993] AC 334, 360E-F, with reference to the relationship between section 37 and the previous arbitration legislation (the Arbitration Act 1950):

> "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."

The court may as a result need 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." (p 364B-C).

However, it is, in my opinion, entirely understandable that Parliament should not have thought to carve out from section 37 of the Senior Courts Act or to reproduce

in the 1996 Act one aspect of a general power conferred by section 37. It cannot be deduced from the fact that it did not do so that it intended that the general power should never be exercised in any context associated with arbitration.

57. On the contrary, it would be astonishing if Parliament should, silently and without warning, have abrogated or precluded the use by the English court of its previous well-established jurisdiction under section 37 in respect of foreign proceedings commenced or threatened in breach of the negative aspect of an arbitration agreement. One would have expected the intended inapplicability of section 37 to have been made very clear in both the DAC Report and the Act. The 1996 Act does in Schedule 3 or 4 provide for other presently immaterial amendments or repeals in respect of provisions in what was the Supreme Court Act and is now the Senior Courts Act 1981.

58. *The "Angelic Grace"* [1994] 1 Lloyd's Rep 168 in particular was a highly prominent decision, expressed in emphatic terms during the very period when the DAC was preparing the Bill for the Act and its own report. Nothing in the DAC report of 1996 addresses either it or the long-standing and well recognised jurisdiction which was its subject-matter. Yet a regime under which the English court could no longer enforce the negative rights of a party to a London arbitration agreement by injunctive relief restraining foreign proceedings would have been, and would have been seen, as a radical diminution of the protection afforded by English law to parties to such an arbitration agreement. It would have aroused considerable interest and, no doubt, concern. The only sensible inference is that the drafters of the Act never contemplated that it could or would undermine the established jurisprudence on anti-suit injunctions.

59. It was only later that the Court of Justice in Luxembourg restricted the use of such injunctions; and then only in relation to foreign proceedings in the area covered by the Brussels/Lugano régime and on the basis of the mutual trust affirmed to exist between courts within that regime. The interest and concern that this aroused witnesses to the interest that would have been aroused had the Bill or 1996 Act been seen as having any such radical intention or effect in relation to courts worldwide. The *West Tankers* case [2009] AC 1138 suggests that it did not occur to anyone until this case that it did.

Conclusion

60. The power to stay domestic legal proceedings under section 9 and the power to determine that foreign proceedings are in breach of an arbitration agreement and to injunct their commencement or continuation are in truth opposite and complementary sides of a coin. Subject to the recent European inroad, that

remains the position. The general power provided by section 37 of the 1981 Act must be exercised sensitively and, in particular, with due regard for the scheme and terms of the 1996 Act when any arbitration is on foot or proposed. It is also open to a court under section 37, if it thinks fit, to grant any injunction on an interim basis, pending the outcome of current or proposed arbitration proceedings, rather than a final basis. But, for the reasons I have given, it is inconceivable that the 1996 Act intended or should be treated sub silentio as effectively abrogating the protection enjoyed under section 37 in respect of their negative rights under an arbitration agreement by those who stipulate for an arbitration with an English seat.

61. In some cases where foreign proceedings are brought in breach of an arbitration clause or exclusive choice of court agreement, the appropriate course will be to leave it to the foreign court to recognise and enforce the parties' agreement on forum. But in the present case the foreign court has refused to do so, and done this on a basis which the English courts are not bound to recognise and on grounds which are unsustainable under English law which is accepted to govern the arbitration agreement. In these circumstances, there was every reason for the English courts to intervene to protect the prima facie right of AESUK to enforce the negative aspect of its arbitration agreement with JSC.

62. It follows that Burton J had jurisdiction under section 37 of the Senior Courts Act 1981 to make the order that he did, and that there was nothing wrong in principle with his exercise of his power to do so. The Court of Appeal was right so to conclude, and the appeal should be dismissed.