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Case No: 2007 FOLIO 540

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
28/06/2007

B e f o r e :

THE HONOURABLE MR JUSTICE COOKE

Between:

C
Claimant
- and -

D
Defendant

Bernard Eder QC and Stephen Houseman (instructed by Allen & Overy LLP) for the Claimant
Jonathan Hirst QC, Robert Howe and Shaheed Fatima (instructed by Robin Simon LLP) for the Defendant
Hearing dates: 20-21 June 2007

HTML VERSION OF JUDGMENT

Mr Justice Cooke :

Introduction

1. On 26 April 2007 Field J granted the claimant (C) an interim anti-suit injunction against the defendant (D) on a without notice application. That interim relief has since been replaced by undertakings from D, from which D now applies to be released, whilst also seeking a stay of the present claim. C seeks final injunctive and declaratory relief against D in the following form:-

"(1) An injunction, pursuant to section 44 of the Arbitration Act 1996 and/or section 37 of the Supreme Court Act 1981 and/or the inherent jurisdiction of the Court, restraining the defendant from bringing any legal proceedings and/or taking any steps to:-

(a) challenge and/or vacate and/or review (otherwise than in the Courts of England and Wales) the Partial Award dated 13 March 2007 [the Partial Award] rendered by [The Tribunal] in a London arbitration between the claimant and the defendant (the "Arbitration") and/or challenge and/or vacate and/or review (otherwise than in the Courts of England and Wales) any other award rendered by the Tribunal in the Arbitration (a "Subsequent Award"); or

(b) enjoin or restrain the claimant from taking any steps to seek to confirm or enforce the Partial Award and/or any Subsequent Award or to seek in any court the registration or conversion into a judgment of the Award and/or any subsequent Award; or

(c) enjoin or restrain the claimant from taking any steps against the defendant in the Courts of England and Wales in respect of the Arbitration and/or the Partial Award and/or any Subsequent Award; or

(d) enjoin or restrain the claimant from taking any further steps in the Arbitration.

(2) Such further or other relief as may be just and appropriate.

(3) A declaration that the Partial Award is final and binding."

D applies for these proceedings to be stayed until after the conclusion of any challenge by it to the Partial Award and/or any subsequent Award in the courts of the United States. It is D's expressed intention to mount such a challenge in the Southern District of New York after the arbitrators have determined the remaining issues in the arbitration and issued their award in relation to them, if not before.

The Insurance Policy

2. D is a US incorporated insurer with a branch in England registered here. It issued an insurance policy to C (which is also a US corporation) as the named insured. The policy was a claims made policy on Bermuda Form and insured C and others against "all sums which the Insured shall be obligated to pay by reason of liability imposed upon the Insured by law or assumed under contract or agreement by the Insured for damages on account of personal injury resulting from an occurrence," as defined in the policy. The occurrence limit and the aggregate

limit was $100 million and the excess was $190 million. The policy ran from November 1 1997 to November 1 2000. The definition of the insured included both the named insured (C) and any subsidiary, affiliate or associated company of C, as listed on Schedule A to the policy. That schedule included a large number of such companies, including 303 which were incorporated outside the USA. C or its US brokers were, under the terms of the policy to be treated as representing all insureds in all matters arising under the policy.

3. It is common ground between the parties that both C and the companies listed in Schedule A to the policy were parties to the insurance and were able to bring arbitration proceedings under it, although the arbitration which has given rise to the issues before me was between C and D alone.

4. The arbitration clause appeared as paragraph V[o] and included the following wording:-

"Any dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950 as amended…

If the party…notified of a desire for arbitration shall fail or refuse to nominate the second arbitrator…the party who first served notice of a desire to arbitrate will…apply to a judge of the High Court of England for the appointment of a second arbitrator…In the event of the failure of the first two arbitrators to agree on a third arbitrator…any of the parties may…apply to a judge of the High Court of England for the appointment of the third arbitrator….

The Board shall, within 90 calendar days following the conclusion of the hearing, render its decision on the matter or matters in controversy in writing…In case the Board fails to meet a unanimous decision, the decision of the majority of the members of the Board shall be deemed to be the decision of the Board and the same shall be final and binding on the parties thereto, and such decision shall be a complete defence to any attempted appeal or litigation of such decision in the absence of fraud or collusion."

5. The Governing Law and Interpretation clause at V[q] provided as follows:-

"This policy shall be governed by and construed in accordance with the internal laws of the State of New York, except insofar as such laws may prohibit payment in respect of punitive damages hereunder and except insofar as such laws pertain to regulation by the Insurance Department of the State of New York of insurers doing insurance business or issuance or delivery of policies of insurance within the State of New York; provided, however, that the provisions, stipulations, exclusions and conditions of this policy are to be construed in an evenhanded fashion as between the Insured and the Company; without limitation, where the language of this policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions [without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favour of either the Insured of the Company and without reference to parol evidence]."

6. In addition there was a Service of Suit clause at V[y] in the following terms:-

"In consideration of the premium charged it is hereby understood and agreed that in the event of failure by D (herein called "the Company") to pay any amount claimed to be due hereunder, the Company, at the request of the Insured, will submit to the jurisdiction of a court of competent jurisdiction within the United States. Nothing in this condition constitutes or should be understood to constitute a waiver of the Company's rights to commence an action in any court of competent jurisdiction in the United States to remove an action to a United States District Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any state in the United States. It is further agreed that service of process in such suit may be made upon Counsel, [an address in New Jersey], or his or her representative, and that in any suit instituted against the Company upon this contract, the Company will abide by the final decision of such court or of any appellate court in the event of any appeal.

Further, pursuant to any statute of any state, territory, or district of the United States which makes provision therefor, the Company hereby designates the Superintendent, Commissioner, or Director of Insurance, other officer specified for that purpose in the statute, or his or her successor or successors in office as its true and lawful attorney upon whom may be served any lawful process in any action, suit, or proceeding instituted by or on behalf of the Insured or any beneficiary hereunder arising out of this contract of insurance, and hereby designates the above named Counsel as the person to which the said officer is authorized to mail such process or a true copy thereof."

7. There was a dispute between the parties as to what was meant by "the internal laws of the State of New York", the phrase which appeared in clause V[q]. In that context C drew attention to IV[n] where there was reference to "the Employee Retirement Income Security Act of 1974 as amended, and/or any similar federal State or local statutory or common law". C contended that the expression excluded Federal law as the parties distinguished internal law of the State of New York from Federal law. D drew attention to the decision of the US Court of Appeals Second Circuit in Pryor v Sworner 445 F.2d.1272 where the internal law of a State was said to be that law which would be applied to a purely domestic case, without conflict of laws complications. That was also the approach of Toulson J (as he then was) in XL Insurance Ltd v Owens Corning [2000] 2 LLR 500 at page 507.

The Reference to Arbitration

8. According to the witness statement of Mrs Gill (a solicitor acting for C), during the policy period various claims were asserted against C and a subsidiary with significant operations in Europe. C paid damages and expenses in respect of these claims, considerably in excess of the policy limits, and made demand of D for payment under the policy which D refused. On 2 May 2005, C initiated arbitration against D in London. The Tribunal's terms of appointment dated 31 August 2005 and signed by the parties and by the Tribunal included the following:-

"2. Appointment of Tribunal

(a) The parties confirm their acceptance that the Tribunal composed of….has been validly established in accordance with article V of their Insuring Agreements…

8. Applicable Law

(a) Pursuant to article V[q] of the Agreement, the law governing the insurance policy is the law of the State of New York, USA.

(b) Pursuant to article V[o] of the Agreement, the juridical seat of the arbitration is London, UK. Accordingly the law governing the arbitration itself [Lex Arbitri] is the English Arbitration Act 1996, as amended and supplemented, regardless of whether meetings and hearings take place elsewhere in the interests of saving costs or convenience."

9. D raised four defences to C's claim for indemnification. The first related to the scope of Endorsement number 5 to the policy; the second related to late notice; the third related to misrepresentations and/or nondisclosure prior to the inception of the insurance; and the fourth was a defence labelled as the "paediatric defence". That defence consisted of D's allegation that C had breached a purported duty of good faith and fair dealing under New York law and/or had violated public policy in relation to the alleged promotion of its product to children, with the alleged consequence that C should not be afforded coverage under the policy for claims by children.

10. By Procedural Order number 3 dated 20 February 2006, the Tribunal ordered that issues relating to the first three defences should be heard first and the "paediatric defence" should be deferred until later. The rationale for this was explained in the order since, if C obtained an award which amounted to the full $100 million policy limit in relation to adult use, the paediatric use issue would no longer require determination. It was only if all the first three defences failed and the recoverable sum, without taking into account the paediatric use, was less than $100 million that the Tribunal would need to make any further determination.

11. Pursuant to that order, a hearing took place between 4 and 12 October 2006 to deal with the first three defences. Sixteen witnesses attended the hearing for cross-examination and there were extensive post hearing submissions. The Tribunal issued its Award on 13 March 2007, ruling that C succeeded in full on its claim under the policy and that it was entitled to recover, dismissing each of D's first three defences and related claims for relief. C was also awarded interest and costs. The Award also provided that the paediatric defence would only be considered if C could not establish that it had exhausted the policy limits, without including losses attributable to paediatric use. The parties were invited to seek to agree the quantum of the claims which the Tribunal had held were covered by the policy. It is agreed that this Partial Award is, in English law terms, final as to what it decides.

12. In correspondence following the Award, D applied to the Tribunal to correct it, stating (inter alia) that the Tribunal's findings constituted a "manifest disregard of New York law", that the Award fell outside the scope of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the 1958 Convention) and as such was reviewable for error by any US Federal District Court having jurisdiction over the parties under the general federal venue statute. D sought the Tribunal's withdrawal of its findings as to C's duty to disclose, as to its expectation and intent and as to materiality, pending the outcome of the next phase of the hearing

during which the Tribunal would hear evidence of C's promotion of paediatric use.

13. In further correspondence, D intimated its intention to apply to a Federal Court applying US Federal Arbitration law governing the enforcement of arbitral awards, which was said to permit vacatur of an award where arbitrators have manifestly disregarded the law. It was in consequence of such intimation that C sought and obtained the interim anti-suit injunction. The Tribunal made two "clerical" amendments but refused otherwise to amend the Partial Award, saying it had no power to do so.

The Parties' Respective Cases

14. C's case is that D's proposed challenge to the Partial Award in the United States (and now particularised as a likely application to the Southern District of New York), is impermissible by reason of the agreement of the parties to London as the seat of arbitration and to the application of the English Arbitration Act of 1996, by reason of the terms of the Arbitration Agreement and Agreement to Refer, and by reason of this court's power of supervision over arbitrations held in this jurisdiction. The only permissible challenges to the award itself are those which can be made under the 1996 Arbitration Act and the only permissible challenges to enforcement in other countries, which are parties to the 1958 Convention (as is the US), are those which arise under Article V of the Convention.

15. D's case is that, as New York law is the governing law of the insurance policy and that law entitles D to a minimum standard of review of arbitration awards, when such arbitrations take place between US corporations in relationships without an important international element, D cannot be deprived of exercising its contracted right to such a review. Federal law, which is part of the law of New York, operates to require such a minimum standard of review, regardless of the terms agreed between the parties which might appear to restrict any ground of challenge. Although English law is the curial law of the arbitration, that does not exclude a challenge which reflects the parties' express choice of New York law to govern their obligations under the policy. D contends that the arbitrators have made fundamental errors of New York law in the Partial Award and that the court should proceed on the assumption that it has at least a seriously arguable case in that respect.

16. C put its case on the basis of English law and maintained that, for the purposes of the court's consideration of the injunction sought, the law of New York was irrelevant. By contrast D focused on the law of New York, seeking to establish that the Award was a non-Convention Award under the terms of section 202 of the US Federal Arbitration Act (FAA), with the result that it was capable of challenge in New York. D relied on English principles of conflicts of law to the extent required, on its case, to import New York law.

New York Law

17. Whilst I have no sufficient basis on which to form a view on the subject, I am prepared to assume, without examining the issue at all, that D has a seriously arguable case, under the law of the State of New York, that the Tribunal acted in manifest disregard of New York law.

18. For the purposes of the argument I am also prepared to assume that D may be right in its

contentions as to the effect of New York law in relation to a challenge to the Partial Award. This was an issue which was hotly debated in extensive witness statements from eminent New York lawyers and raised what D's counsel conceded were difficult points of New York law which, he said, the court in the Southern District of New York would be much better equipped to decide. He summarised D's contention's as follows:-

i) A foreign award can be a non-Convention Award if it falls within the second sentence of section 202 of the Federal Arbitration Act (the FAA) which provides as follows:-

"an arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement described in [chapter 2 of the FAA] falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states".

Thus, notwithstanding the terms of Article 1(1) of the 1958 Convention which provides that "this convention shall apply to (1) the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought", D submitted that the US enabling act limited the enactment of that article with the result that a foreign award arising out of a legal relationship entirely between citizens of the United States and without any reasonable relation with a foreign state, was to be treated by the New York courts as a non-Convention award.

ii) A non-Convention award is governed by Chapter 1 of the FAA which permits a party to an arbitration to seek to confirm, modify or vacate an arbitration award pursuant to sections 9-11 in any US court where venue is proper under the general federal venue statute. Although not expressly stated in Chapter 1, a manifest disregard of New York Law is, by virtue of binding authority, a ground for review.

iii) The right of review under Chapter 1 of the FAA provides for a minimum standard of review from which the parties cannot derogate by contract.

iv) If an award is a Convention award for the purposes of New York law, the only right is to resist enforcement on the limited grounds set out in part V of the 1958 Convention.

v) The Partial Award is a non-Convention award, in the eyes of the United States court, because it arises out of a commercial legal relationship entirely between citizens of the United States without a reasonable relation with a foreign state.

19. All these points were fully contested and there is much to be said in favour of C's contrary arguments on the question whether the Partial Award is or is not, in the eyes of the New York court, a Convention award. It would appear that, if D is right in its first contention, the USA has not, at least to English eyes, properly fulfilled its treaty obligations under the New York Convention. The conflicting US authorities which were cited to me on this illustrate the nature of

the problem and questions arise as to whether there is a valid distinction to be made between enforcing an agreement to arbitrate and enforcing an award where the situs of the award is outside the United States. A clear issue arises also in relation to the existence of 303 foreign subsidiaries who are parties to the insurance contract which is the legal relationship out of which the Arbitration Agreement arises.

20. I need not decide any of these issues of New York law because, in my judgment, the critical matters which I have to decide all fall to be determined in accordance with the English law principles of conflicts of laws.

English Conflict of Laws Principles

21. Because this matter is being decided in an English court, I have, of necessity to apply the principles of the English rules on conflicts of laws. According to those principles it is clear that, as the parties recognise, the policy is, as it expressly says, to be governed by and construed in accordance with the internal laws of the State of New York (bar exceptions which are not material). The curial law of the arbitration (sometimes referred to as the procedural law) is that of England and in particular the Arbitration Act of 1996 to which the policy indirectly refers. Whilst the issue was not determinative, on C's case, there was disagreement as to the law of the Arbitration Agreement and the law of the Agreement to Refer the particular dispute to the arbitrators. D maintained that these were both governed by the same law of New York whilst C contended for English law.

22. C's primary case was that, regardless of any questions of the proper law of the agreement to arbitrate or the Agreement to Refer, D had, by agreeing London as the seat of the arbitration and the curial law as English law, expressly including the Arbitration Act 1996, committed itself to limit its challenges to the Partial Award by reference to that Act. It had also accepted the supervisory jurisdiction of the English court over arbitrations in London in accordance with the 1996 Act and consequently the English court was bound to uphold the integrity of the regime provided by that statute. In consequence, any attempt by D to challenge the award in another jurisdiction on the basis of "manifest disregard of New York law" was inconsistent with the scheme of the Act (quite apart from being inconsistent with the scheme of the Convention, which only allowed for challenges to enforcement in foreign courts in accordance with part V). D took issue with this approach, contending that what mattered was the proper law of the Arbitration Agreement which governed the validity or invalidity of that agreement and the performance of it, including any implied obligations there might be to pay an award or right to challenge it.

The Significance of the Seat of the Arbitration

23. It is undisputed that the curial law of the arbitration, which took place in London, is English law and that the arbitration had to be conducted in accordance with the provisions of the Arbitration Act of 1996, as the policy expressly provided. The wording of the arbitration provision emphasised that the determination by such an arbitration would be full and final ("finally and fully determined in London under the provisions of the English Arbitration Act of 1950 as amended"). The arbitration provision also expressly provided that the decision of the Board should be "final and binding on the parties thereto" and that "such decision shall be a complete defence to any attempted appeal or litigation of such decision in the absence of fraud or

collusion". The parties thus expressly agreed to limit any right of appeal, whilst at the same time agreeing to the application of the 1996 Act.

24. Section 2(1) of the 1996 Act provides that the provisions of Part 1 of the Act are to apply where the seat of the arbitration is in England. Thus the seat of the arbitration is made the reference point for the applicability of sections 1-84. Section 3 explains what is meant by "the seat of the arbitration" but no issue arises on that in the present case. Section 4(1) then provides that there are mandatory provisions of Part 1 of the arbitration which take effect notwithstanding any agreement to the contrary, whilst section 4(2) provides that other provisions (the non-mandatory provisions) allow the parties to make their own arrangements by agreement, whilst providing rules which apply in the absence of such agreement. The mandatory provisions of Part 1 of the Arbitration Act are listed in Schedule 1 and include section 66 (enforcement of the award), sections 67 and 68 (challenging the award on the grounds of substantive jurisdiction or serious irregularity) and sections 70 and 71 (which include supplementary provisions insofar as they relate to section 67 and 68). Section 73, which provides for the loss of the right to object to (inter alia) the improper conduct of the arbitration proceedings, a failure to comply with the Arbitration Agreement or with any provisions of Part 1 or any irregularity affecting the Tribunal or the proceedings, is also included as a mandatory provision. By agreeing to the 1996 Arbitration Act, the parties thus, prima facie, accept the framework of the mandatory provisions and, absent other agreement, to the application of the non-mandatory provisions. Section 4(4) provides that "it is immaterial whether or not the law applicable to the parties' agreement is the law of England and Wales". In the context, this must mean the law applicable to the parties' agreement to arbitrate.

25. Section 4(5) states that "the choice of a law other than the law of England and Wales..as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter". Thus, if the parties agree a curial law which is not the law of England and Wales, provisions of that law are effective to replace any non-mandatory provision in the 1996 Act, insofar as they make provision for such a matter.

26. In Dubai v Paymentech [2001] 1 LLR 65 at page 71, Aikens J stated that it was clear from section 2(1) of the 1996 Act that the concept of the "seat of an arbitration" was used in order to define which arbitrations would be subject to the statutory regime of Part 1 of the Act. He stated that the Act uses the concept of the "seat" as the test for the exercise of Part 1 powers, rather than the choice of procedural law made by the parties in their Arbitration Agreement. That, he said, seemed clear from the wording of section 4(4) and (5) of the Act. I respectfully agree but note that the seat of the arbitration and the choice of procedural law will almost invariably coincide, apart from the possibility, provided for in section 4(5) of the parties choosing another procedural law in relation to the matters covered by the non-mandatory provisions of Part 1, which will take effect. In the present case the seat is London and the agreed curial law is that of England. The mandatory provisions, including the right to challenge the award under section 67 and 68, are necessarily included by this agreement whilst section 69, which provides for appeals on points of law and which is a non-mandatory provision, is abrogated by the express agreement of the parties that the award is to be final and binding and to constitute a complete defence to any attempted

appeal in the absence of fraud or collusion.

27. As a matter of construction of the policy and the arbitration provision within it, with its express reference to English law and the 1996 Arbitration Act, I consider that the parties have incorporated the framework of that Act and agreed that it should apply to any arbitration between them with all its mandatory provisions and with its non-mandatory provisions, save to the extent that there is agreement to the contrary. The agreement to the seat and the curial law necessarily imports that, with the result that challenges to any award are governed by the relevant sections of the Act, as amended by the parties' agreement where the Act itself allows it.

28. Section 58(1) of the 1996 Act provides that "unless otherwise agreed by the parties, an award made by the Tribunal pursuant to an arbitration agreement is final and binding" whilst section 58(2) provides that "this does not affect the right of a person to challenge the award..in accordance with the provisions of this Part" of the Act. This provision thus fits in with the framework of the Act making the Partial Award final and binding, subject only to challenge in accordance with the terms of the Act under section 67 and 68 and the grounds of challenge specifically set out in the arbitration clause which would, in any event, constitute a "serious irregularity" within the meaning of section 68. The wording of section 58 reinforces the "final and binding" wording of the arbitration provision.

29. The significance of the "seat of arbitration" has been considered in a number of recent authorities. The effect of them is that the agreement as to the seat of an arbitration is akin to agreement to an exclusive jurisdiction clause. Not only is there agreement to the arbitration itself but also to the courts of the seat having supervisory jurisdiction over that arbitration. By agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration.

30. In Weissfisch v Julius [2006] 1 LLR 716 (CA) Swiss law was the law of the Arbitration Agreement and the seat of the arbitration was Geneva. Lord Phillips CJ at paragraphs 25 and 33 approved the decision of Steel J at first instance in stating that it was a well established principle of English law that the courts of the seat of arbitration should have supervisory jurisdiction. Absent exceptional circumstances, an English court would not act to restrain an arbitration with its seat in a foreign jurisdiction. To do so would infringe the principles of the law of international arbitration set out in the 1958 Convention and recognised in this country by the 1996 Act. In a "follow-up" decision Colman J in A v B [2007] 1 LLR 237 at paragraphs 111-112, examined the consequences of the parties' designation of Geneva as the seat of the arbitration. He held that this had two consequences:-

"1. Not only was the meaning of the terms of the arbitration agreement to be determined in accordance with Swiss law but so also was the effect of the alleged misrepresentation and duress or breach of the fiduciary duty on the enforceability of the arbitration agreement….

2. Whether it should be the arbitrator or the court that decided in the first instance whether the arbitration agreement should be avoided ab initio or rescinded and, if the arbitrator, what right of recourse to the Swiss courts might be available to either party who wished to challenge

the arbitrator's decision would be determined in accordance with Swiss law exclusively in the Swiss courts, Geneva being the place of the seat of the arbitration. For an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration. It is thus not merely, as was stated by Lord Phillips in the Court of Appeal judgment in this case, that the "natural consequence" of the arbitration agreement was that any issue as to the validity of the arbitration provisions would fall to be resolved in Switzerland according to Swiss law, but that it would be a breach of agreement to invite the courts of any other place to resolve such an issue or at least to order a remedy founded on such resolution. This analysis reflects international arbitration practice over the entire period since the coming into effect of the New York Convention. The provisions of Article V of that Convention rests on that basis…."

31. Colman J went on to refer to Kerr LJ's comment at page 119 of Naviera Amazonica Peruana SA v Cia Internacional [1988] 1 LLR 116 that every arbitration had to have a "seat" or "locus arbitri" or "forum", which subjected its procedural rules to "the municipal law" there in force. It followed, in the absence of an express and clear provision to the contrary, that an agreement that the curial law of an arbitration was the law of a particular country had the consequence that it was also the law of the seat of the arbitration and the lex fori. A further consequence was that the courts, which were competent to control or assist the arbitration, were the courts exercising jurisdiction at that place.

32. The judge then held that anything done by any party which was contrary to this second consequence of the agreement, whereby supervisory jurisdiction was vested exclusively in the Swiss courts, would in substance equally amount to a breach of the agreement to arbitrate. In such a case having agreed not only on the jurisdiction of the arbitral tribunal over their substantive disputes but also on the jurisdiction of the court of the seat, either party would be in breach of contract in litigating any matters within that court's jurisdiction, in the English courts. There had to be strong "cause" or "reason", in the interests of justice, for the English courts to retain jurisdiction in the face of a Agreement to Refer a dispute to a foreign tribunal and an application directly to restrain a foreign arbitral tribunal from proceeding with the reference, in circumstances where the courts of a foreign jurisdiction have been agreed to be exclusively vested with that function.

33. In A v B (No 2) [2007] 1 LLR 358 the same judge at paragraphs 15-19 returned to the same subject. He held that the invocation of the English courts' jurisdiction was a breach of the obligation to refer to the Swiss courts any issue which arose between the parties, going to the supervisory jurisdiction relating to the arbitration. It was just as much a breach, as an attempt to invoke the jurisdiction of the English courts for the purpose of determining the substantive disputes between the parties. He said this:-

"The agreement as to the exclusive jurisdiction of the Swiss courts to resolve issues falling within their supervisory jurisdiction, even if the arbitration agreement subsequently were held by these courts to be voidable or invalid, would still be an effective means of vesting exclusive jurisdiction in them, for the Kompetenz - Kompetenz principle would apply as fully to that

jurisdiction as to the jurisdiction of the arbitrator. Were it otherwise, the whole structure of the supervisory jurisdiction of the seat of an international arbitration would be completely undermined. Accordingly, just as a breach of an arbitration or jurisdiction agreement can properly be reflected in an award of damages, so breach of the jurisdiction agreement vesting supervisory jurisdiction in the courts of the seat of the arbitration can be remediable in damages and upon an application in which one party ignores that agreement and is unsuccessful in so doing, by an order for costs against that party on an indemnity basis."

34. I was referred to the decision of the House of Lords in the Front Comor [2007] 1 LLR 391, where the House of Lords referred the matter to the European Court of Justice for a ruling as to whether it was consistent with EC law for a court of a member state to grant an anti-suit injunction in respect of proceedings in another member state on the ground that such proceedings were in breach of an arbitration agreement. Both Lord Hoffmann and Lord Mance made comments about the preservation of contractual rights to have a dispute determined by arbitration and both, at paragraphs 22 and 31 respectively, referred to the basis of granting injunctions as the choice of the seat of the arbitration and the supervisory jurisdiction thus given, by the parties' agreement, to the courts of that location.

35. C contended, on the basis of these authorities that D would be acting in breach of contract in pursuing a challenge to the Partial Award in the Southern District Court of New York or any court other than the court of the seat of arbitration, namely the English court. It would also breach C's statutory rights under section 58 since there was no agreement to negate that section. Furthermore, to act in the way that D proposed would amount to an abuse of the process of this court which had exclusive jurisdiction, by the parties' agreement, to supervise the arbitration in London and to determine any challenges to the Partial Award.

36. D urged caution on the court in looking at decisions such as A v B where the law of the arbitration agreement and curial law was the same. There was, however, little which could be said in relation to the reasoning in all these decisions which was based upon the importance of the parties' agreement to the location of the seat of the arbitration. The essence of D's argument was that the provisions of the curial law could not override the parties' express choice of New York law as the law governing the substantive obligations under the policy, which incorporated the FAA, with its rights of challenge on the basis of manifest disregard of New York law. Mr Jonathan Hirst QC, who appeared for D, contended that, if the policy had included an express term which provided that either party might challenge the decision in a USA court on the basis of the FAA, the English court would be bound to respect the parties' agreement to that affect. He contended that the parties' agreement to "the internal laws of New York", as the governing law of the policy, necessarily meant that the parties had agreed to the application of the FAA and to such a challenge in the courts of the USA. He further contended that, for the purposes of section 58 of the 1996 Act, the parties had thus "otherwise agreed", so that the award was not final and binding, in the sense that a challenge under the FAA was permissible.

37. I am unable to accept either of these arguments. It is clear that there is no express agreement to allow a challenge to an award in any other country than the seat of the arbitration. Equally there is no express agreement that any award should not be final and binding. To the contrary, the

parties went out of their way, in the terminology used in the arbitration provision, to make it plain that the award is to be final and binding, subject only to challenge under the mandatory provisions of the English Arbitration Act or on the basis of fraud or collusion, a matter covered by section 68 in any event.

38. In this connection, section 4(5) of the 1996 Act provides that the choice of a law other than the law of England "as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter". This can however only mean the choice of a curial law, not the choice of the governing law for the substantive obligations in the parent contract in which the arbitration agreement is to be found. The mandatory provisions of the 1996 Act take effect, regardless of the proper law of the arbitration agreement chosen by the parties (sub-section 4) and, a fortiori, regardless of the proper law of the substantive parent contract. The choice of the "internal laws of the state of New York" as the governing law of that contract, cannot, of itself, amount to the importation of a different framework for challenging an award in place of the non-mandatory provisions (section 69) of the English Arbitration Act. Nor, for similar reasons can that choice amount to an agreement that the award should not be final and binding for the purposes of section 58 of the English Arbitration Act.

39. In XL Insurance v Owens Corning [2000] 2 LLR 500 at page 508 Toulson J (as he then was) was faced with a similar argument in relation to a choice of law clause for the substantive contract which was said to fall within section 4(5) of the 1996 Act and exclude sections 5 and 30 which were not mandatory provisions of the Act. He found that proposition surprising, holding that it would have been most unusual to seek to effect such an alteration in that way. If intended, he would have expected there to be an express term to achieve the desired effect. Equally, in Lesotho Highlands Development Authority v Impregilo SpA [2006] 1 AC 221 (HL) Lord Steyn at paragraphs 36 and 37 held that the agreement to the governing law of the substantive contract could not amount to "an agreement in writing within the meaning of section 49 of the Arbitration Act in relation to the Tribunal's powers to award interest". The agreement to the proper law was in writing, so the point being made was that the incorporation of that law as the proper law of the contract could not amount to an excluding agreement in itself. I am fortified by both of these decisions in my conclusion that the effect of agreeing "the internal laws of New York" as the governing law of the policy is not to contract out of the non-mandatory provisions of the 1996 Arbitration Act nor to constitute an agreement that the Partial Award shall not be final and binding, within the terms of, and subject to, section 58 of that Act.

40. D also relied upon International Tank and Pipe SAK v Kuwait Aviation Fuelling [1975] 1 QB 224 (CA) and the speeches of Lord Denning MR and Browne LJ at pages 232-3 and 234. There the court granted an extension of time under section 27 of the 1950 Arbitration Act where the seat of the arbitration had not yet been settled, since the agreement to arbitrate required arbitration under the ICC Rules, which provided that the arbitration would be governed by the law of procedure chosen by the parties or, failing such choice, the law of the country in which the arbitrator held the proceedings. That point had not yet arisen. The proper law of the substantive contract was English law and, upon the basis that the interpretation of the arbitration clause was governed by that proper law, the court held that it was for English law to say whether or not

section 27 of the Arbitration Act of 1950 could be invoked. This decision did not, in my judgment, take D any distance. Although there was every possibility that the parties might ultimately settle upon Kuwait as the place where the arbitration would be held so that Kuwait law became by later agreement the curial law, at the stage at which the English court was dealing with it, the only established proper law was that of the substantive contract, the agreement to arbitrate and the agreement to refer, all of which were subject of English law. Whilst the court did not subject the matter to any analysis because there had, in the authorities, been little or no discussion as to the four categories of contract which arise in connection with an arbitration, when looked at today the conclusion would be that the curial law, at the stage the court was considering it, was the same as the proper law of the other three contracts. There is therefore no necessary inconsistency between this decision and the later decisions based upon the seat of the arbitration, to which I have already referred.

41. I therefore conclude that D is threatening to break the agreement to the exclusive supervision of the arbitration by the English court and to impeach C's rights under section 58 in respect of a final and binding award.

The Proper Law of the Arbitration Agreement

42. If I am right in relation to the applicability of the law of the seat of the arbitration, it does not matter whether English law is or is not the governing law of the agreement to arbitrate. It is the curial law which governs the question of the validity of the award and challenges to it. Nonetheless the issue was fully debated and I have come to a clear conclusion about it. I was referred to a number of decisions where the different contracts connected with an arbitration were discussed by reference to the applicable law relating to each. As a matter of theory it is of course possible for a different governing law to apply to each contract, whether by express choice, implied choice or by operation of English conflicts of laws. The same governing law does not have to apply to the substantive parent contract in which the agreement to arbitrate is found, the agreement to arbitrate itself, the Agreement to Refer and the contract for the conduct of the arbitration (the curial law).

43. The authorities show that in many cases the law will be the same for each of these contracts but that this is not always the case and that it is by no means uncommon for the proper law of the substantive contract to be different from the curial law. There is general agreement that it would be rare for the law of the Arbitration Agreement and the law of the Agreement to Refer to differ. However the authorities reveal different emphases as to the likelihood of the coincidence of the governing law for the Arbitration Agreement/Agreement to Refer with the law of the substantive parent agreement on the one hand or the curial law on the other. These points emerge in the decision of Mustill J in Black Clawson v Papierwerke [1981] 2 LLR 446 at 453, the speech of Kerr LJ in Naviera Amazonica Peruana SA v Compania Internacional [1988] 1 LLR 116 at 119-120, the decision of Potter J in Sumitomo v Oil & Natural Gas [1994] 1 LLR 45 at page 57, the speech of Lord Mustill in Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334 at page 357-358 and the decision of Toulson J in XL Insurance v Owens [2000] 2 LLR 500 at page 507. Apart from the decision of Potter J, the broad thrust appears to suggest that, where the law of the substantive contract differs from the curial law, there is an increased likelihood that the law of the Arbitration Agreement and the law of the contract of reference will

tally with that of the curial law.

44. D relied on those dicta and passages in a number of text books in saying that it was usual or more likely that the proper law of the agreement to arbitrate would be the same as the proper law of the substantive parent contract and contends that Toulson J was wrong if or when he suggested otherwise.

45. Regardless of such generalities, it is crucial to examine the terms of the relevant contracts in question, to ascertain what is the governing law for each, as derived from the wording of the documents in which they are to be found. In my judgment, it is particularly important here to focus on the wording of the arbitration provision in the policy.

i) This expressly provides for any dispute to be "finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950 as amended" and thereby specifically brings in the terms of the English Arbitration Act.

ii) There is also express reference to applications to a Judge of the High Court in this country to make good defaults in the appointment of arbitrators.

iii) There is the express provision that the decision of the Board is to be "final and binding on the parties..and..a complete defence to any attempted appeal or litigation of such decision in the absence of fraud or collusion".

46. In English law terms, the right of appeal on a point of law is excluded under section 69 of the Arbitration Act in the absence of fraud or collusion which would fall within the mandatory provision of section 68. This is entirely permissible under section 69(1) of that Act. On D's case, those words restricting the right of challenge are ineffective as a matter of the law of New York and if that be the case, this is a clear pointer to the applicability of English law to the issue and to the agreement to arbitrate. In this standard form contract, known as the Bermuda Form, the intention clearly is to restrict the parties' right to appeal and it is, to my mind, absurd to think that the parties would provide for a limitation on the right of appeal which was known to be wholly ineffective, by reason of the terms of New York law. This points to the application of English law to the Arbitration Agreement, particularly when coupled with express references to the English Arbitration Act, with its mandatory and non-mandatory provisions, as discussed at length earlier in this judgment.

47. As I have already mentioned, that Act has express provisions which deal with challenges to Awards, whether for excess of jurisdiction (section 67), serious irregularity (section 68) or appeals on points of law (section 69). By section 58 of the 1996 Act, an Award made by the Tribunal pursuant to an Arbitration Agreement is final and binding but this is expressly not to affect the right of a person to challenge the Award "in accordance with the provisions of this part (part 1) of the 1996 Act". The agreement to the application of the provisions of the 1996 Act thus made the Award final and binding, subject only to challenge in accordance with the terms of that Act, a point which is reinforced by the particular language of the arbitration provision and its use of words such as "finally and fully determined" and "final and binding".

48. In this context I was referred to the decision of Toulson J in XL v Owens Corning (ibid) on an earlier version of the Bermuda Form. It was accepted that there was no material difference between the agreement to arbitrate in that form and that found in the form with which I am concerned. In the XL case, there was express reference to the English Arbitration Act, to section 68, section 45 and section 69 of it. Toulson J referred to the Channel Tunnel decision and the Black Clawson decision and concluded that a reason for the law governing the Arbitration Agreement to tally with the lex fori (the law of the seat of the arbitration) was not hard to find. He said:-

"Arbitration law is all about a particular method of resolving disputes. Its substances and processes are closely intertwined. The Arbitration Act contains various provisions which could not readily be separated into boxes labelled substantive arbitration law or procedural law, because that would be an artificial division.

….

The choice of law clause has to be considered in conjunction with the arbitration clause by which the parties chose that any dispute relating to the policy should be determined not only in London, but expressly under the provisions of the Arbitration Act 1996, with the modification that they waived any right to apply to the Court under s.45 for the determination of a question of law arising in the course of proceedings and any right of appeal under s.69 on a point of law…

…when..the arbitration clause provided that an award should be a complete defence to any attempted appeal or litigation of the decision in the absence of serious irregularity under s.68, it cannot have meant that such irregularity should be judged otherwise than by English law….

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

49. Whilst the wording with which Toulson J was concerned differs from that which I have to consider, he considered the impact of the reference to the Arbitration Act 1996 (albeit with particular reference to specific sections) to be highly significant. I respectfully agree and take the view that the logical conclusion is that English law, including the Act, is the law of the agreement to arbitrate and which therefore governs performance of the obligations which arise thereunder. This is reinforced by the terms of clause 8 of the Agreement to Refer, which spells out the law governing the arbitration itself as the English Arbitration Act 1996, as amended and supplemented.

50. I am unable to see how, without express wording to the contrary, the provisions of the Act are agreed to apply to the arbitration, without also importing the provisions which relate to enforcement (section 66 - a mandatory provision), sections 67 and 68 (also mandatory

provisions) and those parts of section 70 and 71 which apply to section 67 and 68, and section 73. As Toulson J pointed out, it is not easy to separate questions of validity of the award, enforcement of the award and challenges to the award into neat divisions of points of law which are substantive or procedural in the context of these issues. Whilst in the earlier part of this judgment, I have held that questions of challenge to the award and enforcement of the award are matters for the curial law, they plainly impact also upon the law of the agreement to arbitrate and the law of the Agreement to Refer, because those are matters which are inextricably caught up with the whole business of arbitrating and the effect of it. When the parties agreed to arbitrate in a particular place under particular laws, they plainly had in mind the effect of so doing and chose the law and seat of the arbitration with a view to achieving particular results in that respect. I cannot see that the law of the agreement to arbitrate and the law of the agreement to refer can here differ from the curial law.

The Consequences

51. If, as I have found, the governing law of the agreement to arbitrate and the agreement to refer is English law then it is common ground that, as stated by Lord Hobhouse in AEGIS Ltd v European Re-insurance Co of Zurich [2003] 1 WLR 1041 (PC) at paragraph 9 at page 1046, "it is an implied term of an arbitration agreement that the parties agree to perform the award".

52. The earlier authority upon which he relied, Bremer Oeltransport v Drewry [1933] 1 KB 753 at 760 and 764, also places the implied term to perform the award in the agreement to arbitrate or the agreement to refer. The effect of Colman J's decisions in A v B is that there is a contractual promise made by each of the parties, in the agreement to the curial law, to treat the courts of the seat of the arbitration as having exclusive supervisory jurisdiction.

53. Whilst a challenge to the award in accordance with the terms of the arbitration agreement (here the Arbitration Act 1996) or in accordance with the law of the agreed supervisory jurisdiction (here English law) does not constitute a breach of contract, the attempt to invoke the jurisdiction of another court is such a breach, of the contract to arbitrate, the agreement to refer and the agreement to the curial law. Such a challenge usurps the function of the English court which has power to grant injunctions to protect its own jurisdiction and the integrity of the arbitration process. In such a case there is an infringement of the legal rights of C (both contractual and statutory rights) under English law and an abuse of the process of this court in the usurpation of its exclusive jurisdiction to supervise arbitrations with their seat in this country.

54. When Colman J in A v B (No 2) at page 363 stated that "the whole structure of the supervisory jurisdiction of the seat of an international arbitration would be completely undermined", unless there was exclusive jurisdiction in the court of the seat of an international arbitration, it was suggested that he was overstating the case. The difficulties which would arise, however, if there was not such exclusive jurisdiction or if the exclusive jurisdiction agreement was ignored, are manifest. No challenge has been made to the Partial Award in this country and it is to be regarded as binding therefore in this jurisdiction. If proceedings were brought in New York and the challenge was successful there, what would a third party country's courts do when faced with an application to enforce the award? Moreover, although D's counsel would not accept the point, it appears to me that the logic of D's argument is that D could take proceedings

anywhere in the world to challenge the award on the basis that the substantive law of New York governed the contract and had the effect for which it contended, namely that a "manifest disregard of the principles of New York law" vitiated the award (unless there is a narrow jurisdictional argument under the FAA).

55. In the context of anti-suit injunctions to enforce compliance with an exclusive jurisdiction clause or an arbitration agreement, "the English court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced" (The Angelic Grace [1995] 1 LLR 87 at page 96). In a succession of cases commencing with the Eleftheria [1969] 1 LLR 237 and flowing through the El Amria [1981] 2 LLR 119 to Donohue v Armco [2002] 1 LLR 524, the courts have stated that the parties should be kept to their bargain unless "strong cause", "good reason" or "strong reason" is shown for not doing so. Damages are plainly an inadequate remedy if a party is compelled to litigate with all the trouble and inconvenience involved in that exercise, when there is agreement that this should not be the case. Time and again the English courts have granted an injunction to restrain a clear breach of an exclusive jurisdiction agreement or a breach of an arbitration agreement where the rights of the parties are clear. In my judgment the position is even stronger where an award has already been issued and the breach of the agreement to London arbitration consists of an unlawful attempt to invalidate the award.

56. It matters not at all whether the US courts would or would not ultimately assume jurisdiction and uphold or vacate the Award or whether the US court in question, under its own conflicts of laws rules, is bound to exercise a supervisory jurisdiction - see Akai v Peoples Insurance Co [1988] 1 LLR 90 at pages 98-100 and OT Africa v Magic Sportswear [2005] 2 LLR 170 at pages 177-179. As Longmore LJ pointed out in the latter decision, no questions of comity arise because the mandatory exercise of jurisdiction by a foreign court, in such circumstances, only arises by reason of the breach of contract on the part of the party invoking that jurisdiction. An injunction preventing suit in that court is thus not a breach of international comity in preventing a court from exercising what it regards as a mandatory jurisdiction but merely restrains a party to a contract from doing something which it has promised not to do.

57. In Noble v Gerling [2007] 1 CLC 85, Toulson LJ was again concerned with the Bermuda Form wording. In that case the reinsured was a US corporation whilst the reinsurer was a German international reinsurance company with a UK branch which had its principal place of business in London. There, following a London arbitration award, the reinsurers commenced proceedings in Vermont which constituted a collateral attack upon the award. At paragraph 46 the Lord Justice drew attention to supervisory jurisdiction of the English court under the Arbitration Act and at paragraphs 84-98 set out the jurisdiction of this court to grant an anti-suit injunction, referring to "unconscionable conduct" which included conduct which was "oppressive or vexatious or which interferes with the due process of the [English] court". A clear need to protect English Proceedings or to protect the applicant's legitimate interests in English proceedings could give rise to the need for an injunction in such circumstances. He held that the injunction sought was to protect the reinsured's interest in the English proceedings and that this was a corollary of the fact that the whole object of the Vermont proceedings was to undo the findings of the arbitrators as to the reinsurer's obligation to indemnify the reinsured. He held that "a collateral attack on a binding

judgment or award of a properly constituted tribunal is capable of being oppressive conduct, at least as much as if the same proceedings had been commenced before the judgment or award had been given". He found that, in that case, the behaviour of Gerling, as a London reinsurer, in attempting to nullify the result of an arbitration by bringing a suit in another jurisdiction was vexatious, oppressive and an abuse of process and/or unconscionable.

58. It matters not at all that the parties here are both US corporations. The important element is that there was agreement to London as the seat of the arbitration and to the supervisory jurisdiction of this court, as well as to the application of the Arbitration Act of 1996 to the Arbitration Agreement. To take a step which would negate the whole framework in which the arbitration took place is, in my judgment, equally conduct which is properly described as "vexatious and oppressive". It is a direct attack on the Partial Award and not just a collateral attack. It is unconscionable and an abuse of process.

59. The matters put forward by Mr Jonathan Hirst QC on behalf of D cannot, in such circumstances, amount to strong cause or strong reason not to grant an injunction, whether put on the basis of New York law or as a matter of discretion. The alleged points of non disclosure, in obtaining the interim injunction, which I reject, even if good, would not make any difference to my conclusion.

60. If D was entitled as a matter of contract to take the steps that it says it is entitled to take, then no question of oppressive or vexatious conduct would arise. As was recognised however, once a finding is made as to breach of contract, should proceedings be brought in the USA to challenge the award, it almost inevitably follows that such conduct would amount to conduct of the type characterised in Noble v Gerling.

Conclusion

61. For the above reasons, it follows that C is entitled to the relief sought in the form of injunctions preventing a challenge to the award in any jurisdiction other than this court. D's future intention has been made plain and, absent an injunction or continuing undertakings to this court to the same effect, D will launch proceedings in the Southern District of New York. There can therefore be no release from the undertakings given unless they are to be replaced by an injunction and there can be no stay of these proceedings or any proceedings to enforce the Partial Award pending a decision of any foreign court on the validity of that Partial Award. None of this of course impacts upon any challenge D may be able to mount to enforcement in a foreign jurisdiction under Part V of the 1958 Convention on the grounds therein set out.

62. The parties should be able to agree either to the form of undertakings or the injunction prior to the formal handing down of this judgment but if there is any dispute about it, the matter can be argued at that point. It also seems to me that costs must inevitably follow the event, unless there are any peculiar circumstances of which I am unaware. It may be that this element too can form part of an agreed order but if not, I will make any necessary determination.

Neutral Citation Number: [2007] EWCA Civ 1282
Case No: A3/2007/1697

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE COOKE
2007 FOLIO 540

Royal Courts of Justice
Strand, London, WC2A 2LL
05/12/2007

B e f o r e :

MASTER OF THE ROLLS
THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
and
THE RIGHT HONOURABLE LORD JUSTICE JACOB

Between:
C
Respondent/Claimant
- and -

D
Appellant/
Defendant

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company

190 Fleet Street, London EC4A 2AG
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Official Shorthand Writers to the Court)

Mr Jonathan Hirst QC & Mr Robert Howe (instructed by Robin Simon LLP) for the Appellant
Mr Bernard Eder QC & Mr Stephen Houseman (instructed by Allen & Overy LLP) for the Respondent
Hearing dates : 29th & 30th October 2007

HTML VERSION OF JUDGMENT

Lord Justice Longmore :

Introduction

1. This appeal is, as far as I am aware, the first time that this court has had the opportunity to consider the Bermuda Form which has emerged in the last 15 years or so, partly as a response to the problem of diminution in liability insurance capacity in the United States in the later part of the 20th century. The striking feature of the form is that it requires the parties to arbitrate in London but provides for the proper law of the insurance contract to be the internal laws of New York. No doubt this represents a balancing of the conflicting interests of the insured on the one hand and liability insurers on the other. The authors of the standard work on the topic put the matter rather starkly when they say:-

> "The liability insurance crisis of the mid-1980's was viewed by many insurance people at the time as largely attributable to decisions by American judges and juries which expanded tort liabilities and broadened insurance coverage, both beyond what insurers believed was contemplated when they wrote and sold the policies. To address this problem, the decision-making process on disputes with policyholders was moved from the United States court system to London arbitration." See Liability Insurance, The Bermuda Form by Jacobs, Masters and Stanley (2004) para 1.25.

It may be true that the impetus for London arbitration may have arisen from a certain disenchantment with the expansionist scope of American jury and judicial decision-making but it might equally be true that the selection of New York law as the proper law of the contract may show a certain disenchantment with the substantive law of insurance in England, a matter which the Law Commission is currently addressing, see Joint Consultation Paper LCCP No. 182.

The Contract

2. The defendant (and appellant) was the liability insurer of the claimant New Jersey Company for 3 years between 1st November 1997 and 1st November 2000. The occurrence limit and the

aggregate limit was US$100 million excess of $190 million. The policy was a claims made policy written on the Bermuda Form. The claimant was the named insured but the definition of the insured included any subsidiary, affiliate or associated company of the claimant as listed in the Schedule to the Policy. That list included 303 companies incorporated outside the United States of America so the policy offered world-wide cover. Various sections of the document deal with various matters under the head of "Insuring Agreements". Section I deals with coverage but it is Section V with which this appeal is chiefly concerned. That is headed "Conditions" and there is then an alphabetical list of conditions to which the policy is subject e.g. (a) "Premium" (d) "Notice of Occurrence and Claim" (m) "Cancellation" and (n) "Currency". Conditions (o) "Arbitration" and (q) "Governing Law and Arbitration" then provide as follows:-

"(o) Arbitration

Any dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950 as amended …

If the party … notified of a desire for arbitration shall fail or refuse to nominate the second arbitrator … the party who first served notice of a desire to arbitrate will … apply to a judge of the High Court of England for the appointment of a second arbitrator … In the event of the failure of the first two arbitrators to agree on a third arbitrator … any of the parties may … apply to a judge of the High Court of England for the appointment of a third arbitrator ….

The Board shall, within ninety (90) calendar days following the conclusion of the hearing, render its decision on the matter or matters in controversy in writing … In case the Board fails to reach a unanimous decision, the decision of the majority of the members of the Board shall be deemed to be the decision of the Board and the same shall be final and binding on the parties thereto, and such decision shall be a complete defence to any attempted appeal or litigation of such decision in the absence of fraud or collusion."

(Condition (y) is then a Service of Suit clause pursuant to which the insurer agrees (1) that, if it does not pay any amount claimed to be due under the policy, it will submit to any court of competent jurisdiction in the United States and (2) that process may be served in New Jersey.)

"(q) Governing Law and Interpretation

This policy shall be governed by and construed in accordance with the internal laws of the State of New York, except insofar as such laws may prohibit payment in respect of punitive damages hereunder and except insofar as such laws pertain to regulation by the Insurance Department of the State of New York of insurers doing insurance business or issuance or delivery of policies of insurance within the State of New York; provided, however that the provisions, stipulations, exclusions and conditions of the policy are to be construed in an even-handed fashion as between the Insured and the Company; without limitation, where the language of this policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions [without regard to authorship of the language, without any presumption or arbitrary

interpretation or construction in favour of either the Insured or the Company and without reference to parol evidence]."

The Reference to Arbitration

3. During the policy period various claims were asserted against the claimant and a subsidiary with significant operations in Europe. The claimant paid damages and expenses in respect of these claims, considerably in excess of the policy limits, and made demand for payment under the policy which the defendant refused. On 2nd May 2005, the claimant initiated arbitration against the defendant in London. The Tribunal's terms of appointment dated 31st August 2005 and signed by the parties and by the Tribunal included the following:-

"2. Appointment of Tribunal

(a) The parties confirm their acceptance that the Tribunal composed of … has been validly established in accordance with Article V of their Insuring Agreements …

8… Applicable Law

(a) Pursuant to Article V(q) of the Agreement, the law governing the insurance policy is the law of the State of New York, USA.

(b) Pursuant to Article V(o) of the Agreement, the juridical seat of the arbitration is London, UK. Accordingly the law governing the arbitration itself [lex arbitri] is the English Arbitration Act 1996, as amended and supplemented, regardless of whether meetings and hearings take place elsewhere in the interest of saving costs or convenience."

4. The defendant raised four defences to the claimant's claim for indemnification. The first related to the scope of Endorsement number 5 to the policy; the second related to late notice; the third related to misrepresentations and/or non-disclosure prior to the inception of the insurance; and the fourth was a defence labelled as the "paediatric defence". That defence consisted of the defendant's allegation that the claimant had breached a purported duty of good faith and fair dealing under New York law and/or had violated public policy in relation to the alleged promotion by the claimant the use of its product by children.

5. By Procedural Order No. 3 dated 20th February 2006, the Tribunal ordered that issues relating to the first three defences should be heard first and the "paediatric defence" should be deferred until later. The rationale for this was explained in the order since, if the claimant obtained an award which amounted to the full $100 million policy limit in relation to adult use, the paediatric use issue would no longer require determination. It was only if all the first three defences failed and the recoverable sum, without taking into account the paediatric use, was less than $100 million that the Tribunal would need to make any further determination. It has not yet been possible to determine whether the policy limit will be fully utilised in respect of adult use but it seems to be increasingly likely.

6. A hearing took place between 4th and 12th October 2006 to deal with the first three

defences. Sixteen witnesses attended the hearing for cross-examination and there were extensive post hearing submissions. The Tribunal issued its Partial Award on 13th March 2007, ruling that the claimant succeeded in full on its claim under the policy and that it was entitled to recover, dismissing each of the defendant's first three defences and related claims for relief. The claimant was also awarded interest and costs. The Partial Award also provided that the paediatric defence would only be considered if the claimant could not establish that it had exhausted the policy limits, without including losses attributable to paediatric use. The parties were invited to seek to agree the quantum of the claims which the Tribunal had held were covered by the policy. It is agreed that this Partial Award is, in English law terms, final as to what it decides.

7. In correspondence following the Partial Award, the defendant applied to the Tribunal to "correct" it, stating (inter alia) that the Tribunal's findings constituted a "manifest disregard of New York law", that the Partial Award fell outside the scope of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958 (the 1958 New York Convention) and as such was reviewable for error by any US Federal District Court having jurisdiction over the parties under the general federal venue statute. The defendant sought the Tribunal's withdrawal of its findings as to the claimant's duty to disclose, as to its expectation and intent and as to materiality, pending the outcome of the next phase of the hearing during which the Tribunal would hear evidence of the claimant's promotion of paediatric use.

8. In further correspondence, the defendant intimated its intention to apply to a Federal Court applying US Federal Arbitration law governing the enforcement of arbitral awards, which was said to permit "vacatur" of an award where arbitrators have manifestly disregarded the law. It was in consequence of such intimation that the claimant sought and obtained an interim anti-suit injunction. The Tribunal made two "clerical" amendments but refused otherwise to amend the Partial Award, saying it had no power to do so.

The Parties' Respective Cases before the Judge

9. The claimant's case was that the defendant's proposed challenge to the Partial Award in the United States (now particularised as a likely application to the courts of the Southern District of New York) was impermissible by reason of the agreement of the parties to London as the seat of arbitration and to the application of the English Arbitration Act of 1996 ("the 1996 Act"), by reason of the terms of the Arbitration Agreement and Agreement to Refer, and by reason of the court's power of supervision over arbitrations held in this jurisdiction. The only permissible challenges to the Partial Award itself were those which can be made under the 1996 Act and the only permissible challenges to enforcement in other countries, which are parties to the 1958 Convention (as is the US), were those which arise under Article V of the Convention.

10. The defendant's case was that, as New York law is the governing law of the insurance policy and that law entitles the defendant to a minimum standard of review of arbitration awards, when such arbitration takes place between US corporations in relationships without an important international element, the defendant cannot be deprived of exercising its right to such a review. Federal law, which is part of the internal law of New York, operated to require such a minimum standard of review, regardless of the terms agreed between the parties which might appear to restrict any ground of challenge. Although English law was the "curial law" of the arbitration,

that did not exclude a challenge which reflected the parties' express choice of New York law to govern their obligations under the policy. The defendant contended that the arbitrators had made fundamental errors of New York law in the Partial Award and that the court should proceed on the assumption that it had at least a seriously arguable case in that respect.

11. The claimant put its case on the basis of English law and maintained that, for the purposes of the court's consideration of the final injunction now being sought, the law of New York was irrelevant. By contrast the defendant focused on the law of New York, seeking to establish that the Partial Award was a non-Convention Award under the terms of section 202 of the US Federal Arbitration Act (FAA), with the result that it was capable of challenge in New York. The defendant relied on English principles of conflicts of law to import New York law as the proper law of the arbitration agreement as well as the proper law of the underlying contract.

The Judgment

12. The judge was prepared to assume for the purpose of the argument before him, first that the defendant had a sufficiently arguable case that the Arbitration Tribunal has acted in manifest disregard of New York law and, secondly that it was arguable that the Partial Award was not a Convention Award for the purpose of the New York Convention, so that a wider challenge could be made to the Partial Award than permitted under Article V of that Convention. The claimant without accepting them is content for present purposes that those assumptions should be made and I will proceed on the same basis.

13. The judge then proceeded to hold that the choice of England as the seat of the arbitration was determinative of the matter in as much as the parties had, by that agreement, expressly (or perhaps impliedly) agreed that any proceedings seeking to attack or set aside the Partial Award would only be those permitted by English law. That effectively meant that the Partial Award could only be attacked by reference to sections 67 and 68 of the 1996 Act (lack of jurisdiction and serious irregularity), the right of appeal under section 69 on points of law having been excluded by agreement. It was not therefore permissible for the defendant to bring any proceedings in New York or elsewhere to attack the Partial Award in any respect permitted by the law of that place e.g. for any supposed "manifest disregard" of the proper law of the contract. The judge also rejected arguments to the effect that the choice of the law of New York as the proper law of the contract amounted to an agreement that the law of England should not apply to proceedings post-award pursuant to section 4(5) of the 1996 Act and a further argument that the separate agreement to arbitrate contained in the Condition V(o) of the policy was itself governed by New York law so that proceedings could be instituted in New York. He then granted the claimant a final injunction.

The Arguments in this Court

14. The main submission of Mr Hirst QC for the defendant insurer was that the judge had been wrong to hold that the arbitration agreement itself was governed by English law merely because the seat of the arbitration was London. He argued that the arbitration agreement itself was silent as to its proper law but that its proper law should follow the proper law of the contract as a whole, namely New York law, rather than follow from the law of the seat of the arbitration namely England. The fact that the arbitration itself was governed by English procedural law did

not mean that it followed that the arbitration agreement itself had to be governed by English law. The proper law of the arbitration agreement was that law with which the agreement had the most close and real connection; if the insurance policy was governed by New York law, the law with which the arbitration agreement had its closest and most real connection was the law of New York. It would then follow that, if New York law permitted a challenge for manifest disregard of the law, the court in England should not enjoin such a challenge.

15. Mr Eder QC contested all these points but submitted that they were all irrelevant because the judge was correct to decide that, once it was clear that England was the seat of the arbitration and that English law was, therefore, the "curial law" of the arbitration, it must follow that the parties intended only attacks which were permissible by English law and not attacks permitted by other laws, including those permitted either by the proper law of the underlying insurance contract or by the proper law of the arbitration agreement, if different.

Primary Conclusion

16. I shall deal with Mr Hirst's arguments in due course but, in my judgment, they fail to grapple with the central point at issue which is whether or not, by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law. In my view they must be taken to have so agreed for the reasons given by the judge. The whole purpose of the balance achieved by the Bermuda Form (English arbitration but applying New York law to issues arising under the policy) is that judicial remedies in respect of the award should be those permitted by English law and only those so permitted. Mr Hirst could not say (and did not say) that English judicial remedies for lack of jurisdiction on procedural irregularities under sections 67 and 68 of the 1996 Act were not permitted; he was reduced to saying that New York judicial remedies were also permitted. That, however, would be a recipe for litigation and (what is worse) confusion which cannot have been intended by the parties. No doubt New York law has its own judicial remedies for want of jurisdiction and serious irregularity but it could scarcely be supposed that a party aggrieved by one part of an award could proceed in one jurisdiction and a party aggrieved by another part of an award could proceed in another jurisdiction. Similarly, in the case of a single complaint about an award, it could not be supposed that the aggrieved party could complain in one jurisdiction and the satisfied party be entitled to ask the other jurisdiction to declare its satisfaction with the award. There would be a serious risk of parties rushing to get the first judgment or of conflicting decisions which the parties cannot have contemplated.

17. It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award. As the judge said in paragraph 27 of his judgment, as a matter of construction of the insurance contract with its reference to the English statutory law of arbitration, the parties incorporated the framework of the 1996 Act. He added that their agreement on the seat and the "curial law" necessarily meant that any challenges to any award had to be only those permitted by that Act. In so holding he was following the decisions of Colman J in A v B [2007] 1 Lloyds Rep 237 and A v B (No. 2) [2007] 1 Lloyds Rep 358 in the first of which that learned judge said (para. 111):-

> "… an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction

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

That is, in my view, a correct statement of the law.

18. Mr Hirst's argument was that section 58 of the 1996 Act which provided for the finality of an arbitral award was not a mandatory provision of the Act and that there was a permissible "agreement to the contrary" contained in the arbitration clause itself which was governed by the law of the state of New York which permitted challenge for manifest disregard of the law.

19. The fact, however, that the 1996 Act allows parties to contract out of its non-mandatory provisions does not mean that the proper law of a contract to refer disputes to arbitration can constitute an "agreement to the contrary" and thus import a method of challenge to the award not permitted by the seat of the arbitration. For example section 49 of the 1996 Act gives an arbitration tribunal power to award interest. That provision is one of the non-mandatory provisions of the Act. It was argued in Lesotho Highlands Development Authority v Impregilo SpA [2006] 1 AC 221 that, if the proper law of the underlying contract did not permit an award of interest, the choice of that proper law amounted to an agreement to the contrary so as to preclude the Tribunal from awarding interest. Lord Steyn (with whom the majority of the House agreed) pointed out (para. 37) that by reason of section 5 of the Act only an agreement in writing as defined by the 1996 Act could qualify as an "agreement to the contrary" and that a choice of proper law clause was not such an agreement. That is reinforced by the terms of section 4(5) of the Act which refers not to a choice of law clause generally but to a choice of law as "the applicable law in respect of a matter provided for by a non-mandatory provision of this part" of the Act. In other words there has to be a choice of law with regard to the specific provision of the Act which the parties agree is not to apply.

20. Even if therefore the first plank of Mr Hirst's argument (that the arbitration clause itself was governed by the law of New York) were to be correct, it would not qualify as an "agreement to the contrary" in the 1996 Act. Still less would it entitle the defendant to mount a challenge to the award in a country other than the seat of the arbitration.

Secondary Considerations

21. It is therefore unnecessary to engage with Mr Hirst's first argument that the arbitration agreement is governed by New York law. But since the point was fully argued, I will express my view upon it.

22. It is necessary to distinguish between the proper law of the underlying insurance contract which is, by agreement, the internal law of New York and the arbitration agreement which is, by virtue of section 7 of the 1996 Act, as well as by virtue of common law, a separable and separate agreement, see Harbour Assurance Co. (UK) Ltd v Kansa General International Insurance Co Ltd [1993] QB 701 before the Act and Premium Nafta Products Ltd v Fili Shipping Co Ltd [2007] UKHL 40 after the Act. There is also the law of the seat of the arbitration, namely English law, which will be relevant. The question then arises whether, if there is no express law of the arbitration agreement, the law with which that agreement has its closest and most real connection

is the law of the underlying contract or the law of the seat of arbitration. It seems to me that if (contrary to what I have said above) this is a relevant question, the answer is more likely to be the law of the seat of arbitration than the law of the underlying contract.

23. In the days before the separability of the arbitration agreement was fully apparent it was often said that if a contract chose a place of arbitration, the law of that place was the proper law of the contract on the principle of 'Qui elegit judicem elegit jus' see Tzortzis v Monark Line [1968] 1 WLR 406. (No doubt it would conversely have been said that, if a contract had an express choice of law clause, the law of the arbitration agreement would have been the same as the proper law of the contract). This convenient but stark proposition was departed from by the House of Lords in Compagnie Tunisienne De Navigation S.A. v Compagnie D'Armement Maritime S.A [1971] AC 572 in which it was pointed out that the inquiry must always be to discover the law with which the contract has the closest and most real connection. It was there decided that the mere fact that arbitration was to be in London did not mean that what was in reality a French contract of affreightment had to be governed by English rather than French law. It did not matter at all that English arbitrators would have to apply French law. In these circumstances it cannot be automatic that if the relevant inquiry is the converse inquiry (namely to discover the proper law of an arbitration agreement) the answer to that inquiry is to be the proper law of the agreement. The inquiry is, as I have said, to discover the law with which the agreement to arbitrate has the closest and most real connection.

24. The matter is not entirely free from authority. In Black-Clawson v Papierwerke [1981] 2 Lloyds Rep 446, 483 Mustill J set out the three potentially relevant laws, namely (i) the law governing the substantive agreement; (ii) the law governing the agreement to arbitrate and the performance of that agreement; and (iii) the law of the place where the reference is conducted (the lex fori). He then said:-

"In the great majority of cases, these three laws will be the same. But this will not always be so. It is by no means uncommon for the proper law of the substantive contract to be different from the lex fori; [The Compagnie Tunisienne De Navigation S.A. case was then one such an example]; and it does happen, although much more rarely, that the law governing the arbitration agreement is also different from the lex fori."

Mustill J gave Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 583 as an example of this second situation. That was a case where the proper law of the building contract and the arbitration agreement was English but the reference was conducted in Scotland. Mustill J was, however, saying that it would be a rare case in which the law of the arbitration agreement was not the same as the law of the place (or seat) of the arbitration.

25. Mr Hirst submitted that, by the time Lord Mustill came to give judgment in Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334, he had changed his mind on this question. In the course of deciding whether section 12(6)(h) of the Arbitration Act 1950 (relating to the power to grant interim injunctions) applied to arbitrations with their seat outside England, Lord Mustill said (357A – 358A):-

"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."

Mr Hirst submitted that Lord Mustill was there saying that it was less rare or less exceptional that the law governing the arbitration agreement should be different from the lex fori (as he called it in Black v Clawson) or the "curial law" as he is calling it in Channel Tunnel Group (a phrase that goes back in an arbitration context at least to the submissions of Mr James McKay QC (as he then was) in Miller v Whitworth Estates [1970] AC at page 587 B-E, and probably a good deal earlier, as being equivalent to the lex fori).

26. It does not seem to me that Lord Mustill is in fact saying any such thing. He is merely saying that although it is exceptional for the proper law of the underlying contract to be different from the proper law of the arbitration agreement, it is less exceptional (or more common) for the proper law of that underlying contract to be different from the lex fori or curial law namely the seat of the arbitration. He is not expressing any view on the frequency or otherwise of the law of the arbitration agreement differing from the law of the seat of the arbitration. One is therefore just left with his dictum in Black-Clawson (with which I would respectfully agree) that it would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration. The reason is that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place.

27. Mr Hirst might say that Miller v Whitworth is a good example of a case where the agreement to arbitrate took its colour from the proper law of the underlying contract rather than from the fact that the arbitration took place in Scotland. But (1) although the arbitration did in fact take place in Scotland it was not a requirement of the contract that it should – it was never decided that the arbitration was contractually required to take place in Scotland; and (2) the case, if it is support for Mr Hirst's submissions on this part of the case, becomes a strong authority against him on the primary part of the case. That is because the House of Lords determined that it was the law of the seat of the arbitration that decided whether it was possible to require the arbitrator to state a special case. Since the seat of the arbitration was Scotland, there was no such power. The fact the arbitration agreement was itself governed by English law did not at all mean that an English law remedy was available, if it was not available at the seat of the arbitration. The

decision was that the losing party in an arbitration whose seat was in Scotland could not go to the English courts and ask for an English remedy. Likewise the insurers who have lost an arbitration in England cannot go to another state (e.g. New York) and invoke the local remedies in that state.

28. As the judge observed in paragraph 45 of his judgment, these are only general considerations; much more forceful in the present case are the positive indications in the arbitration agreement itself which point to English law governing the agreement. Moreover as the judge points out in paragraph 47, the provision that the arbitral decision shall be final and binding and

> "…a complete defence to any attempted appeal or litigation of such decision in the absence of fraud or collusion"

would be rendered otiose if either party could say in New York that there had been a manifest disregard of New York law. That itself must be a strong pointer to the arbitration agreement being governed by English rather than New York law. Mr Hirst's response was to say that the clause anyway attempted to exclude forms of serious irregularity other than fraud of collusion and that even in English law the provision was therefore partially invalid. But that (if true) is a much less serious invalidity than an invalidity which would permit the parties to raise any question of law arising on the award when it was the manifest intention of the parties to exclude that possibility.

29. For all these reasons Mr Hirst's first argument that the proper law of the arbitration agreement was New York law rather than English law cannot get off the ground and the only remaining questions relate to remedy and costs.

Remedy

30. The judge granted an anti-suit injunction preventing the defendant insurers from initiating proceedings on the Partial Award in New York and also preventing them from relying on law of the New York in any application to enforce the Partial Award. Mr Hirst reminded us of the caution that the English court always exercises in relation to such injunctions by reason of the possibility that they may be thought to interfere with decisions or potential decisions of a foreign court. Having every regard to that caution, it nevertheless seems to me that the judge was right not only to grant a final injunction but to frame it in the way in which he did. It is only by doing so that the parties' legitimate expectations in relation to the Bermuda Form can be respected and enforced. I have already said that the form constitutes a balancing of the opposing interests of the insured and their insurers. If either party was permitted to challenge an award in a manner intended to be excluded by the form, that balance would be fatally compromised. This is just as much in the interest of insurers as well as of the insured. This particular case is one in which it is the insured who seeks injunctive relief but tomorrow it may be the insurer in whose interest it is to uphold the intentions of the parties as expressed in the Bermuda Form. The form of relief is, in any event, a matter for the judge's discretion with which this court will not lightly interfere. Since the insurers have indicated that they will seek relief unless they are restrained, the judge's exercise of his discretion is, in my judgment, unassailable.

Costs

31. There has been much recent debate at first instance whether, in a case where a party has acted in breach of a jurisdiction clause, an arbitration clause or an anti-suit clause, it is proper to make an order for costs on an indemnity basis rather than the standard basis. In Kyrgyz Mobil v Fellowes International [2005] EWHC 1314 (Comm.) Cooke J awarded indemnity costs against a defendant who had started proceedings in the courts of Kyrgyzstan in breach of an arbitration agreement saying that that was the general approach of the Commercial Court. In A v B (No. 2) [2007] 1 Lloyds Rep 358 Colman J said he had not come across any such practice but decided that, where a claimant had wrongly invoked the jurisdiction of the English court to make claims which were covered by an arbitration agreement or were subject to the jurisdiction of the Swiss courts (the seat of the arbitration being Switzerland), the successful defendant was entitled to be paid costs on an indemnity basis. In National Westminster Bank v Rabobank Nederland RV [2007] EWHC 1742 (Comm.) Colman J decided that damages for breach of a jurisdiction clause and anti-suit clause should include the costs of the wrongful proceedings assessed by reference to the indemnity basis rather than the standard basis. In the present case Cooke J followed what was, at any rate, his practice and the question is now whether it is right that the insured should have received the costs of his successfully proceeding for an anti-suit injunction on an indemnity basis.

32. This appeal is not, in my judgment, a suitable vehicle for coming to any definitive decision on the proper approach for awarding costs in such cases. That is partly because we only received short oral argument on the question (the detailed and intricate judgment of Colman J only coming to our attention after the oral argument had concluded) but mainly because, in all the cases to which our attention has been drawn, there had been conduct which was found to be in breach of a relevant exclusive jurisdiction or arbitration clause.

33. This case is, however, different. Although costs are normally a matter for the judge's discretion, questions of principle do arise. In the first place neither the judge (nor I) have held that there is an exclusive jurisdiction clause in fact; I have merely agreed with Colman J in A v B (No. 1) and Cooke J in the present case that agreement on the seat of the arbitration is "analogous to an exclusive jurisdiction clause". Secondly, there has been no instigation of proceedings which can be categorised as an actual breach of the agreement that the seat of the arbitration should be London, England. Insurers have very properly not (as far as I am aware) actually started proceedings in New York, but have merely intimated that they will start such proceedings, if they are not restrained from doing so. Thirdly, the issues which have been raised on the Bermuda Form are novel issues on which up to now conflicting views could legitimately be held. For these reasons in this particular case I do not think an order for indemnity costs was appropriate. The wider issue will have to await further argument on another day.

Privacy

34. We held the oral hearing in private at the joint request of the parties. It is not the practice of this court to sit in private on arbitration (or indeed any other) appeals unless there is a special reason to do so. That is the case even though parties to arbitrations can legitimately expect that arbitrations are themselves confidential to the parties. Having heard the appeal, I am satisfied that there was no good reason to have sat in private at any rate if anonymisation of the parties was continued for the hearing. I would therefore now rescind the order which the court originally

made for a private hearing but continue the order for anonymity for the moment.

35. As regards anonymisation, we received some short submissions from Mr Eder on instructions setting out why anonymity was desirable. I was not convinced by those submissions that anonymity should continue to be preserved, particularly because there was no evidential basis for the submissions which he, on instructions, was able to make. I would therefore propose that, unless the claimant wishes to make further submissions based on some form of actual evidence within the next 14 days, the order for anonymity should also cease to have effect after that 14 day period.

36. I would further wish to emphasise that any future application for privacy or anonymity (for arbitration appeals) should be supported by written evidence at the time such application is made in the form of a statement from someone at managerial level explaining the need for privacy or anonymity.

Conclusion

37. As it is, I would dismiss this appeal, save as to costs.

Lord Justice Jacob:

38. I agree.

Master of The Rolls:

39. I also agree.