THE LAW REPORTS 1992

Queen's Bench Division

and on Appeal therefrom in the

Court of Appeal

and Decisions in the

Court of Appeal Criminal Division

and

Employment Appeal Tribunal

London

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES

[COURT OF APPEAL]

CHANNEL TUNNEL GROUP LTD. AND ANOTHER v. BALFOUR BEATTY CONSTRUCTION LTD. AND OTHERS

1991 Dec. 18, 19, 20;
1992 Jan. 22

Neill, Woolf and Staughton L.JJ.

Arbitration—Stay of judicial proceedings—Arbitration agreement—Construction contract containing clause for arbitration in Belgium—Arbitrable dispute—Proceedings for injunction in relation to dispute before any reference to arbitration procedure—Whether proceedings to be stayed—Whether jurisdiction to grant injunction—Arbitration Act 1950 (14 Geo. 6, c. 27), s. 12(6)(h)[1]*—Arbitration Act 1975 (c. 3), s. 1*[2]*—Supreme Court Act 1981 (c. 54), s. 37*[3]

The plaintiffs employed the defendants, a consortium of English and French companies, to build a tunnel under the English Channel between England and France and, by a later variation, to construct a cooling system. The contract provided for the initial reference of disputes or differences, including disputes as to the valuation of variations, to a panel of experts and contained an arbitration clause providing for final settlement by arbitration in Brussels. A dispute arose as to the amounts payable in respect of the work on the cooling system, and by letter the defendants threatened to suspend that work, alleging that the plaintiffs were in breach of contract. The plaintiffs issued a writ seeking an injunction to restrain the defendants from suspending the work. On the plaintiffs' application for an interim injunction, Evans J. held that he would be inclined to grant an injunction against the defendants, but made no order on the defendants' undertaking to give notice of any suspension of works by them. He also dismissed a summons by the defendants to stay the plaintiffs' action in favour of arbitration under section 1 of the Arbitration Act 1975.

On appeal by the defendants:—

Held, allowing the appeal and granting a stay of the action, (1) that a party to an arbitration clause was not entitled to disregard the arbitration procedure and bring an action at law merely because a preliminary step had not been taken; that, although there had not been a decision by or even a reference to the panel, there was a dispute between the parties "with regard to the matter agreed to be referred" which could be referred to arbitration, since it could not be shown, readily and beyond doubt, that the defendants had no right to suspend

[1] Arbitration Act 1950, s. 12(6)(*h*): see post, p. 670A–B.

[2] Arbitration Act 1975, s. 1: "(1) If any party to an arbitration agreement . . . commences any legal proceedings in any court against any other party to the agreement . . . in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

[3] Supreme Court Act 1981, s. 37: "(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

work on the cooling system; and that, accordingly, the defendants were entitled to a stay of the plaintiffs' action under section 1 of the Arbitration Act 1975 (post, pp. 669A–C, E–G, 679B–C).

(2) That the court's power under section 12(6)(*h*) of the Arbitration Act 1950 to grant an interim injunction, even where the proceedings were otherwise stayed, could be exercised before there had been any request for arbitration or before arbitrators had been appointed, provided that the applicant intended in due course to take the dispute to arbitration; but that where the proceedings did not concern a domestic arbitration agreement the court did not have jurisdiction to exercise all the powers in the Arbitration Act 1950, even if the parties had agreed to English curial law; that the connecting factor for the application of section 12(6)(*h*) of the Act of 1950 to a case containing a foreign element was the place which the parties had chosen as the seat of arbitration for the dispute between them, and if that seat was not within England or Wales the court did not have the jurisdiction; and that, accordingly, since the parties had agreed that the seat of any arbitration of a dispute between them was to be Brussels, the court had no jurisdiction to grant the injunction sought under section 12(6)(*h*) (post, pp. 670A–B, 675D, H–676B, 679B–C).

Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1981] 2 Lloyd's Rep. 446; *Bank Mellat v. Helliniki Techniki S.A.* [1984] Q.B. 291, 301, C.A. and *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep. 116, C.A. considered.

(3) That, as a matter of judicial restraint, the general power to grant an injunction under section 37 of the Supreme Court Act 1981 should not be exercised where the parties to an arbitrable dispute had agreed to arbitrate abroad, whether or not there was jurisdiction (post, pp. 676D–F, 677G–H, 679B–C).

Decision of Evans J. reversed.

The following cases are referred to in the judgment of Staughton L.J.:

Bank Mellat v. Helliniki Techniki S.A. [1984] Q.B. 291; [1983] 3 W.L.R. 783; [1983] 3 All E.R. 428, C.A.

Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1981] 2 Lloyd's Rep. 446

Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. [1981] A.C. 909; [1981] 2 W.L.R. 141; [1981] 1 All E.R. 289, H.L.(E.)

British Airways Board v. Laker Airways Ltd. [1985] A.C. 58; [1984] 3 W.L.R. 413; [1984] 3 All E.R. 39, H.L.(E.)

Dimskal Shipping Co. S.A. v. International Transport Workers Federation [1992] 2 A.C. 152; [1991] 3 W.L.R. 875; [1991] 4 All E.R. 871, H.L.(E.)

Enco Civil Engineering Ltd. v. Zeus International Developments Ltd. (unreported), 22 October 1991, Judge Esyr Lewis Q.C.

Films Rover International Ltd. v. Cannon Film Sales Ltd. [1987] 1 W.L.R. 670; [1986] 3 All E.R. 772

Hayter v. Nelson [1990] 2 Lloyd's Rep. 265

Hiscox v. Outhwaite [1992] 1 A.C. 562; [1991] 3 W.L.R. 297; [1991] 3 All E.R. 641, H.L.(E.)

Irish Shipping Ltd. v. Commercial Union Assurance Co. Plc. [1991] 2 Q.B. 206; [1990] 2 W.L.R. 117; [1989] 3 All E.R. 853, C.A.

Leisure Data v. Bell [1988] F.S.R. 367, C.A.

Locabail International Finance Ltd. v. Agroexport [1986] 1 W.L.R. 657; [1986] 1 All E.R. 901, C.A.

Morris v. Redland Bricks Ltd. [1970] A.C. 652; [1969] 2 W.L.R. 1437; [1969] 2 All E.R. 576, H.L.(E.)

Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru [1988] 1 Lloyd's Rep. 116, C.A.

Nissan (U.K.) Ltd. v. Nissan Motor Co. Ltd. (unreported), 31 July 1991; Court of Appeal (Civil Division) Transcript No. 848 of 1991, C.A.

Rich (Marc) & Co. A.G. v. Società Italiana Impianti P.A. [1989] 1 Lloyd's Rep. 548, C.A.; (Case C 190/89) Arbitration International, vol. 7, No. 3 (1991), p. 197, E.C.J.

Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210; [1977] 3 W.L.R. 818; [1977] 3 All E.R. 803, H.L.(E.)

South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V. [1987] A.C. 24; [1986] 3 W.L.R. 398; [1986] 3 All E.R. 487, H.L.(E.)

Tuyuti, The [1984] Q.B. 838; [1984] 3 W.L.R. 231; [1984] 2 All E.R. 545, C.A.

Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd. [1970] A.C. 583; [1970] 2 W.L.R. 728; [1970] 1 All E.R. 796, H.L.(E.)

The following additional cases were cited in argument:

Canterbury Pipe Lines Ltd. v. Christchurch Drainage Board (1979) 16 B.L.R. 76

Golden Trader, The [1975] Q.B. 348; [1974] 3 W.L.R. 16; [1974] 2 All E.R. 686

Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd. [1990] 1 W.L.R. 153; [1989] 3 All E.R. 74, C.A.

Mayer Newman and Co. Ltd. v. Al Ferro Commodities Corporation S.A. [1990] 2 Lloyd's Rep. 290, C.A.

Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd. [1974] A.C. 689; [1973] 3 W.L.R. 421; [1973] 3 All E.R. 195, H.L.(E.)

Rena K., The [1979] Q.B. 377; [1978] 3 W.L.R. 431; [1979] 1 All E.R. 397

S.L. Sethia Liners Ltd. v. State Trading Corporation of India Ltd. [1985] 1 W.L.R. 1398; [1986] 2 All E.R. 395, C.A.

Shepherd Homes Ltd. v. Sandham [1971] Ch. 340; [1970] 3 W.L.R. 348; [1970] 3 All E.R. 402

Smith (Paul) Ltd. v. H. & S. International Holding Inc. [1991] 2 Lloyd's Rep. 127

Wolverhampton Corporation v. Emmons [1901] 1 K.B. 515, C.A.

The following additional cases, though not cited, were referred to in the skeleton arguments:

American Cyanimid Co. v. Ethicon Ltd. [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.)

Associated Portland Cement Manufacturers Ltd. v. Teigland Shipping A/S [1975] 1 Lloyd's Rep. 581, C.A.

Astro Exito Navegacion S.A. v. Southland Enterprise Co. Ltd. (No. 2) [1982] Q.B. 1248; [1982] 3 W.L.R. 296; [1982] 3 All E.R. 335, C.A.

Babanaft International Co. S.A. v. Bassatne [1990] Ch. 13; [1989] 2 W.L.R. 232; [1989] 1 All E.R. 433, C.A.

Derby & Co. Ltd. v. Weldon (Nos. 3 and 4) [1990] Ch. 65; [1989] 2 W.L.R. 412; [1989] 1 All E.R. 1002, C.A.

Haiti (Republic of) v. Duvalier [1990] 1 Q.B. 202; [1989] 2 W.L.R. 261; [1989] 1 All E.R. 456, C.A.
Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A. [1978] Q.B. 708; [1977] 3 W.L.R. 479, E.C.J.
Medway Packaging Ltd. v. Meurer Maschinen G.m.b.H. & Co. K.G. [1990] 2 Lloyd's Rep. 112
Monmouth County Council v. Costelloe & Kemple Ltd. (1965) 63 L.G.R. 429, C.A.
Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei G.m.b.H. [1977] 1 W.L.R. 713; [1977] 2 All E.R. 463, H.L.(E.)
Overseas Union Insurance Ltd. v. AA Mutual International Insurance Co. Ltd. [1988] 2 Lloyd's Rep. 63
Posner v. Scott-Lewis [1987] Ch. 25; [1986] 3 W.L.R. 531; [1986] 3 All E.R. 513

INTERLOCUTORY APPEAL from Evans J.

By a construction contract dated 13 August 1986 the plaintiffs, Channel Tunnel Group Ltd. and France Manche S.A., employed the defendants, Balfour Beatty Construction Ltd., Costain Civil Engineering Ltd., Tarmac Construction Ltd., Taylor Woodrow Construction Holdings Ltd., Wimpey Major Projects Ltd., Gie Transmanche Construction, Bouygues S.A., Lyonnaise Des Eaux-Dumez, Société Auxiliaire d'Enterprises S.A., Société Générale d'Enterprises S.A. and Spie Batignolles S.A., to build the Channel Tunnel and its ancillary works. Clause 67 of that contract provided that disputes or differences between the parties should be referred to a panel of experts. A dispute arose about the correct price to be paid to the defendants for the provision of a cooling system in the tunnel, which had not been part of the original contract but which had been added by a variation order dated 29 April 1988, and on 3 October 1991 the defendants threatened to suspend all work relating to the cooling system unless certain conditions were met. By a writ dated 14 October 1991 the plaintiffs sought an injunction to restrain the defendants in breach of their obligations from suspending work relating to the cooling system. By a summons dated 16 October 1991 the defendants sought to have the plaintiffs' action stayed pursuant to section 1 of the Arbitration Act 1975 pending arbitration by the panel. On 4 December 1991 Evans J. ordered that the defendants' application for a stay of the proceedings be dismissed but, on the defendants undertaking that they would not suspend work on the cooling system without giving the plaintiffs 14 days' notice of their intention to do so, decided to make no order in respect of the plaintiffs' application for an interlocutory injunction.

By a notice of appeal dated 9 December 1991 the defendants appealed against that order on the grounds, inter alia, that the judge had erred (1) in forming judgments and conclusions or preliminary conclusions on the plaintiffs' application without regard to the mandatory provisions of section 1 of the Arbitration Act 1975; (2) in holding that clause 67(1) and (4) of the contract were to be regarded separately and that, accordingly, clause 67 was not an arbitration agreement for the purposes of section 1 of the Act of 1975; (3) in holding that an application under section 1 of the Act of 1975 could only be made for

the purpose of having the dispute referred to arbitration; (4) in holding that the defendants could not obtain a mandatory stay under section 1 of the Act of 1975 because a panel decision would take more than 14 days to obtain and/or could not do so by reference to a possible future dispute which might be referred to arbitration under clause 67(4) of the contract; (5) in holding that the defendants could not say that they were ready and willing to arbitrate in accordance with the arbitration agreement; (6) in holding that he had jurisdiction to order a mandatory interlocutory injunction even on the assumption that a mandatory stay under section 1 of the Act of 1975 was required; (7) in concluding that section 12(6)(*h*) of the Arbitration Act 1950 empowered the court with jurisdiction to grant an interim injunction notwithstanding that the contract provided for arbitration in Brussels; (8) in concluding that section 12(6)(*h*) empowered the court with jurisdiction to grant mandatory injunctions by way of specific performance; (9) in holding that section 24(1) of the Civil Jurisdiction and Judgments Act 1982 gave the court power to order the interim relief sought by the plaintiffs against the French defendants; and (10) in holding that were it not for the defendants' offer of an undertaking to give no less than 14 days' notice of any cessation of work to the cooling system, he would have had no hesitation in making the order that the plaintiffs sought.

The facts are set out in the judgment of Staughton L.J.

Bernard Rix Q.C. and *Andrew White* for the defendants. There is no jurisdiction in personam over the French defendants and, in any event, all the defendants are entitled to a mandatory stay of the proceedings under section 1 of the Arbitration Act 1975. Clause 67 of the contract contains no "domestic arbitration agreement." The absence of any current reference, and the fact that the arbitration clause requires a reference to experts as a condition precedent to a reference from experts to arbitrators, does not prevent legal proceedings from being "in respect of any matter agreed to be referred:" see *Enco Civil Engineering Ltd. v. Zeus International Developments Ltd.* (unreported), 22 October 1991; article II, paras. 1 and 3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1976) (Cmnd. 6419). The exception within section 1(1) of the Act of 1975 that "there is not in fact any dispute" lies on the plaintiffs to prove and the applicable test is a stringent one: see *Hayter v. Nelson* [1990] 2 Lloyd's Rep. 265; *Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd.* [1990] 1 W.L.R. 153 and *Paul Smith Ltd. v. H. & S. International Holding Inc.* [1991] 2 Lloyd's Rep. 127. The case is neither clear nor simple, nor is it readily and immediately demonstrable that the defendants have no good grounds for disputing the claim: see *Canterbury Pipe Lines Ltd. v. Christchurch Drainage Board* (1979) 16 B.L.R. 76 and *Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd.* [1974] A.C. 689. It follows that the defendants' application for a stay should and must be granted.

If the action is stayed under section 1 of the Act of 1975 the court cannot make any other order in the proceedings: see *Nissan (U.K.) Ltd. v. Nissan Motor Co. Ltd.* (unreported), 31 July 1991; Court of Appeal

(Civil Division) Transcript No. 848 of 1991. Thus, a stay under section 1 would exclude any jurisdiction to grant an interlocutory injunction for the purpose of the arbitration since, for the English court to be entitled to grant an interlocutory injunction, there must be an invasion of some legal or equitable right belonging to the plaintiffs in England and enforceable in England by a final judgment for an injunction: see *Siskino (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210, 256C–257D; *Irish Shipping Ltd. v. Commercial Union Assurance Co. Plc.* [1991] 2 Q.B. 206; *Bremer Vulkan Schiffbau and Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] A.C. 909; *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58 and *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.* [1987] A.C. 24.

Section 12(6)(*h*) of the Act of 1950 is irrelevant to the present proceedings. If no stay is ordered the plaintiffs' action can continue or not on its own merits: see *The Golden Trader* [1975] Q.B. 348; *The Rena K.* [1979] Q.B. 377 and *The Tuyuti* [1984] Q.B. 838. If a stay is ordered, whether under section 1 of the Act of 1975 or in the court's inherent discretion, section 12(6) is excluded because it does not apply to extra-territorial arbitration, unless (perhaps) that arbitration is expressly governed by English curial law (and because section 12(6) is only concerned with arbitration where a reference has actually taken place or the plaintiff has undertaken immediately to put the machinery of arbitration into operation): see *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.* [1970] A.C. 583; *Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1981] 2 Lloyd's Rep. 446 and *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep. 116.

An English court is empowered by the Act of 1975 to review an arbitration award made in a state other than the United Kingdom where the English court was the court of the country in which or under the law of which the award was made (the curial law): see *Bank Mellat v. Helliniki Techniki S.A.* [1984] Q.B. 291 and *Hiscox v. Outhwaite* [1992] 1 A.C. 562.

The Brussels Convention brought into force in the United Kingdom by section 2(1) of the Civil Jurisdiction and Judgments Act 1982 has no application to the present proceedings. Article 1(4) of the Convention excludes arbitration from its scope: see *Marc Rich & Co. A.G. v. Società Italiana Impianti P.A.* [1989] 1 Lloyd's Rep. 548 and in the European Court of Justice (Case C 190/89) Arbitration International, vol. 7, No. 3 (1991), p. 197. It follows that the service of proceedings on the French defendants under R.S.C., Ord. 11, r. 1(2) was invalid.

A final mandatory injunction is granted only in exceptional cases and never in building cases: see *Wolverhampton Corporation v. Emmons* [1901] 1 K.B. 515 and *Morris v. Redland Bricks Ltd.* [1970] A.C. 652. A court should be even more cautious when considering the grant of an interlocutory mandatory injunction because at that stage the evidence is incomplete and may be contested: see *Shepherd Homes Ltd. v. Sandham* [1971] Ch. 340; *Locabail International Finance Ltd. v. Agroexport* [1986] 1 W.L.R. 657 and *Leisure Data v. Bell* [1988] F.S.R. 367 and cf. *Films*

Rover International Ltd. v. Cannon Film Sales Ltd. [1987] 1 W.L.R. 670.

John Dyson Q.C., *Mark Howard* and *Vivian Ramsey* for the plaintiffs. Any dispute between the parties should be dealt with under the agreed procedure, namely clause 67: see *Mayer Newman and Co. Ltd. v. Al Ferro Commodities Corporation S.A.* [1990] 2 Lloyd's Rep. 290. The purpose of the injunction sought by the plaintiffs was to prevent the defendants from bypassing that procedure. The defendants' application for the stay was misconceived, since the plaintiffs' intention was to preserve, not to avoid, the clause 67 procedure.

The action, however, cannot be stayed under section 1 of the Arbitration Act 1975. There is no dispute about a "matter agreed to be referred." [Reference was made to *Hayter v. Nelson* [1990] 2 Lloyd's Rep. 265 and *Paul Smith Ltd. v. H. & S. International Holding Inc.* [1991] 2 Lloyd's Rep. 127.] The dispute as to the plaintiffs' right to an injunction pending a determination by the panel is not one which the panel or the arbitrators are empowered to determine: see *S. L. Sethia Liners Ltd. v. State Trading Corporation of India Ltd.* [1985] 1 W.L.R. 1398 and *Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd.* [1990] 1 W.L.R. 153, but cf. *Enco Civil Engineering Ltd. v. Zeus International Developments Ltd.* (unreported), 22 October 1991, which was wrongly decided.

Even if the action is stayed the court has jurisdiction to grant the injunction sought: see section 37 of the Supreme Court Act 1981 and section 12(6)(*h*) of the Arbitration Act 1950. That is not affected by what the Court of Appeal said in *Nissan (U.K.) Ltd. v. Nissan Motor Co. Ltd.*, Court of Appeal (Civil Division) Transcript No. 848 of 1991. The court also has the power to grant the injunction under its inherent jurisdiction: see *Shepherd Homes Ltd. v. Sandham* [1971] Ch. 340; *Locabail International Finance Ltd. v. Agroexport* [1986] 1 W.L.R. 657; *Films Rover International Ltd. v. Cannon Film Sales Ltd.* [1987] 1 W.L.R. 670; *Leisure Data v. Bell* [1988] F.S.R. 367 and *Dimskal Shipping Co. S.A. v. International Transport Workers Federation* [1992] 2 A.C. 152. In any event the court has jurisdiction under section 24(1)(*a*) of the Civil Jurisdiction and Judgments Act 1982 to grant an injunction pending resolution of any question as to jurisdiction: see *Marc Rich & Co. A.G. v. Società Italiana Impianti P.A.* (Case C 190/89), Arbitration International, vol. 7, No. 3 (1991), p. 197.

The French defendants were properly served under R.S.C., Ord. 11, r. 1(2) on the basis that such service is permitted under articles 6(1), 5(1) or 5(3) of the Brussels Convention.

Rix Q.C. replied.

Cur. adv. vult.

22 January 1992. The following judgments were handed down.

STAUGHTON L.J. The plaintiff companies are the employers under a contract to build a tunnel under the Channel between England and France; together they have been referred to as "Eurotunnel." The

A defendants are English and French concerns which together form a consortium known as "Trans Manche Link" or "T.M.L.," and are the contractors.

On 3 October 1991 the contractors wrote to Eurotunnel stating that unless certain conditions were met by 7 October, the contractors would be obliged to suspend all work relating to the cooling system of the tunnel. In consequence, on 14 October 1991, Eurotunnel issued a writ against the contractors claiming:

B

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

C

An order of Evans J. made on 4 December 1991 in the Commercial Court provided:

> "On the defendants by their counsel undertaking that they will not suspend work in respect of the cooling system without giving the plaintiffs 14 days' notice, there be no order, with liberty to apply."

D

The contractors now appeal against that order, by leave of the judge. At first sight this seems odd, since no order was made against them. What they really complain about is that Evans J. was prepared to grant a mandatory injunction requiring them to continue work on the cooling system, and only refrained from doing so because an undertaking was offered. I do not consider that this presents any technical obstacle to the hearing of the appeal.

E

Evans J. had also to consider a summons by the contractors that the action be stayed in favour of arbitration under section 1 of the Arbitration Act 1975, which provides for a mandatory stay where there is an agreement for arbitration in a state other than the United Kingdom. That application was dismissed by Evans J., and the contractors also appeal against that part of his order.

F

On 12 December 1991 the Court of Appeal (Lord Donaldson of Lymington M.R. and Staughton L.J.) had to consider whether the hearing of the appeal should be adjourned for some time until Eurotunnel's counsel should prove to be available, or until other counsel could be found and afforded a substantial period in which to familiarise themselves with the facts and the relevant law. The court ruled that either the appeal would start on 18 December 1991, or else the contractors would be permitted to withdraw their undertaking. Counsel then appearing for Eurotunnel chose the first alternative.

G

H

The contract

This is a massive document, as one would expect. But for present purposes it is sufficient to refer in detail to two clauses only. Clause 67

is headed "Settlement of Disputes." Paragraph (1) provides that any dispute or difference, with certain exceptions:

> "shall . . . in the first place be referred in writing to and be settled by a panel of three persons (acting as independent experts but not as arbitrators) who shall unless otherwise agreed by both the employer and the contractor within a period of 90 days after being requested in writing by either party to do so . . . state their decision in writing . . ."

It has not been suggested that this paragraph provides in law for an arbitration, despite the term that the panel members shall act as experts and not as arbitrators. So we need express no opinion on that point. By paragraph (2) it is provided:

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

Paragraph (4) of clause 67 provides that, subject to certain provisions as to notice:

> "all disputes or differences . . . shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed under such rules. . . . The seat of such arbitration shall be Brussels."

The Rules of the International Chamber of Commerce, which I have taken from the 1987 version, printed in *Mustill & Boyd, Commercial Arbitration*, 2nd ed. (1989), p. 743, provide:

> "8(5) Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator . . . 11. The rules governing the proceedings before the arbitrator shall be those resulting from these rules and, where these rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration. . . . 13(3) The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate."

In this case the proper law of the contract is determined by clause 68:

> "The construction, validity and performance of the contract shall in all respects be governed by and interpreted in accordance with the

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

B

Since both Eurotunnel and the contractors were partly French and partly English, I wonder why they did not choose either English law or French law exclusively—and for that matter why they chose Brussels as the seat of any arbitration. The hybrid system of law which they did choose has a superficial attraction, but I suspect that it will lead to C lengthy and expensive dispute. However, ours is not to reason why. There are before us affidavits of two professors of French law, and the affidavit of a person qualified both in French law and in the law prevailing in the United States of America.

The facts

D It was not originally contemplated that the tunnel would require a cooling system. This was later considered necessary, and on 29 April 1988 a variation order was issued for the construction of such a system. Clause 51(1) of the contract entitled Eurotunnel to order, and obliged the contractors to carry out if ordered, "additional work of any kind necessary for the completion of the works." It is accepted that the E contractors were obliged to proceed with the construction of a cooling system.

Clause 52 deals with the valuation of variations. By paragraph 1(b), the valuation is, in brief, to be based on rates and prices set out in the contract; if there are none, suitable rates or prices are to be agreed, and in the event of disagreement, Eurotunnel are to fix such rates or prices F as shall, in their opinion, be reasonable and proper. By paragraph (5) if the contractors do not accept any rate or price fixed by Eurotunnel as reasonable and proper, the dispute is to be referred to the panel under clause 67.

The parties were and are some distance apart in calculating the appropriate figure. The contractors, on 6 December 1989, proposed G £120m. The figure later rose to £133·84m., and we were told that this did not include the additional cost of delay and disruption. Eurotunnel, on 26 November 1990, proposed a figure of £86·93m., which is said to have been inclusive of delay and disruption. (All three figures were, by a convention which the parties adopted, in the money of September 1985, presumably to be adjusted later.)

The contractors pressed for an agreement by Eurotunnel to fund H work on the cooling system pending final determination of the price to be paid for it. It is said that agreement was reached, first, that Eurotunnel would pay the cost to the contractors of the work plus 15 per cent., and later the cost plus 20 per cent. Payments were made on

that basis from time to time until Eurotunnel wrote to the contractors on 19 March 1991. They recorded that there had been agreement

> "to fund the procurement of pipework by [the contractors] under this variation order on a cost plus basis as an interim measure pending the overall agreement of the valuation of this variation order."

After protesting that the contractors did not appear to wish to settle the valuation, Eurotunnel said that they were basing their current payment on the evaluation contained in their letter of 26 November 1990, that is to say, £86·93m. The letter continued:

> "We remain willing to discuss this matter further with yourselves, and remain convinced that an overall agreement on variation order No. 3 is possible, without difficulty. In the event that we are unable to do so we shall have no option but to resolve the issue in accordance with clause 52(1)(b) of the contract."

It is said that from March 1991 onwards Eurotunnel have made payments on the basis of their valuation, and that this has not even covered the contractors' costs. Up to September 1991 the contractors had applied for a total of £58m. and had been paid only £41m., a difference of £17m. That seems to me, at a glance, to be more than the 20 per cent. allowed for mark-up on cost. There followed the letter of 3 October 1991 in which the contractors threatened to suspend work on the cooling system.

The underlying dispute

There is plainly a dispute as to the proper price to be paid by Eurotunnel for the cooling system. The contractors also accuse Eurotunnel of failing to negotiate in good faith, which is said to be a breach of contract by international trade law, and it seems likely that Eurotunnel will make a similar charge against the contractors. In addition the contractors say that Eurotunnel are in breach of contract by abandoning the agreed basis for interim funding of work on the cooling system; they also say that Eurotunnel have failed to fix a price for the cooling system under clause 52(1)(b) of the contract.

Eurotunnel's answer to that is that they have fixed a price, namely £86·93m., by their letter of 19 March 1991, or by the payments which they have made since that date. If they are wrong about that, their counsel, at the invitation of the court, did fix the price during the hearing of the appeal at "£87m. I suppose" for variation order No. 3, excluding the effect of later variations.

There is a further potential dispute of considerable importance. The contractors maintain that they are entitled to suspend work on the cooling system, although they have not yet done so, by reason of Eurotunnel's breaches of contract described above. If it were solely a question of English law, this argument would face some difficulty. It is well established that if one party is in serious breach, the other can treat the contract as altogether at an end; but there is not yet any established doctrine of English law that the other party may suspend performance,

keeping the contract alive. It is said that there is authority, at any rate in the Commonwealth, which would support such a doctrine.

In the hybrid system of law which governs this contract, however, it is not presently disputed that some such doctrine exists. It is called "l'exception d'inexécution," or exceptio non adimpleti contractus. In the present case it seems likely that questions would arise as to whether the express terms of the contract took away the defendants' right to rely on this principle, and if not, whether any breach of contract by Eurotunnel was sufficiently serious to justify suspension.

I may not have stated the underlying points in dispute either completely or accurately. But enough has been said to show that there are matters in dispute which it would be the task of the arbitrators to decide, if and when they are called on to do so.

Evans J. accepted that this was the case, at any rate in part. He said:

> "It would be idle to deny, and Eurotunnel do not deny, that there are 'disputes or differences' regarding the application of clauses 51, 52 and 60 to the cooling system works and that these do fall within clause 67."

However, he regarded the relevant dispute in the present proceedings as "whether the contractors have the right to suspend work which they claim."

The decision of Evans J.

In *Hayter v. Nelson* [1990] 2 Lloyd's Rep. 265 Saville J. had to consider the provision in section 1 of the Arbitration Act 1975 that the court need not order a stay if satisfied "that there is not in fact any dispute between the parties with regard to the matter agreed to be referred." He held, at p. 271:

> "only in the simplest and clearest cases, i.e., where it is readily and immediately demonstrable that the respondent has no good grounds at all for disputing the claim, should that party be deprived of his contractual right to arbitrate."

Evans J. followed that decision and applied that test. He came close to holding that it was satisfied; in other words, that any claim by the contractors that they would be justified in suspending work could readily and immediately be shown to be unfounded. Thus he was inclined to hold (i) that there was no breach of contract by Eurotunnel, (ii) that if there had been any breach it could not possibly justify a total suspension of the cooling system works, and (iii) that in any event the defence of non-fulfilment of the contract (exceptio non adimpleti contractus) was excluded by the express terms of clause 67(2).

Evans J. took into account those conclusions when he reached the decision that he would have been prepared to grant an injunction if the contractors had not offered an undertaking. He was satisfied that Eurotunnel showed "the necessary strong probability of success on the issue whether the defendants are entitled to suspend work." However, he did not in the end base his decision to refuse a stay on those grounds. He found it unnecessary to express a final conclusion on

whether there was in fact anything disputable, and he preferred not to do so.

What led the judge to conclude that a stay in favour of arbitration should be refused was that neither party was currently in a position to embark on an arbitration. Neither party had initiated a reference to the panel on these issues, and the contractors were taking the position that a price had not even been fixed by Eurotunnel under clause 52(1)(b). A reference to and decision by the panel was a necessary preliminary to arbitration during the course of the works. Accordingly, in the judge's view, the time for a mandatory stay under section 1 of the Arbitration Act 1975 had not arrived. A discretionary stay would not be ordered because the contractors might suspend work before a decision had been obtained from the panel.

As to an injunction, Evans J. held that there was power to grant one under section 12(6) of the Arbitration Act 1950, because the contractors were subject to the territorial jurisdiction of the English court, and notwithstanding that the arbitration was to be held abroad.

In this court the issues were addressed by Mr. Rix for the contractors under the headings (1) stay and (2) injunction. Mr. Dyson, for Eurotunnel, adopted a slightly different division, that is to say, (1) jurisdiction and (2) discretion. This difference in approach is more important than one might suppose. Until it has been decided whether the action ought to be stayed in so far as any substantive relief is concerned, there is no framework in which to determine what power there may be to grant an interim injunction. If, for example, there were no arbitration clause at all, or no dispute that could conceivably call for an arbitration, section 12(6)(*h*) of the Arbitration Act 1950 would be irrelevant; but an interim injunction might be granted under section 37 of the Supreme Court Act 1981. The argument for Eurotunnel is indeed based primarily on section 37. If on the other hand there are disputes which ought to go to arbitration, it is natural to consider section 12(6)(*h*) first. Only if it is not available, for one reason or another, does one have to consider section 37 in such a case. I shall therefore adopt the route (1) stay, (2) jurisdiction, (3) discretion.

Stay

Evans J. held that a stay should be refused because the time for arbitration had not arrived; there has not yet been a decision by, or even a reference to, the panel under clause 67(1) in relation to the cooling system. Against that there is a recent decision of Judge Esyr Lewis Q.C. in *Enco Civil Engineering Ltd. v. Zeus International Developments Ltd.* (unreported), 22 October 1991. There a construction contract, as commonly happens, provided that disputes should be referred in the first instance to the engineer. Only if the engineer had made a decision, or had failed to do so within three months, was there provision for arbitration. The engineer had not made a decision at the time when the defendants sought a stay of the action under section 4(1) of the Arbitration Act 1950 (this being a domestic arbitration agreement). The judge nevertheless granted a stay. He said:

> "The fact that the disputes cannot for the moment be referred to arbitration because of the two-stage procedure prescribed by

A condition 66 does not, in my judgment, prevent the court from ordering a stay of the action. Section 4 does not require that a reference should be made before an action is brought to give the court jurisdiction to stay it."

Mr. Dyson submits that the case was wrongly decided, but I do not agree. Many types of contract provide for some preliminary step to be B taken before there is an arbitration. I cannot see that this entitles a party to disregard the arbitration procedure altogether and start an action at law, merely because the preliminary step has not been taken. In many cases the arbitration agreement could be altogether bypassed if that were permitted.

The decision in *Enco Civil Engineering Ltd. v. Zeus International Developments Ltd.* proceeded upon section 4(1) of the Act of 1950, C which requires that the applicant for a stay must be "ready and willing to do all things necessary to the proper conduct of the arbitration." It cannot be any less applicable to a dispute under a non-domestic arbitration agreement where section 1 of the Arbitration Act 1975 does not, in express terms, contain any such requirement. The defendant in the court proceedings who applies for a stay may not have any claim D which he wishes to make against the plaintiff, or any reason either to start an arbitration or to carry out any preliminary action before there can be one; he may merely wish to resist the plaintiff's claim. I can see no reason why he should not say to the plaintiff: "I dispute your claim. If you wish to pursue it, you must carry out the preliminary step and then proceed to arbitration. I am ready and willing to arbitrate if you do, but if you go to court instead, I shall apply for a stay."

E So in my judgment the contractors are entitled to a stay if there is a dispute "with regard to the matter agreed to be referred." Plainly there are disputes of that nature unless it can readily be shown beyond doubt that the contractors do not have any right to suspend work on the cooling system. It is undesirable that we should say more about the merits of the dispute than is strictly necessary in order to decide whether F a stay should be granted. In my judgment it is not shown, readily and beyond doubt, that the contractors have no right to suspend work. As I have said, it is not presently disputed that there is some such doctrine as the defence of non-fulfilment of the contract. There are issues as to whether there has been any breach of contract by Eurotunnel, whether any breach is sufficiently important to justify suspension, and whether the defence is excluded by the express terms of the contract. Those G issues depend at this stage in an English court largely on expert evidence. I cannot say that Eurotunnel are readily and beyond doubt shown to be right in their contentions.

I would accordingly stay the action. But that does not conclude the question whether there should nevertheless be an injunction. It merely decides the framework, as I have said, in which the application for an injunction falls to be considered. H

Jurisdiction

As Evans J. recorded, it is accepted on behalf of the defendants that an English court can grant an interim injunction in a case where the

parties have agreed that disputes shall be settled by arbitration, and even if proceedings in court are otherwise stayed. That follows from section 12(6) of the Arbitration Act 1950, which provides:

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

In my view this power can be exercised before there has been any request for arbitration or the appointment of arbitrators, provided that the applicant intends to take the dispute to arbitration in due course. Whatever the meaning of "reference" in section 12(6)(*h*)—and it is not always easy to determine the precise meaning of the word in arbitration statutes—I would hold that the power of the court in such a case would be exercised "for the purpose of and in relation to a reference."

I would also hold that the power to grant an interim injunction under section 12(6)(*h*) is not limited to the detention or preservation of goods or other property, which are in any case dealt with in section 12(6)(*g*), or to preserving the status quo. It may in an appropriate case be exercised by granting an interim mandatory injunction, such as an order to continue performance of a building contract. What is an appropriate case is a matter to be considered under the heading of discretion.

So if this were a dispute between two English companies who had agreed to arbitrate in England, I would have held that there was jurisdiction to grant the injunction which Evans J. was prepared to grant. But some of the parties here are not English but French, and they have all agreed to arbitrate, not in England, but in Brussels. We are therefore concerned with something which is not a "domestic arbitration agreement" within section 1(4) of the Arbitration Act 1975, on two grounds: it provides for arbitration in a state other than the United Kingdom, and some of the parties are incorporated in a state other than the United Kingdom.

Before Evans J. it was accepted on behalf of the contractors that an interim injunction might nevertheless be granted, even where a stay was mandatory under the Act of 1975. That concession must, I think, have been limited to cases where the arbitration agreement was not domestic because one or more of the parties was a foreigner; Evans J. records the contractors as contending that there was no jurisdiction under section 12(6)(*h*) of the Arbitration Act 1950 when the arbitration was to take place abroad.

That is, in my view, the crucial point on this issue as to jurisdiction. Does an English court have power to grant an injunction where the arbitration is to take place abroad, and if there is such a power, should it be exercised? I consider this question first in relation to section 12(6)(*h*) of the Act of 1950, and only thereafter under section 37 of the Supreme Court Act 1981 although that was the preferred route of Eurotunnel.

A It is often said that statutes of the United Kingdom Parliament have no application to things which happen outside the United Kingdom; or, more accurately, outside that part of the United Kingdom for which they are enacted. As I explained in *Irish Shipping Ltd. v. Commercial Union Assurance Co. Plc.* [1991] 2 Q.B. 206, 219, I consider that in the case of a civil dispute the problem requires closer analysis. One has to ascertain the connecting factor prescribed by the rules of conflict of laws B in order to find which country's laws are to be applied to a dispute of the kind which has arisen. What is more, "just because two rules of law are enacted in the same statute, it does not follow that the same connecting factor applies in each case:" see p. 220F.

Thus section 4 of the Arbitration Act 1950, which provides for a stay of court proceedings where there is a submission to arbitration, applies C only to court proceedings in the relevant part of the United Kingdom. The section grants no power to stay court proceedings elsewhere. But there is power to stay proceedings here if the proposed arbitration is abroad. That was clear in the unamended section 4, and is clearer still in section 1 of the Arbitration Act 1975. So the territorial application of the two sections is that they apply to court proceedings in the relevant part of the United Kingdom, but to arbitration proceedings anywhere in D the world. But it by no means follows that other provisions of the Act of 1950 apply to arbitrations anywhere in the world; each enactment must be considered separately.

If better authority is required for this approach to the Arbitration Act 1950, I would refer to the speech of Lord Goff of Chieveley in *Dimskal Shipping Co. S.A. v. International Transport Workers Federation* E [1992] 2 A.C. 152, 169:

> "The judge was impressed by another argument . . . which was that a man ought to be able safely to regulate his conduct by complying with the laws of the country in which he finds himself. This may be true so far as the criminal law is concerned; but I cannot see that it applies in the case of matters which may affect the validity of a F contract governed by some other system of law. If a person enters into such a contract, he has for most purposes to accept the regime of the proper law of the contract . . ."

There are instances where our rules of conflict of laws provide two or more alternative connecting factors for a given topic: illegality in the performance of a contract is an example. But in general such a rule is G undesirable since it may lead to different decisions by an English and a foreign court. As will appear, there are grounds for arguing that such a rule applies when the topic is arbitration procedure.

I have dealt at some length with what might be thought rather elementary law, because Mr. Rix for the contractors submitted that United Kingdom statutes do not normally affect things done abroad. He also relied on sections 34, 41 and 42 of the Arbitration Act 1950, which I deal with its application to Scotland and Northern Ireland. These, it is said, show that it does not apply at all outside the United Kingdom. But those sections are concerned only with the extent to which the Act of 1950 forms part of the law of Scotland or Northern Ireland. They tell

one nothing as to the circumstances in which the law so enacted is to apply to transactions containing a foreign element. A few statutes, but not very many, contain their own express conflict rule regulating their application to such transactions. There is none in the Arbitration Act 1950; the connecting factor has to be deduced from the content of its substantive provisions.

There are, however, two instances where United Kingdom or English legislation appear to recognise a conflict rule in relation to arbitration proceedings. The first is in section 5(2) of the Arbitration Act 1975. This provides that a convention award need not be enforced if

> "(*b*) . . . the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or . . . (*e*) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or (*f*) that the award . . . has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made."

This suggests (i) that the validity of an arbitration agreement is governed by the law which the parties have chosen, and, if none, by the law of the place where any award is made; (ii) that arbitral procedure is governed by the law which the parties have chosen and, if none, by the law of the country where the arbitration takes place, which may not be the same as where the award is made; and (iii) that the setting aside or suspension of an award is governed either by the law of the country where it is made, or by the law of the country where the arbitration takes place, or by the law, if any, which the parties have chosen to apply to it: see *per* Lord Oliver of Aylmerton in *Hiscox v. Outhwaite* [1992] 1 A.C. 562, 595 who referred to this as "the curial country." If that be the correct interpretation of section 5(2) of the Act of 1975, it cannot be said to provide a logical and convenient regime for arbitration cases.

The second legislative indication of a conflict rule is in R.S.C., Ord. 73, r. 7(1). This provides that service out of the jurisdiction of an application under the Arbitration Acts 1950 and 1979 is permissible if the arbitration "is governed by English law or has been, is being or is to be held within the jurisdiction." One might not expect a substantive rule of conflict of laws to be enacted in delegated legislation such as the Rules of the Supreme Court. But Ord. 73, r. 7(1) appears to recognise two connecting factors for the application of English law to an arbitration: it must be *either* the law which the parties have chosen, *or* the law of the place of arbitration.

The cases to which we were referred start with *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.* [1970] A.C. 583. There it was found that, although the contract was governed by English law, the parties had agreed on Scottish law as the curial law of the arbitration, and the arbitral proceedings did in fact take place in Scotland. So neither of the connecting factors mentioned above pointed

A to English law. It was held that an English court could not order the arbiter to state a case under section 21 of the Arbitration Act 1950, which did not form part of the law of Scotland. Lord Wilberforce held, at p. 617, that the procedure adopted

> "was inconsistent with the exercise by a foreign (sc., English) court of the powers of direction and control contained in the English Act, B whether the general procedural powers of section 12 or the special powers contained in section 21."

Lord Guest went rather further and said, at p. 609:

> "as the Arbitration Act 1950, does not apply to Scotland the respondents must fail to obtain this remedy or, indeed, any other C remedy under the Act of 1950."

I am afraid that I cannot accept the full breadth of Lord Guest's observations. If a stay had been sought of court proceedings in favour of arbitration in Scotland, or if it had been sought to enforce a Scottish award in England, the Arbitration Act 1950 would have been relevant as part of English law because a different connecting factor would have D been involved. English law would have been applied as the law of the place of the court proceedings, or the law of the place of enforcement. But it is what Lord Wilberforce said that is important for present purposes.

In *Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1981] 2 Lloyd's Rep. 446 a contract provided for E arbitration in Zurich, and also that this should be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1950. Mustill J. said of the proper law of the arbitration agreement, at p. 453:

> "The only factor apparently pointing towards English law is the reference . . . to the Arbitration Act 1950. Common sense suggests F this provision cannot have been intended to apply the whole of the Act of 1950 to an arbitration which was from the outset designed to take place abroad. For otherwise, the arbitrators would have been obliged to state a special case from their Zurich arbitration to the English court; and the latter court would have had power to set aside or remit the award, and to make interlocutory orders for G discovery, security for costs, interim preservation and so on; all in potential conflict with the powers exercisable by the local court. Such a result would be absurd."

Mustill J. was, I think, at that point reciting the submission of counsel. But he may perhaps be thought to have been accepting that it was in the power of the parties to choose the curial law of their arbitration, whilst H at the same time recognising the absurdity of their choosing English curial law for an arbitration held abroad.

Bank Mellat v. Helliniki Techniki S.A. [1984] Q.B. 291 was directly concerned with one of the paragraphs of section 12(6) of the Arbitration

Act 1950, that is to say, the paragraph dealing with security for costs. Kerr L.J. stated the connecting factor in plain terms, at p. 301:

> "The fundamental principle in this connection is that under our rules of private international law, in the absence of any contractual provision to the contrary, the procedural (or curial) law governing arbitrations is that of the forum of the arbitration, whether this be England, Scotland or some foreign country, since this is the system of law with which the agreement to arbitrate in the particular forum will have its closest connections . . ."

However, in that case the parties had both chosen England as the place of arbitration and were in fact proceeding to arbitration here. So it made no difference whether a choice of curial law by the parties could override the system of law prevailing at the place of arbitration. The same was true in *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.* [1970] A.C. 583. In *Bank Mellat v. Helliniki Techniki S.A.* [1984] Q.B. 291, 315, Robert Goff L.J. may perhaps be thought to have put the point differently:

> "It is of course true that English law will, as the curial law, apply to the conduct of the arbitration; and the parties will, by holding their arbitration here, subject themselves for that purpose to English law . . ."

It was, however, held in that case that an English court should be slow to exercise its power to order security for costs in international arbitrations; and an order was refused.

I cannot find assistance on this point in *The Tuyuti* [1984] Q.B. 838. There the arbitration was to take place in England and there was no discussion of the curial law. So I turn to *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep. 116. That concerned an application for the appointment of an arbitrator pursuant to the Arbitration Act 1950, where there was an agreement to arbitrate "bajo las Condiciones y Leyes de Londres." Kerr L.J. discussed in some detail the question whether the parties could choose a curial law which was different from the law of the place of arbitration, or, more accurately, the "seat" of arbitration, since it may on occasion be convenient to hold hearings elsewhere. Kerr L.J. said, at p. 120:

> "There is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y. The limits and implications of any such agreement have been much discussed in the literature, but apart from the decision in the instant case there appears to be no reported case where this has happened. This is not surprising when one considers the complexities and inconveniences which such an agreement would involve. Thus, at any rate under the principles of English law, which rest upon the territorially limited jurisdiction of our courts, an agreement to arbitrate in X subject to English procedural law would not empower our courts to exercise jurisdiction over the arbitration in X."

Kerr L.J. went on to quote the passage from the judgment of Mustill J. in *Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1981] 2 Lloyd's Rep. 446, 453 which I have already set out. However, he held that the parties had not agreed on a curial law different from that prevailing at the place of arbitration, so the validity and effect of such an agreement was not directly in issue. As the curial law and the place of arbitration were both English, there was jurisdiction to appoint an arbitrator under the Arbitration Act 1950.

We were referred to the opinion of Mr. Advocate General Marco Darmon in *Marc Rich & Co. A.G. v. Società Italiana Impianti P.A.* (Case C 190/89) set out in Arbitration International, vol. 7, No. 3 (1991), p. 197, 219:

> "By virtue of a well-established practice, courts at the place of arbitration give their support and assistance to the arbitration process: appointment of an arbitrator, protective measures, interim measures and measures for the obtaining of evidence."

However, later in the same paragraph it appears to be allowed that the parties may choose a different system of law.

Like Kerr L.J. in *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep. 116, 120, I do not believe that an English court has jurisdiction to exercise all the powers in the Arbitration Act 1950 in the case of an arbitration held abroad, even if the parties have agreed to English curial law. It may exercise some of them, for example, by staying court proceeding here, or by enforcing the award, as I have already mentioned. And in the converse case, where parties arbitrate here but agree on the procedural law of a foreign country, it seems to me that at least some of the powers conferred by the English Act could still be exercised. That is the view of *Mustill & Boyd, Commercial Arbitration*, 2nd ed., p. 90:

> "The choice of a foreign curial law does not, we submit, deprive the English court of jurisdiction. It has never, so far as we are aware, been suggested that parties may validly contract out of the power to set aside or remit an award for misconduct; and if an explicit agreement cannot accomplish this, it is hard to see how it could be achieved indirectly by the choice of a foreign curial law."

Where the arbitration has a foreign seat but there is an express choice of English curial law *Mustill & Boyd's* view is, at pp. 91–92:

> "the English court would be highly unlikely to assume jurisdiction to intervene in the reference or to set aside or remit the award. Any attempt to exercise powers to appoint arbitrators or to give ancillary relief, such as orders for the inspection of property, would in fact present formidable difficulties of enforcement. Moreover the prospect of two courts exercising supervisory powers over the same reference at the same time would appear to be unacceptable."

In my judgment the connecting factor for the application of section 12(6)(*h*) of the Arbitration Act 1950 to a case containing a foreign element is the place which the parties have chosen as the seat of the

arbitration. If that is in England or Wales, our courts have jurisdiction; if not, they have none. It follows that the English court has no jurisdiction under section 12(6)(*h*) in the present case, since the seat of any arbitration is Brussels.

Rule 8(5) of the International Chamber of Commerce Rules provides that the parties may apply "to any competent judicial authority for interim or conservatory measures." That ought to mean the courts of Brussels. If it does not, and is wider in scope, it at most amounts to an option to choose some other curial law for that limited purpose. But it follows from what I have already said that an express choice of English law as the curial law does not confer jurisdiction under section 12(6)(*h*) of the Act of 1950, if the arbitration has a foreign seat; nor would a choice of foreign law have taken away jurisdiction if the seat of the arbitration was in England. I have confined my conclusion to section 12(6)(*h*) because that is the provision of the Arbitration Act 1950 which is relevant to this case.

I now turn to the more general power to grant an injunction conferred by section 37 of the Supreme Court Act 1981. In a sense this ought to have been considered first, since Mr. Dyson for Eurotunnel relied on it as the primary source of the court's jurisdiction. Those of the contractors who are not English have been served under the Civil Jurisdiction and Judgments Act 1982 and R.S.C., Ord. 11, r. 1(2); and, though it is disputed that this was valid, there has not as yet been an application to set aside service.

Nevertheless, I consider that the non-availability of section 12(6)(*h*) of the Act of 1950, because there is a dispute which ought to go to arbitration abroad, is the first of three reasons why an injunction should not be granted under section 37 of the Supreme Court Act 1981. Where the specific power most appropriate to the grant of an injunction pending an arbitration is not available by the rules of private international law, it seems to me that, if only as a matter of judicial restraint, such an injunction should not be granted under the more general power. We are not here concerned with a body such as the International Tin Council, which was a creature of international law. But the Channel Tunnel contract involves a delicate balance of power between the municipal law of two sovereign states. We should be careful not to exercise jurisdiction except where to do so is within the spirit as well as the letter of our laws.

The second reason lies in section 25 of the Civil Jurisdiction and Judgments Act 1982. Under that section the power of the High Court to grant interim relief may be extended by Order in Council to arbitration proceedings held abroad, and the Order in Council may at the same time repeal any provision of section 12(6) of the Arbitration Act 1950 to the extent that it is superseded by the Order. No such Order in Council has yet been made. In my judgment it would not normally be appropriate to grant such relief under the general power in section 37 of the Supreme Court Act 1981, when Parliament has provided that a specific power to do so may be granted, but that has not yet been done. It is at first sight a little difficult to see how section 12(6) of the Act of 1950 could be "superseded" by an Order in Council conferring power to grant

A interim relief in aid of arbitrations abroad when, as I have held, no such power is conferred by section 12(6). But the answer is that the Order in Council might confer power for arbitrations both here *and* abroad, and so would supersede section 12(6).

Thirdly, there are dicta which support the view that an English court has no jurisdiction to grant an interim injunction when a stay is mandatory under section 1 of the Arbitration Act 1975. In *Nissan*
B *(U.K.) Ltd. v. Nissan Motor Co. Ltd.* (unreported), 31 July 1991; Court of Appeal (Civil Division) Transcript No. 848 of 1991, Bingham L.J. said:

> "I am tentatively of opinion that Mr. Sumption is right to submit that Nissan (U.K.) Ltd. has no legal or equitable right against Nissan Motor Co. Ltd. justiciable in the English court and that
C accordingly the court has no jurisdiction to grant Nissan (U.K.) an injunction against Nissan Motor Co. Ltd. Like Sir Nicolas Browne-Wilkinson V.-C., however, I do not find it necessary to resolve this question finally, since Nissan (U.K.) Ltd.'s challenge to his exercise of discretion in refusing Nissan (U.K.) an injunction against either defendant does not, in my judgment, succeed."

D So too, Dillon L.J.:

> "I would add that that makes it unnecessary for me to express any conclusion on the jurisdiction point where there is a mandatory reference to arbitration under section 1 of the Arbitration Act 1975, but I see considerable force in the submissions founded on *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera*
E *S.A.* [1979] A.C. 210 to which I have referred."

Although there was mention by Dillon L.J. of section 12(6) of the Arbitration Act 1950, and no express reference that I can see to section 37 of the Supreme Court Act 1981, it seems to me that the court must have been considering jurisdiction under section 37; hence the reference to *Siskina* [1979] A.C. 210 and to a legal or equitable right justiciable in the English court.

F We were referred to other cases on the general power to grant an injunction under section 37 of the Act of 1981, that is to say, *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210; *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] A.C. 909; *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58 and *South Carolina*
G *Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.* [1987] A.C. 24.

In the result I conclude that, whether or not there is jurisdiction, at least as a matter of judicial restraint an interim injunction should not be granted under section 37 of the Supreme Court Act 1981 when the parties have agreed to arbitration in some place outside England and Wales, and there is an arbitrable dispute. In my judgment Evans J.
H would have been wrong to grant an injunction if the contractors had not offered the undertaking which he accepted. It is to the courts of Brussels that application must be made, if it is their practice to grant an injunction in such a case.

Discretion

Unless the exercise of judicial restraint for the reasons that I have given can be described as an exercise of discretion, this topic does not arise. But there are two aspects of it on which we heard a good deal of argument where I wish to say a few words.

First, it has been said that normally a mandatory injunction should only be granted as an interim order if the court feels a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this has the support of the Court of Appeal (reversing Evans J.) in *Locabail International Finance Ltd. v. Agroexport* [1986] 1 W.L.R. 657. That was accepted by Evans J. in the present case. However, in *Leisure Data v. Bell* [1988] F.S.R. 367, the Court of Appeal held that there were cases in which a high standard of probability of success was not made out, but nevertheless an interim injunction of a mandatory nature would be granted. We have also been referred to the pellucid judgment of Hoffmann J. in *Films Rover International Ltd. v. Cannon Film Sales Ltd.* [1987] 1 W.L.R. 670.

In the present case Evans J. had to decide questions of great complexity and even greater importance with limited argument and all the despatch that an interlocutory application can command. In those circumstances it may seem intolerable to say that he should not have accepted at its face value the decision of the Court of Appeal in *Locabail International Finance Ltd. v. Agroexport* [1986] 1 W.L.R. 657 which itself reversed a decision of his own. Since he found that Eurotunnel had a strong probability of success, he did not in fact need to hold that this was necessary. However, I feel bound to say that in view of the great harm to Eurotunnel which might ensue if an injunction were not granted, this might well be a case where it was not essential for a strong probability of success to be shown.

The second point is one where I agree with Evans J. It used to be regarded as established law that an injunction, whether interim or final, must state with precision what the defendant must or must not do if he is to avoid the peril of imprisonment for contempt of court. There must not be a need for constant supervision by the court in deciding whether what the defendant proposes to do will be, or what he had done was, a breach of the injunction. These principles were reiterated by Lord Upjohn in *Morris v. Redland Bricks Ltd.* [1970] A.C. 652, 666.

No doubt the importance of these principles is undiminished in the case of a husband who maltreats his wife or molests her in the former matrimonial home, and in the case of an employee who leaves and proposes to make use of his employer's trade secrets. But it seems to me that over the last 20 years there has been some relaxation of these rules in practice, at any rate in commercial cases. Injunctions of the *Mareva* type are not infrequently framed without any high degree of precision, for example, by allowing money to be spent on living costs or ordinary business expenses. On occasion the courts are asked to vary an injunction so as to clarify what is within that licence. And substantive interim orders of a mandatory nature are sometimes made, for example, in charterparty cases.

A Commercial concerns have ready access to lawyers, and are well able to apply to the court if they are in doubt as to what they must or must not do. I would not have interfered with the judge's decision on this ground if he had granted an injunction and if the contract had not provided for arbitration abroad.

In the result I would grant the application for a stay of the action, and release the contractors from their undertaking, if they ask to be B released. I would not grant an injunction.

In view of the speed with which the appeal was brought on, with different counsel, it is right to say that the arguments before us were of the highest quality, and the papers prepared in exemplary fashion.

WOOLF L.J. I agree.

C

NEILL L.J. I also agree.

Appeal allowed with costs.
Leave to appeal refused.

D 11 June 1992. The Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Ackner and Lord Browne-Wilkinson) allowed a petition by the plaintiffs for leave to appeal.

Solicitors: Masons; Freshfields.

[Reported by NIGEL J. MASON ESQ., Barrister]

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