Neutral Citation Number: [2023] EWHC 2145 (Comm)

Case No: CL-2023-000643

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 21 August 2023

Before :

MR JUSTICE BRIGHT

- -

Between :

SQD

Claimant

- and -

QYP

Defendant

- -
- -

The Claimant appeared represented by leading counsel
The Defendant did not appear and was not represented

Hearing dates: 17, 18 August 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 August 2023 by circulation to the parties or their representatives by e-mail.

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MR JUSTICE BRIGHT

Mr Justice Bright:

1. This judgment concerns the application of the Claimant ("SQD") for an interim anti-suit injunction ("ASI") and anti-enforcement injunction ("AEI") against the Defendant ("QYP").

2. SQD was represented by leading counsel. I am very grateful to him and to the team working with him for the care taken in relation to this application and the fairness with which the matter was explained to me. This was all the more important because the application was made without notice to QYP.

Background

3. The application arises out of an agreement provided by SQD to QYP ("the Agreement") in relation to a project overseas. The Agreement had a choice of law that expressly provided that English law applied. It also had a clause expressly providing for ICC arbitration in Paris.

4. Work on the project was suspended. QYP purported to terminate the contract governing the project. It then called for payment under the Agreement. SQD replied stating that it was legally prohibited from making the payment.

5. QYP wrote stating that it disagreed with SQD's reply. Its message made a number of express references to the Agreement and its terms and stated that it was to be treated as triggering the dispute resolution clause of the arbitration clause in the Agreement.

6. QYP then commenced proceedings in court in its own country, seeking payment of the sum covered by the Agreement and also seeking an order for the seizure of shares owned by SQD in that country.

7. QYP's Statement of Claim in those court proceedings does not deny the arbitration clause in the Agreement or the existence of an agreement to arbitrate. On the contrary, it recites the terms of the arbitration clause, but says that the agreement to arbitrate is unenforceable because QYP will not have access to justice in the context of an ICC arbitration in Paris such as the Agreement provides for: QYP will not be able to appear or be represented and/or is doubtful whether any hearing in France will be fair or impartial and/or the only state in which QYP can effectively defend its rights is its own country.

8. A few days after it received QYP's Statement of Claim in the court proceedings, SQD issued a request for arbitration pursuant to the arbitration clause in the Agreement. The relief sought includes declaratory relief as to the validity and enforceability of the arbitration agreement and the jurisdiction of the tribunal, further declarations that the courts of QYP's own country do not have jurisdiction and orders that QYP must discontinue the proceedings in that country and must not enforce any decisions of those courts.

9. The current position in relation to those court proceedings and the ICC arbitration proceedings is as follows:

i) In those court proceedings, SQD has not yet been required to enter an appearance and has not done so. The first hearing will take place shortly.

ii) In the ICC arbitration, the only procedural step taken so far has been the lodging of SQD's request for arbitration. There has been no response from QYP and no arbitrators have yet been appointed.

SQD's arbitration claim and application

10. SQD issued an arbitration claim form promptly and issued the application notice that is before me. These documents stated that the arbitration claim and the application were brought under s. 44 of the Arbitration Act 1996, alternatively under s. 37(1) of the Senior Courts Act 1981.

11. The relief claimed by the arbitration claim form was as follows:

> "An interim anti-suit injunction and anti-enforcement injunction against the Defendants, restraining them from commencing and / or pursuing [SQD's court proceedings in its own country] in breach of an agreement to arbitrate in Paris, and any other such proceedings in breach of that agreement."

12. The intended meaning of the word "interim" was explained in paragraph 24 of the arbitration claim form, as follows:

> "24. SQD seeks an interim ASI and an interim AEI from the Court under section 44 of the Arbitration Act, alternatively under section 37 of the Senior Courts Act 1981, to hold the ring until the Paris tribunal is established and in aid of the Paris arbitration."

13. The application notice stated that the jurisdiction relied on for the granting of the ASI and AEI was s. 44(2) of the Arbitration Act 1996, alternatively s. 37 of the Senior Courts Act 1981. It further indicated that SQD sought a return date of 8 September 2023 for further directions and "to expedite the final determination of these claims" – but my understanding of this, which SQD's counsel kindly confirmed, is that this meant only the determination of SQD's entitlement to interim relief, pending the establishment of the arbitration tribunal.

14. The application was supported by a witness statement made by a partner within SQD's solicitors, who set out the general background and the procedural history, and a witness statement made by a foreign lawyer, who explained some aspects of the proceedings commenced by QYP.

15. In the course of the hearing, I noted that I did not have any evidence explaining why the application was being made to this court, rather than in France. I adjourned the hearing in order to enable SQD to obtain such evidence. I also indicated that it might be instructive to look at the reports of the Departmental Advisory Committee ("DAC") which preceded the passage of the Arbitration Act 1996; and that there were some additional authorities on which I would be grateful for further assistance.

16. The result was that, when the hearing resumed on the following day, I received a further witness statement from SQD's solicitors, which related to the position in France, as

well as the further assistance that I had requested on the DAC reports and on various additional authorities.

The critical point: the seat of the arbitration is not in the jurisdiction

17. In the usual way, SQD filed various documents with the court in advance of the hearing, including its counsel's extremely clear and helpful skeleton argument. This meant that, at the outset of the hearing, I was able to give the following indications:

    i) I was satisfied to a high degree of probability that the Agreement exists and has terms the clauses mentioned above. It is generally subject to English law and is subject to ICC arbitration in Paris.

    ii) I was satisfied that the arbitration agreement itself is subject to English law, so far as this court is concerned, in the light of *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* [2020] UKSC 38, per Lord Hamblen and Lord Leggatt at [170]; and *Kabab-Ji SAL v. Kout Food Group* [2021] UKSC 48, per Lord Hamblen and Lord Leggatt at [35], [39]. This is so even though I was (very properly) told that a French court might take a different view about the law of the arbitration agreement. I should add that my provisional view about the law of the arbitration agreement might have been different if there had been evidence that there is a provision of French law such that choice of a French seat requires French law to govern the arbitration agreement – cf. *Enka* at [170 (vi)].

    iii) I was satisfied to a high degree of probability that QYP's proceedings in the courts of its own country are a breach of the arbitration agreement and/or a breach of the Agreement.

    iv) In principle, agreements should be honoured. If this court has jurisdiction, it will generally give its support to a party wishing to ensure that an agreement is honoured by its counterparty. This includes arbitration agreements.

    v) I was satisfied that SQD had acted promptly, following its receipt of the Statement of Claim in QYP's court proceedings. Delay therefore is not a factor.

    vi) I was not persuaded that QYP would not have access to justice in the context of the arbitration in Paris. If QYP wishes to instruct western lawyers to represent it in the arbitration, I would expect it to be possible for this to be arranged, with licences being obtained as required. It would also be possible for QYP to be represented by its own lawyers, acting remotely if necessary. Indeed, the reference as a whole could proceed remotely, with the electronic presentation of evidence and witnesses attending by videolink. I am aware of several cases where these solutions have been adopted in international arbitration proceedings. Furthermore, international arbitrators would be capable of conducting the proceedings impartially, and I am confident that the ICC would enforce and protect such impartiality.

    vii) In principle, if this case involved an arbitration with its seat within the jurisdiction, I would be very likely to grant an ASI, and probably an AEI (albeit after some discussion of the terms).

viii) However, I was concerned about whether it was appropriate to grant an injunction in this case, the seat of the arbitration being in Paris.

18. The result was that most of the oral submissions on behalf of SQD were directed to how the court should deal with the fact that the seat of the arbitration is not within the jurisdiction, and whether/how this should affect the court's decision.

s. 44 Arbitration Act 1996, s. 37 Senior Courts Act 1981

19. The court's power to grant relief in support of an arbitration under s. 44 Arbitration Act 1996 is as follows:

> **1.1.1.1.** "**44 Court powers exercisable in support of arbitral proceedings.**
> (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
> (2) Those matters are—
> (a) the taking of the evidence of witnesses;
> (b) the preservation of evidence;
> (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—
> (i) for the inspection, photographing, preservation, custody or detention of the property, or
> (ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;
> and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;
> (d) the sale of any goods the subject of the proceedings;
> (e) the granting of an interim injunction or the appointment of a receiver.
> (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.
> (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
> (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
> (6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.
> (7) The leave of the court is required for any appeal from a decision of the court under this section."

20. This provision has to be read along with s. 2(3), which provides as follows:

> *1.1.1.2.* "**2 Scope of application of provisions.**
> …

> (3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined—
>
> (a) section 43 (securing the attendance of witnesses), and
>
> (b) section 44 (court powers exercisable in support of arbitral proceedings);
>
> but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so."

21. The court's general power to grant injunctive relief is conferred by s. 37(1) of the Senior Courts Act 1981, as follows:

> **1.1.1.2.1. "37 Powers of High Court with respect to injunctions and receivers.**
>
> (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."

22. Reflecting the approach in the arbitration claim form and the application notice, counsel for SQD initially focussed primarily on s. 44 of the Arbitration Act 1996, with s. 37(1) of the Senior Courts Act 1981 relied on as a fallback. I queried this, as in *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, Lord Mance said at [48]:

> "Where an injunction is sought to restrain foreign proceedings in breach of an arbitration agreement - whether on an interim or a final basis and whether at a time when arbitral proceedings are or are not on foot or proposed - the source of the power to grant such an injunction is to be found not in section 44 of the 1996 Act, but in section 37 of the 1981 Act. Such an injunction is not "for the purposes of and in relation to arbitral proceedings", but for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed."

23. SQD's counsel did not accept that it followed that his application could not be brought under s. 44 of the Arbitration Act 1996 and could only be brought under s. 37(1) of the Senior Courts Act 1981. However, this conclusion seems to me inescapable.

24. There are several distinctions between the s. 44 of the Arbitration Act 1996 and s. 37 of the Senior Courts Act 1981, including the following.

25. First, the power under s. 44 of the Arbitration Act 1996 is essentially interim as reflected by s. 44(2), whereas s. 37(1) of the Senior Courts Act 1981 gives the power to grant final relief. The Arbitration Act 1996 therefore restricts the power under s. 44 as set out in subsections (3), (4) and (5) – i.e., the court's power depends on urgency and only arises if the arbitrators (or some other person, such as the ICC) cannot act. In some cases, this could be critical. However, none of these matters arises here, because SQD only seeks interim relief, and does so in circumstances where no arbitrators have yet

been appointed by the ICC and the ICC cannot act, even on an emergency basis, without notice.

26. Second, because this is a case where the seat of the arbitration is in Paris, any power under s. 44 of the Arbitration Act 1996 would be subject to the reservation at the end of s. 2(3) – i.e., the court must consider whether the fact that the seat is in a foreign country means that it would be inappropriate to grant the relief sought.

    i) There is nothing in s. 37 of the Senior Courts Act 1981 that directs the court's attention in such a specific manner to any particular factor.

    ii) However, s. 37(1) is a discretionary power, which is only to be exercised where "it appears to the court to be just and convenient to do so".

    iii) If an application for an injunction under s. 37(1) arises in the context of a contract providing for an arbitration with a foreign seat, and if that factor would make it inappropriate to grant the injunction under ss. 2(3) and 44 of the Arbitration Act 1996 (if they were otherwise applicable), it must be highly likely that the court would not consider that it is "just and convenient" to grant the injunction within the meaning of s. 37(1) of the Senior Courts Act 1981.

27. A further distinction relates to service out of the jurisdiction. That arises in this case because QYP is situated overseas.

    i) Where injunctive relief can be sought and granted under s. 44 of the Arbitration Act 1996, it is relatively straightforward for the claimant to get permission for service out, under CPR 62.5(1)(b).

    ii) Even where the application is for an ASI under s. 37(1) of the Supreme Court Act 1981, but the context relates to an agreement to arbitrate with the seat in the jurisdiction, getting permission to serve out is still straightforward. The claimant can rely on CPR 62.5(c). See *Ust-Kamenogorsk*, per Lord Mance at [50].

    iii) Where the claim is for an ASI under s. 37(1) of the Senior Courts Act 1981 in relation to an agreement to arbitration, but the seat of the arbitration is not in England, CPR 62.5 is not available. The claimant will have to apply for permission under CPR 6.36, showing that the standard criteria are satisfied.

    iv) Among other things, this means that the claimant must show that England and Wales is the proper forum in which to bring the claim: CPR 6.37(3).

    v) There is no such requirement under CPR 62.5. Under CPR 62.5(1)(a) and (c), it is a given that the award has been made in the jurisdiction and/or the seat of the arbitration is within the jurisdiction – in which case, England and Wales is by definition the supervising state and (therefore) the proper forum. This is also the position for most cases where permission is sought under CPR 62.5(1)(b), i.e., where the application is one under s. 44 of the Arbitration Act 1996 and the seat is within the jurisdiction.

vi) Where the claim is for an order under s. 44 of the Arbitration Act 1996 and the seat is not in the jurisdiction, the reservation at the end of s. 2(3) means that the claimant applying under CPR 62.5(1(b) must show the court, when seeking permission, that the case is not one where it would be inappropriate to grant relief because of the seat being in a foreign country.

vii) While that test is not in the same language as CPR 6.37(3), in many cases it will amount to the same thing.

28. In short, there will be many cases where it makes no real difference whether the court's power arises under s. 44 of the Arbitration Act 1996 or under s. 37(1) of the Senior Courts Act 1981.

29. SQD's counsel said that this is the position here. He accepted that, if the fact that the seat of the arbitration is in Paris would have made it inappropriate to grant an ASI or AEI under s. 44 of the Arbitration Act 1996 (if s. 44 applied), then the application would be unlikely to succeed under s. 37(1) of the Senior Courts Act 1981 – whether because permission to serve out of the jurisdiction would not be given in the light of CPR 37(3), or because the court would simply decline to grant injunctive relief in the exercise of its discretion.

30. I agree. One consequence is that, even though I have concluded that this is not a case where s. 44 of the Arbitration Act 1996 applies, I have still found it instructive to look at some of the authorities on ss. 2(3) and 44 of the Arbitration Act 1996, in so far as they shed light on whether/how the s. 44 jurisdiction should be exercised where the seat is in a foreign country. In my view, similar considerations may be relevant to the discretion to be exercised under s. 37(1) of the Senior Courts Act 1981; and to the question whether England and Wales is the proper forum.

ASIs in support of arbitration – general principles

31. It is now well-established that ASIs can be granted in support of arbitration proceedings and to restrain the breach of an agreement to arbitrate. This has been clear since the decision of the Court of Appeal in *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep. 87 , where Millett LJ made it clear that, as long as the application is made promptly and there are no exceptional circumstances, an ASI will be granted as a matter of course:

> "In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the 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. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in *Continental Bank N.A. v. Aeakos Compania Naviera S.A.*, [1994] 1 W.L.R. 588. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case."

32. The authorities since *The Angelic Grace* cases are fairly summarised by Professor Merkin in 'Arbitration Law' at §8.94 as follows:

> "Although the criteria for the grant of an anti-suit injunction are generally strict, the conditions are relaxed where the purpose of the injunction is to prevent the defendant from commencing proceedings in breach of a contractual provision in the form of an arbitration clause or an exclusive jurisdiction clause. The general effect of the authorities… is that an anti-suit injunction will readily be granted if: (a) the claimant can demonstrate with a high degree of probability the existence of an arbitration clause to which the defendant is a party and which covers the dispute; and (b) there are no exceptional circumstances which militate against the grant of relief."

33. For some time, it was unclear whether the power to grant an ASI in the context of arbitration arose under s. 44 of the Arbitration Act 1996, s. 37(1) of the Senior Courts Act 1981 or both. A number of authorities proceeded on the basis that both powers were potentially relevant, and on this basis proceeded on the basis that the limitations applicable to s. 44 of the Arbitration Act 1996 should be of some influence when an application was made under s. 37(1) of the Senior Courts Act 1981; see for example *Starlight Shipping Co v Tai Ping Insurance Co Ltd (The Alexandros T)* [2007] EWHC 1893, per Cooke J at [19] and [29].

34. In the light of *Ust-Kamenogorsk*, it is now clear that the relevant power arises solely under s. 37(1) of the Senior Courts Act 1981. The limitations under the Arbitration Act 1996 in s. 44 (3), (4) and (5) therefore no longer arise, as such. That said, it may well be arguable (always depending on the circumstances) that, if an arbitration tribunal is fully constituted and the arbitrators are ready, able and willing to grant effective relief, and to do so promptly in an urgent case, this should be considered an "exceptional circumstance" that militates against the grant of an ASI under s. 37(1) of the Senior Courts Act 1981 – just as it would prevent the court from acting under s. 44 of the Arbitration Act 1996.

35. However, the many cases where an ASI has been granted in the context of arbitration are (so far as I am aware) all cases where the seat of the arbitration was or would be within the jurisdiction. Indeed, *Ust-Kamenogorsk* was itself a case where the arbitration clause provided for the arbitration to be held in London. *Enka* is another significant recent example.

36. I consider it unlikely that Millett LJ in *The Angelic Grace* or Lord Mance in *Ust-Kamenogorsk* or Lord Hamblen and Lord Leggatt in *Enka* had in mind a case such as the one before me, where the seat of the arbitration is outside the jurisdiction. In such a case, I do not regard it as axiomatic that, as long as it is demonstrated to a high degree of probability that the foreign proceedings are a breach of a valid agreement to arbitrate, this court should feel no diffidence about granting an injunction. To put this another way: the fact that the seat of the arbitration is outside the jurisdiction could in some cases give rise to an "exceptional circumstance" that militates against the grant of an ASI.

37. It is also important to have in mind the background to ss. 2(3) and 44 of the Arbitration Act 1996.

38. Under the Arbitration Act 1950, there was no power to grant an interim injunction relief in aid of a foreign arbitration. This was established by the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, per Lord Mustill (with whom the others agreed) at p. 344B and p. 360C.

39. *Channel Tunnel* was a case where the contract provided for ICC arbitration in Brussels, but the claimant sought an interim injunction in this jurisdiction. Lord Mustill stressed the need for caution, at p. 358F:

> "… the court should bear constantly in mind that English law… is a stranger to this Belgian arbitration, and that the respondents are not before the English court by choice. In such a situation the court should be very cautious in its approach both to the existence and to the exercise of supervisory and supportive measures, lest it cut across the grain of the chosen curial law."

40. Having dealt with the position under the Arbitration Act 1950, Lord Mustill then considered the position under s. 37(1) of the Senior Courts Act 1981. He held that it was possible in principle to claim an interim injunction in support of a foreign arbitration, but he again stressed the need to be cautious, at p. 367F:

> "…the court should approach the making of such an order with the utmost caution, and should be prepared to act only when the balance of advantage plainly favours the grant of relief."

41. He ultimately decided at p. 368B-G that it was not appropriate to grant an injunction on the facts of that case:

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

> and extra-judicial structure may well have been the right choice for the special needs of the Channel Tunnel venture. But whether it was right or wrong, it is the choice which the parties have made. The appellants now regret that choice. To push their claim for mandatory relief through the mechanisms of clause 67 is too slow and cumbersome to suit their purpose, and they now wish to obtain far reaching relief through the judicial means which they have been so scrupulous to exclude. Notwithstanding that the court can and should in the right case provide reinforcement for the arbitral process by granting interim relief I am quite satisfied that this is not such a case, and that to order an injunction here would be to act contrary both to the general tenor of the construction contract and to the spirit of international arbitration."

42. As set out below, it is apparent from the Departmental Advisory Report ("the DAC Report") and the Supplementary Departmental Advisory Report ("the Supplementary DAC Report"), which preceded the Arbitration Act 1996, that ss. 2(3) and 44 were enacted in order to address the decision in *Channel Tunnel* and to permit the grant of interim relief in support of foreign arbitrations. In the light of the decision in *Ust-Kamenogorsk* that those provisions do not encompass ASIs, it must be concluded that the court's power in relation to ASIs did not alter with the passage of the Arbitration Act 1996. Lord Mustill's comments therefore remain entirely apposite, in the context of ASIs.

The DAC reports

43. It appears from the DAC reports that the draft bill from which the Arbitration Act 1996 emerged had a clause 2(3) but not a separate clause 2(4). The main DAC report dealt with the original clause 2(3) as follows:

> "25. Subsection (3) concerns the powers of the court to support the arbitration by staying proceedings brought in breach of an agreement to arbitrate, by compelling the attendance of witnesses, by granting those forms of interim relief which are set out in Clause 44, and by enforcing the award at common law by summary procedure. Such powers should obviously be available regardless of whether the seat of the arbitration is in England and Wales or in Northern Ireland, and regardless of what law is applicable to the arbitration agreement or the arbitral proceedings. Since we have used the expression "whatever the law applicable…", it follows that Clause 2(3) is in no way restricted by Clause 2(1). It will be noted that in extending the power of the court to grant interim relief in support of arbitrations to arbitrations having a foreign seat we have given effect to our recommendation that section 25 of the Civil Jurisdiction and Judgments Act 1982 should be extended to arbitration proceedings. It should be appreciated that Rules of Court will have to be amended to give proper effect to the extension of the court's jurisdiction in Clause 2(3) (*i.e.* so as to allow service out of the jurisdiction in cases where it is necessary). Subsection (4) enables the court to refuse to exercise its power in such cases, where the fact that the arbitration has a foreign seat makes it inappropriate to exercise that power."

44. The supplementary DAC report said a little more:

> "15. Section 2(3) extends the power of the court to grant interim relief in support of arbitrations with a foreign seat, thereby giving effect to section 25 of the Civil

> Jurisdiction and Judgments Act 1982, as was intended by the original Clause 2(3)(b). The power of the court to exercise these powers is restricted in the last part of this section to appropriate cases. There may well be situations in which it would be quite wrong for an English court to make an interim order in support of a foreign arbitration, where this would result in a possible conflict with another jurisdiction.
>
> 16. Section 2(4) deals with those cases where a seat has still to be designated or determined, but where recourse to the court is necessary in the meantime. For example, an arbitration agreement may provide that the tribunal, once constituted, will designate the seat of the arbitration. The agreement may also provide that any arbitration must be commenced within a specified time period. If that time period is exceeded, could a party make an application to the English Court pursuant to section 12 of the Act for an Order extending time for the commencement of proceedings (*e.g.* in order that a seat may be designated)? See, *e.g. International Tank & Pipe S.A.K. v. Kuwait Aviation Fuelling Co. K.S.C.* [1975] Q.B. 224 (CA). Clearly this would not be possible under section 2(1), as long as the arbitration was without an English or Northern Irish seat. It was our view, however, that the English court should be able to exercise supportive powers if there is a sufficient connection with England and Wales or Northern Ireland such that this is appropriate (*i.e.,* the requirement in section 2(4)(b)), and if there will be no clash with a foreign jurisdiction. For example, there will be cases where it is extremely likely that once a seat is designated, that seat will be England and Wales or Northern Ireland.
>
> 17. Section 2(4) therefore gives the English court powers where that court is satisfied, as a matter of English law, that the arbitration in question does not have a seat elsewhere. As long as there is no seat elsewhere, there could be no possible conflict with any other jurisdiction.
>
> 18. Both sections 2(3) and 2(4) are based on a very clear policy: the English court should have effective powers to support an actual or anticipated arbitration that does not fall within section 2(1). However, such powers should not be used where any other foreign court is already, or is likely to be, seized of the matter, or where the exercise of such powers would produce a clash with any other more appropriate forum."

45. It is apparent from paragraphs 15 and 18 of its supplementary report that the DAC considered that it would not be appropriate for the English court to grant relief in the context of an arbitration with a foreign seat if to do so might give rise to a "conflict" or "clash".

The additional authorities

46. SQD's counsel pragmatically acknowledged that the fact that the seat of the arbitration in this case is outside the jurisdiction is a novel feature. He told me that, like me, he is not aware of any case where an ASI has been granted in the context of an arbitration with a foreign seat. However, at my invitation, he considered a number of cases where ASIs were refused and/or where the reservation at the end of s. 2(3) of the Arbitration Act 1996 was considered.

47. Most of the cases where an injunction has been granted under s. 44 of the Arbitration Act 1996 in support of a foreign arbitration concerned freezing orders, where either the defendant or the assets in question were situated within the jurisdiction. In most such instances, it is fairly obvious why it was "appropriate" for this court to grant an injunction. Most such cases therefore shed no real light on the issues that arise in this case and were not raised either by me or by SQD.

48. The cases on which SQD's counsel addressed me were as follows (in chronological order).

Econet Wireless

49. In *Econet Wireless Ltd v Vee Networks Ltd* [2006] EWHC 1568 (Comm), the claimant sought an injunction to restrain the sale of shares in a company incorporated in Nigeria. The injunction was granted at a hearing that took place without notice to the defendant, where the judge was told that the dispute fell within an agreement providing for arbitration in London. A few days later, following a hearing at which the defendant was represented, Morison J concluded that this was incorrect and that the arbitration clause should be understood as providing for arbitration in Nigeria. He then said:

> "17. The judge should have had his attention drawn to the difference between this court exercising its jurisdiction under section 44 when an English arbitration is in being or about to be in being, and the use of the court's exceptional powers under section 44 where the seat of the arbitration is elsewhere. If, in this case, there was no good arguable case that there was an English arbitration clause, then there was no justification, in my judgment, for an application to this court under section 44 of the Act, and none was advanced to the judge. What counsel submitted was as follows:
>
> > "Even if the vendors are correct the court can still grant an injunction under section 44 in support of a foreign arbitration (see section [2(3)(b)] [the reference was left blank] of the Arbitration Act). In the circumstances, if the court is otherwise minded to grant the injunctions
> > sought, it should still exercise its discretion in favour of granting the injunction given that two of the three relevant agreements specify a London arbitration and these are the most recent and most likely to be the ones that govern the situation."
>
> 18. With respect to counsel, who was no doubt working hard under pressure of time, what is said in this quotation will not do. The assumption made is that the vendors are correct in saying that any dispute must be referred to Nigerian arbitrators; yet the court is being asked to make an order because the two London arbitration agreements are ''most likely to be the ones that govern the situation''. That is not a reason for making an order in support of a foreign arbitration; that is a reason for saying the arbitration is domestic and not foreign.
>
> 19. Absolutely no reason is advanced in support of a proposition that the English court should make an order in support of a Nigerian arbitral process and there is no such reason that can now be advanced. In other words, unless Econet could show a good arguable case for arbitration in London, the court's powers under section 44 could not be invoked. The judge may well have been misled into

> thinking that it did not matter who was right about the location of the seat of the arbitration because of the statutory provisions to which counsel had drawn attention. In fact, none of the respondents had or have any connection with this country and had the long arm reach of section 44 been invoked the first question would have been: ‘‘why are you asking for an order from this court?’’ In short, to re-phrase counsel’s submission, ‘‘‘if the vendors are correct’’ [that the arbitration clause comes from the SHA] the court cannot still grant an injunction under section 44 because there is no basis upon which it could properly exercise such jurisdiction’’. English law is not the procedural law of the Nigerian arbitration and nor are there assets here. As Mr Brindle QC submitted on behalf of the respondents, ‘‘The natural court for the granting of interim injunctive relief must be the court of the country of the seat of arbitration, especially where the curial law of the arbitration is that of the same country’’. I agree.”

50. Morison J therefore discharged the injunction. This judgment has been cited in a number of subsequent cases, which similarly consider the question whether it is appropriate or inappropriate to grant an injunction in the context of a foreign arbitration by reference to what connections the case has with this jurisdiction.

Mobil Cerro Negro

51. In *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm), a freezing injunction was sought in support of an ICC arbitration in New York. Walker J was particularly troubled by the fact that there was no real evidence that the defendant had any assets within the jurisdiction; because this meant that there was not a sufficient connection with this jurisdiction for it to be appropriate to grant an injunction, if the case had not been one involving an arbitration (see at [119]).

52. He then considered the significance of the fact that it was an arbitration case, from [120]. The claimant suggested that under s. 44(3) of the Arbitration Act 1996, no connection with the jurisdiction was required (unless the case was subject to s. 2(4) of the Arbitration Act 1996). He rejected this in the passage from [122].

53. In doing so, he noted at [123] the caution urged on the court by Lord Mustill in *Channel Tunnel*, where s. 44 of the Arbitration Act 1996 did not apply.

Charlbury McCouat International

54. In *Charlbury McCouat International v Personal Agreement Foils Ltd* [2010] 2050 (TCC), the relief sought was the appointment of an arbitrator under s. 18 of the Arbitration Act 1996. This arose in the context of a contract for plant to be dis-assembled in the Netherlands and re-assembled in India. The contract provided for arbitration but left it unclear what the governing law was or where the arbitration should be held. The defendant appeared and suggested that it might ask the court in India to appoint an arbitrator.

55. This was not a case under s. 2(3) of the Arbitration Act 1996, but one under s. 2(4). One of the issues arising therefore was whether there was a sufficient connection with England and Wales under s. 2(4)(b) that it was appropriate for the English court to act under s. 18, even though no seat had been designated or determined. Ramsey J’s main

concern was the possibility of a 'clash' arising if the English court were to act under s. 18 of the Arbitration Act 1996, but the seat were in a different jurisdiction.

56. In the event, Ramsey J was persuaded that the risk of a clash was limited and that the matter had a sufficient connection to England and Wales for it to be proper for him to act under s. 18. He held that the governing law of the contract and of the agreement to arbitrate was probably English law and that the arbitration therefore was likely to be held in Europe, possibly in England, but not in India. On this basis he decided that there was no risk of a conflict between his appointment and an appointment by the court in India, because an Indian seat was unlikely. On these facts, he held that the fact that the governing law was English gave the case a sufficient connection to England for the purposes of s. 2(4).

57. Ramsey J cited paragraphs 16 to 18 of the supplementary DAC report, then continued:

> "21. Those provisions indicate that there must not be a clash with a foreign jurisdiction of the type there would be if there is a seat of arbitration elsewhere. The court therefore has to consider where the seat of the arbitration is likely to be. In many international arbitration cases one party may apply to a court in one jurisdiction and the other party to a court in another jurisdiction. In my judgment, that, in itself, is not the type of clash which the DAC report had in mind. Rather, the principle is that a party should not generally bring proceedings in relation to an arbitration except in the courts of the jurisdiction of the seat of arbitration: see *Channel Tunnel Group v Balfour Beatty Ltd* [1993] AC 334 at 357H and 368B-C where the application should have been made to the Belgium court as Belgium was the seat of the arbitration."

58. Ramsey J then said, at [22]: "… there will be sufficient connection if the proper law of the contract is English law." For this proposition, he relied on the decision of the Court of Appeal in *International Tank & Pipe SAK v Kuwait Aviation Fuelling Co KSC* [1975] QB 224, referred to in paragraph 16 of the supplementary DAC report.

59. That case concerned an application to extend the time for commencement of an arbitration under the Arbitration Act 1950, in circumstances where (i) the seat of the arbitration was to be designated by the ICC and this had not yet occurred, (ii) the contract and agreement to arbitrate were subject to English law, (iii) the Court of Appeal held that the procedural law of the arbitration might be the law of Kuwait (or some other non-English law). The Court of Appeal held that the English court could nevertheless extend time under the English Arbitration Act 1950, on the basis that, until the arbitration had actually commenced, the (foreign) procedural law was not relevant (per Lord Denning MR at p. 233E): "that procedural law does not take effect until the arbitration has actually started, that is to say, not until the arbitrator has been properly appointed and is able to rule upon the procedure to be adopted in the arbitration."

60. This reasoning is comprehensible in the context of a case where the seat was not designated and there was not yet a seat or even a putative seat, nor (therefore) any identifiable curial law. However, it is not easily translated to a case such as the one before me, where the parties have specifically chosen a seat in Paris and where the request for arbitration has already been made (i.e., the arbitration proceedings have been commenced even though no arbitrator has yet been appointed). To adopt Lord Denning MR's approach therefore would be disingenuous in this case, the more so following the

decision of the Supreme Court in *Ust-Kamenogorsk* and its deference to the significance of the putative seat even where no arbitration proceedings are on foot. There are, therefore, some important differences between s. 2(3) of the Arbitration Act 1996 and s. 2(4).

61. The decision in *Charlbury McCouat International* seems to me to have been correct, and I note that it was followed in *Crowther v Rayment* [2015] EWHC 427 (Ch). There was no risk of a clash with the courts of India (because that was not the seat); it was not suggested that any other court might be asked to appoint an arbitrator; if Ramsey J had not made an appointment under s. 18 of the Arbitration Act 1996, there would have been no arbitration at all, which would have frustrated the parties' mutual intention. However, I do not accept that *Charlbury McCouat International* is authority for the proposition that the fact that the governing law of the agreement to arbitrate is English law necessarily establishes a sufficient connection for the courts of England and Wales for purposes other than the appointment of an arbitrator under s. 18 Arbitration Act 1996 and within s. 2(4)(b).

62. SQD relied on *Charlbury McCouat International* as showing that the fact that the governing law of the agreement to arbitrate is English law makes it appropriate to grant an injunction in relation to an arbitration whose seat is outside the jurisdiction. However, Ramsey J's decision was not concerned with an ASI or any other kind of injunction, and it did not arise in a case where it was clear that the seat was in foreign jurisdiction and would not be in England and Wales.

63. I therefore do not accept that *Charlbury McCouat International* assists SQD in the manner that SQD suggested. However, it does emphasize the need to avoid an actual or potential conflict or clash (cf. the DAC reports) and sheds some light on what this means.

Malhotra v Malhotra

64. In *Malholtra v Malhotra* [2012] EWHC 3020 (Comm), the contract provided for English law and arbitration in Geneva. The application was for an ASI to restrain the defendant from pursuing proceeding in India.

65. Walker J was not persuaded that the subject-matter of the Indian proceedings was subject to the agreement to arbitrate, or that the pursuit of those proceedings was oppressive or vexatious. He rejected the application for an ASI on this basis.

66. Walker J approached the application on the basis that his power to grant an ASI arose under s. 37(1) of the Senior Courts Act 1981. It was suggested to him that s. 44 of the Arbitration Act 1996 might also be relied on but he did not give separate consideration to the relevance of the Arbitration Act 1996 (see at [64]). He appears to have treated the application as turning simply on the principles of The Angelic Grace (see at [65]).

67. It does not appear to have been suggested to Walker J that it was relevant that the seat of the arbitration was not in this jurisdiction. If it had, this would have made no difference to the outcome. At most, it would have provided an additional reason for reaching the same conclusion.

68. Walker J's judgment does not assist in this case.

U&M Mining Zambia Ltd v Konkola Copper Mines plc

69. In *U&M Mining Zambia Ltd v Konkola Copper Mines plc* [2013] EWHC 260 (Comm), the contract provided for arbitration in London. The application was for an ASI to restrain the defendant from pursuing proceedings for interim measures in Zambia.

70. The claimant contended that the contractual selection of England and Wales as the seat of the arbitration meant that only the courts of England and Wales could grant interim relief, on the basis that this was a principle of English arbitration law. This was an ambitious submission, given that ss. 2(3) and 44 expressly permit the English courts to grant interim injunctions in some circumstances where the seat is in a foreign jurisdiction. It therefore cannot be a principle of English arbitration law that only the courts of the country of the seat can grant interim relief.

71. Blair J referred to the UNCITRAL Model law (which does not suggest that only the court of the seat can grant interim relief) and to s. 2(3) of the Arbitration Act 1996. Then at [63] he referred to the decision of Morison J in Econet Wireless:

> "In *Econet Wireless Ltd v Vee Networks Ltd* [2006] EWHC 1568 (Comm) at [19], Morison J accepted as correct counsel's submission that the natural court for the granting of interim injunctive relief must be the court of the country of the seat of arbitration, especially where the curial law of the arbitration is that of the same country. *Russell on Arbitration* (23rd edn), para. 7-183 cites this case, adding that where the seat of the arbitration is abroad, the court will need a very good reason to exercise its jurisdiction under s. 44. I accept this as a correct statement of the law, noting however that it runs contrary to U&M's case, because it recognises that the power to grant interim relief is not confined to the court of the seat. What it shows, in my view, is that a party may exceptionally be entitled to seek interim relief in some court other than that of the seat, if for practical reasons the application can only sensibly be made there, provided that the proceedings are not a disguised attempt to outflank the arbitration agreement."

72. He therefore rejected at [64] the submission that only the court of the seat can grant interim relief.

73. Blair J then concluded at [70] to [72] that, because the interim relief being sought in that case (an order directing one Zambian company to refrain from excluding another Zambian company from a mine in Zambia) was an order that an English court could or would not make, there was no real risk of conflict between the English court and the Zambian court. Accordingly, he did not grant the ASI.

74. This must be right. Considering the facts of that case in mirror-image (arbitration in Zambia, mine and rival companies in England), the interim relief in question would have fallen clearly within s. 44(2)(b) and/or (c) of the Arbitration Act 1996 (preservation of evidence and/or inspection/preservation of property), and the fact that not only the companies but also the relevant evidence/property (i.e., the mine) were in England would have made the case an exceptional one (per *Econet Wireless*) and one with a sufficient connection to England (per *Mobil Cerro Negro*) for the English court to have considered it appropriate to grant an injunction, always subject to s. 44(3), (4) and (5).

Petrochemical Logistics Ltd v Axel Krueger

75. In *Petrochemical Logistics Ltd v Axel Krueger* [2020] EWHC 975 (Comm), the application was for a freezing injunction. Moulder J referred to Mobil Cerro Negro as authority showing that, in the absence of assets within the jurisdiction, there must be some other connection with this jurisdiction sufficient to justify the grant of an injunction (see at [50] and [51]).

76. Moulder J appears to have rejected a submission from the claimant that the connection to this jurisdiction did not have a high threshold (see at [52] and [58]). She said at [60] that an application should be made in the court of the seat and concluded at [61] that there was an insufficient connection with England and Wales.

The approach to ASIs in France

77. When I told SQD's counsel that I would find it helpful to know why SQD had not applied in France, I indicated that it was likely to be relevant to know whether it was possible for SQD to obtain an interim ASI from the court in France and, if not, why not. I had in mind three possible situations (while conscious that there might be others):

    i) It was possible to obtain an interim ASI from the court in France and there was no reason why SQD should not do so.

    ii) It was not possible to obtain an interim ASI from the court in France because ASIs or interim ASIs are not available from the French courts.

    iii) ASIs are available in principle in France, but it was practically difficult to obtain them on an interim basis, speedily and with the urgency required, especially during August.

78. Considering matters prospectively, before I had sight of SQD's evidence, I had in mind that everything would depend on the details that might emerge. However, in principle, I thought it might be unlikely to be appropriate for this court to grant an interim ASI in the first situation, but potentially appropriate in the third. In the second situation, it might be important to understand why such ASIs are not available from the French courts.

79. The evidence provided by SQD overnight on the approach to ASIs in France, consisting of a short statement from an academic – a Professor in Civil Law and Civil Procedure – and a further short statement from a French practitioner.

80. Both confirmed that it would not be possible to obtain an ASI in France. I found the statement from the Professor more informative. It states as follows (in translation):

> "The French civil procedure does not have any written or non-written rule authorising a state judge to order a litigant not to act before a court other than that seized by his opponent or to terminate the application made before a different judge.
>
> As a result, it is legally impossible for a French judge to issue such an injunction. For two reasons:

- on the one hand, the procedural tool enabling such an injunction to be granted is absent from the legal toolkit available for the national judge to guide the behaviour of litigants: the procedure for interim relief (*la procédure des référés*), which enables the French judge to order the measures he deems necessary in view of the situation at issue, is only a protective measure or a merely provisional solution to urgent situations, or situations where a solution is obvious. Further, it only allows injunctions to be issued in support of pre-existing obligations which, are not seriously contestable; the penalty payment procedure (*l'astreinte*), which consists of ordering the litigant to pay a sum of money (which would increase for as long as he refuses to comply with the order), can only Agreement the performance of lawful obligations; this is precisely what the *anti-suit injunction* is not in French law;

- on the other hand, in France, such an injunction would contradict the fundamental principle of freedom of legal action, as well as the constitutionally recognised limitation on the general powers of the judge, who is not entitled to diminish the legal capacity of other judges - *a fortiori* if they are foreign - to assess their own competence. Any contravention of this legal impossibility would constitute an excess of power on the judge's part, which would have to be sanctioned on appeal if a French judge were to contravene it.

This difference with English law stems, at its core, from a historical difference in the two systems' understanding of the respective roles of the judge and the law, written law and judicial equity, in the resolution of disputes and, beyond that, in the legal regulation of social relationships. In France, since the revolutionary period, judges have been responsible for putting the law into practice, not for creating the law on their own authority, let alone settling disputes or the difficulties they give rise to according to their own sense of fairness, even if the law is silent. For this reason, the rules of civil procedure were conceived in a spirit of mistrust as a remedy against judicial arbitrariness: the civil procedure rules are therefore written down and traditionally conceived in a very objective way. Things are changing today, but the difference in approach with English law remains fundamental.

Thus, the fight against *forum shopping malus*, for which English law has made the *anti-suit injunction* an effective instrument under the control of the judge, is sought in France in the legal provisions which organise in particular the exceptions of *litispendence* and *connexity*, which naturally offer, by virtue of their very objectivity, less possibilities of neutralizing fraudulent behaviour.

European Union law, which takes precedence over national law in France, only reinforces this difference in approach, the Court of Justice of the European Union ruled in its famous *West Tankers* judgment of 10 February 2009 (case C-185/07) that the use of injunctions by the courts of a State infringes the legitimate trust between courts within the European judicial area when it prevents each court from assessing its own jurisdiction. So much so, that a recent ruling by the Paris Court of Appeal gave the interim relief judge the power to neutralise such an injunction, in the name of international public policy, even outside the application of European law, when its effect is to interfere with French jurisdictional competence (CA Paris, Pôle 5, 16ème ch., March 3, 2020, n°

> 19/21426, Lexbase: A90183G4). It is only when the purpose of an injunction duly issued abroad is to ensure the performance of a lawful agreement that its effectiveness can and must be recognised in France, insofar as the parties have then been able to freely dispose of the disputed right, and because it then finds its basis in the applicable procedural law."

81. It therefore appears that it would not be possible for SQD to obtain an interim ASI from the court in France, because ASIs are simply not available in France. This case therefore falls into the second category that I had in mind, making it relevant to know why an ASI will not be granted in France.

82. My understanding from the evidence is that this is not because the grant of ASIs is an emerging doctrine under French law (cf. the incremental acceptance of freezing injunctions: English law was a relatively early adopter, making it natural and often helpful for the English courts to grant worldwide freezing injunctions in support of litigation in jurisdictions where there was no conceptual opposition to freezing injunctions, but the jurisprudence had not yet developed). It is, rather, that French law has a philosophical objection to ASIs.

83. I reach this conclusion on the basis of the second of the two reasons given by the Professor – i.e. "… - on the other hand". ASIs are not in the French legal toolkit, but this is not a mere omission. It is a deliberate choice. French law considers ASIs to "contradict the fundamental principle of freedom of legal action." ASIs are a tool that French law does not like.

84. Counsel for SQD suggested that French law objects to French judges granting ASIs but has no objection to foreign judges doing so. This is not how I understand the evidence submitted to me by SQD. On the contrary, the final paragraph that I have set out indicates that, while the French courts will not issue an ASI, they will issue an anti-ASI: i.e., an injunction that seeks to strike down or restrain an ASI granted by a non-French court. It is difficult to think of a clearer way of demonstrating an objection to ASIs granted by foreign judges.

85. I further understand that the only situation in which French law will accept an ASI granted by a non-French court is if it has been "duly issued abroad" in the sense that it "finds its basis in the applicable procedural law". Thus, if a non-French court has substantive jurisdiction and the procedural law applicable to the matter is the procedural law of that non-French court, under which an ASI can properly be granted, the ASI will be recognised in France.

86. The facts of this case do not fall within that paradigm. The seat of the arbitration being Paris, the procedural law that the parties have agreed upon is French law. I therefore understand this to be a case where the French court would not enforce an interim ASI granted by this court, were I to grant one. On the contrary, if requested to do so in its capacity of court of the seat of the arbitration, the French court might well grant an anti-ASI.

ICC Rule 29.7

87. The ICC Rules make provision for arbitral relief to be available even before the tribunal has been appointed, in urgent situations. The relevant provision is ICC Rule 29, which

provides for emergency measure and the appointment of an emergency arbitrator. I was told that the ICC emergency measures are not available without notice, but that the ICC Rules do not prevent a party from seeking relief from a court. SQD referred to ICC Rule 29.7, providing as follows:

> "The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat."

88. SQD relied on this provision, and on the fact of the parties' agreement to ICC arbitration (including this Rule), as indicating that the parties accepted that either of them might apply to this court for interim relief such as an ASI.

89. I do not agree. Rule 29.7 accepts that there may be an application to a "competent judicial authority", but it does not confer judicial competence on the courts of this jurisdiction. It must be implicit in Rule 29.7 that the courts of the seat will be competent and will have the necessary jurisdiction (subject to the law and procedure of the relevant country – here, France). However, whether this court has competence depends on the normal questions that affect its jurisdiction. Where the defendant is out of the jurisdiction and the agreement is subject to English law, this includes the question whether England and Wales is the proper forum in which to bring the claim: CPR 6.37(3).

90. I therefore do not see that ICC Rule 29.7 advances matters either way, for the purposes of SQD's application. I note that similar points made under earlier versions of Rule 29.7 did not impress Lord Mustill in *Channel Tunnel* (see at p. 368B) or Walker J in *Mobil Cerro Negro* (see at [121] ff.).

Conclusion

91. Ultimately, SQD had two main points.

92. The first was that the agreement to arbitrate is subject to English law, and the English courts have an interest in securing the performance of contracts that are subject to English law. I accept this in principle, but the English courts will not act in every case where the relevant agreement is subject to English law. This is obvious (i) from the fact that CPR 6.36 does not give the English courts jurisdiction in every case concerning a contract subject to English law – it is always necessary for England and Wales to be the proper forum; and (ii) from the fact that *The Angelic Grace* acknowledges that there may be exceptional cases where as an ASI should not be granted even though the foreign proceedings are in breach of the agreement to arbitrate. Indeed, *Enka* at [177] suggests that it should make no difference if the governing law is English or some other law – which may imply that the seat is more important than the governing law.

93. The second was that the fact that an ASI cannot be obtained in France makes this court the proper forum. SQD said that the availability of ASIs in England and Wales was a legitimate juridical advantage – cf. *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. However, this begs the question whether it is right to consider the juridical advantage that English jurisdiction offers legitimate, in circumstances where the law of the seat of the arbitration takes a different view.

94. I have in mind Lord Mustill's repeated urging in *Channel Tunnel* of the need to be cautious. I also have in mind the concerns of the DAC report to avoid any conflict or clash, in particular a conflict or clash with the court of the seat of the arbitration. In the light of the evidence that I have received in relation to French law, I consider that England is not the proper forum and that this court should not grant the interim ASI and AEI that SQD seeks.

95. I have reached that view in two complementary ways. The first is that to grant an interim ASI would be inconsistent with the approach of the courts of the seat of the arbitration and (therefore) with the curial law that applies. This court should have deference to the approach of French law. To do otherwise would or at least might give rise to a conflict or clash.

96. The second is that the court should also have deference to the objective intention of the parties. The parties deliberately chose Paris as the seat of the arbitration. They must be taken to have done so knowing that the French courts will not grant ASIs. I do not accept as realistic the suggestion that the selection of English law as the governing law indicates an intention that there might be an application to this court, despite the express selection of a French seat.

97. In some countries, ASIs are readily available to support arbitration. In others, they are not. Each country is free to form its own policy on this point. Similarly, contracting parties are free to arbitrate where they like. If the parties choose to arbitrate in a country such as France, where the policy is that ASI will not be granted and will not generally be enforced, this court should acknowledge the significance of these circumstances. Vive la différence.

98. It is generally right for the courts of England and Wales to support arbitration in this jurisdiction. It is not the job of the courts of England and Wales to support arbitration in France by granting ASIs, given the fundamentally inconsistent approach in France on whether such support is appropriate or desirable. Indeed, it seems that the support of this court would be unwelcome.

99. In reaching this conclusion, I note that Lord Mustill appears to have held similar views: see *Channel Tunnel* at p. 368E-G.

100. The point that has made me pause longest is that based on *Spiliada* – i.e., that it would be a virtue, not an insult, for this court to step in where the French courts cannot. The best way of developing that point (I think) would be that, while it is true that the parties have chosen French law as the curial law/law of the seat, they have also chosen to adopt the ICC Rules – which (as I understand it) permit the arbitrators to grant conservatory and interim measures, including ASIs. The French courts cannot grant ASIs, but the arbitrators can (including an emergency arbitrator). Accordingly, even if French law

objects to ASIs, the parties do not. All SQD is seeking is an interim ASI to maintain the status quo until the ICC arbitrators can take over and grant their own ASI.

101. This approach assimilates an ASI granted by this court to one granted by the arbitrators, on the basis that the injunction I am asked to me is an anticipatory and temporary version of the relief that will in due course be given by the arbitrators.

102. I consider this a false equivalence. There are real differences between orders granted by courts and those made by arbitrators – which is why parties are often astute to ask for relief from the court, where they can find a way to justify this. Above all: court orders are backed by the coercive powers of the state; arbitrators' orders are not.

103. This is exemplified by the draft order presented to me by SQD. Prominent on its front page is a penal notice, which threatens the recipient with being held in contempt of court and being fined or having assets seized. The ultimate penalty is imprisonment. This is exactly what the French system regards as unacceptable. The fact that the parties have agreed to the arbitrators being able to make orders for interim measures does not mean that they have implicitly accepted the availability of a court order such as that presented to me in draft.

104. Ultimately, therefore, I therefore am unmoved by this point and by SQD's other arguments. SQD's application is dismissed.