Neutral Citation Number: [2009] EWHC 957 (Comm)

Case No: FOLIO 1588 OF 2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2009

Before :

THE HONOURABLE MR JUSTICE COOKE

- -

Between :

(1) ROGER SHASHOUA	**Claimants**
(2) RODEMADAN HOLDINGS LIMITED	
(3) STANCROFT TRUST LIMITED	
- and -	
MUKESH SHARMA	**Defendant**

- -
- -

Mr D Wolfson QC (instructed by **K&L Gates LLP**) for the **Claimant**
Mr T Charlton QC (instructed by **Balsara & Co**) for the **Defendant**

Hearing dates: 29 and 30 April 2009

- -

Judgment

Mr Justice Cooke :

Introduction

1. The claimants seek an order pursuant to section 37(1) of the Supreme Court Act 1981 and/or section 44(4) of the Arbitration Act 1996 restraining the defendant from bringing or participating in any proceedings outside the jurisdiction that challenge, impugn or have as their object or effect the prevention or delay in enforcement by the claimants of an interim arbitration award (the Costs Award) and various orders of this court in connection therewith. On 30th January 2009 Andrew Smith J made an order to this effect on the claimants' application without notice to the defendant and by consent that order has been continued until the *inter partes* hearing which took place on 29th and 30th April 2009.

2. Following the grant of the interim injunction on 29th January 2009, the claimants wrote to the tribunal inviting the tribunal to determine whether it would hear the claimants' application for interim relief or whether it would grant permission for the claimants to pursue the application in this court. Following representations by both parties, the tribunal wrote a letter of 11th February 2009 giving its permission to the claimants to pursue the application in the court and setting out the reasons why it did not consider itself able to act effectively in the circumstances. It is not disputed that

LANBUK.COM LANBUK SIERRA LEONE

the requirements of section 44 of the Arbitration Act for the court to exercise its supervisory jurisdiction are met.

3. In order to understand the content of the anti suit injunction originally granted and now sought on a perpetual basis, it is necessary to explain the history of an arbitration in which a final award is still awaited and the series of applications which have been made in England and India.

The Shareholders Agreement

4. By a Shareholders Agreement dated 1st July 1998 the first claimant and the defendant agreed to set up a joint venture using a public limited company incorporated in India for the purpose of constructing and running an exhibition/convention/seminar centre in India. The Shareholders Agreement contained provisions relating to the 50/50 shareholdings to be held by the first claimant and the defendant in the joint venture company, about composition of the board and other matters relating to the business to be carried out. Clause 17.6 provided that the agreement was to be governed by the laws of India and clause 14 was an arbitration clause which provided for arbitration to be in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris. Clause 14.2 provided for arbitration proceedings to be conducted in the English language and clause 14.4 provided that "the venue of arbitration shall be London, United Kingdom". There was a further provision in clause 14.5 that each party should bear its own costs in connection with such an arbitration. The agreement further provided that English would be used in all correspondence and communications between the parties.

5. There is no dispute that the governing law of the Shareholders Agreement is Indian law. There is a dispute between the parties as to the law of the arbitration agreement since the defendant submits that it is Indian law and the claimant maintains that it is English law. There is now, although there was not at an earlier stage, a similar dispute in relation to the curial law of the arbitration which is significant in the context of deciding where a challenge can be mounted to any arbitration award.

The Arbitration

6. On or about 21st May 2005 the claimants made an application to the High Court in New Delhi seeking "interim measures of protection" under section 9 of the Indian Arbitration and Conciliation Act 1996, prior to the institution of arbitration on 26th of that month. The protection sought related to inspection of the joint venture company's books of account, the stopping of board meetings, the prevention of the use of the joint venture company's bank accounts and of disposal of its assets. In its application the claimants stated that the arbitration agreement was governed by English law and the arbitration was to be held in London as the seat, but because of the domicile of the second respondent to the application and the location of the company records, the application for interim protection would lie under Indian law. There is an issue in Indian law as to whether this application by the claimants amounts to a submission to the jurisdiction of the Indian courts for all purposes connected with the arbitration.

7. On 26th May 2005 the claimants filed a Request for Arbitration in accordance with clause 14 against the defendant and 2 further entities, one of which has played no part in the arbitration proceedings and the other of which was the joint venture company which was the subject of the dispute. The arbitration panel consists of 3 lawyers, Mr Harish Salve SC (India), Mr Andrew Onslow QC (England) and Mr David A R Williams QC (New Zealand), who was the chairman. Hearings on the merits took place in November 2007, March 2008 and May 2008. According to the letter from

LANBUK.COM LANBUK SIERRA LEONE

the arbitrators dated 11th February 2009, the arbitrators are in the course of writing their award.

8. On 12th July 2005 the second respondent in the arbitration (a company associated with the defendant to which shares in the joint venture company had been issued) applied to the Delhi High Court for a declaration that there was no valid arbitration agreement between it and the other parties to the arbitration. That application was rejected by the High Court on 20th December 2005 but was the subject of an appeal on 21st February 2006 which has been much delayed. It appears that appeal has now been heard but judgment has not yet been handed down. Meanwhile the arbitration progressed against the first respondent (the defendant) but not against the second respondent.

The History

9. Following the commencement of the arbitration the defendant and the joint venture company raised a challenge to the jurisdiction of the arbitral tribunal which the panel heard as a preliminary issue with hearings in July and October 2006. By an award dated 12th February 2007, the tribunal rejected the jurisdictional objections, confirmed the existence of the Shareholders Agreement and the arbitration agreement within it, confirmed the parties to the arbitration agreement and found that the first defendant was not authorised to retain legal representatives to act for the joint venture company.

10. On 20th October 2007 the defendant applied to the tribunal for permission to apply to the English court to use court procedures to compel the production of documents and oral evidence from third parties. The tribunal dismissed that application on 26th March 2007 and ruled that the claimants were entitled to their costs of the defendant's application.

11. As is usual, the ICC Court had fixed the advance on costs in the arbitration proceedings. Although the claimants paid their 50% share, as the defendant did not, the claimants did so in order to cover the position as required by the ICC Rules. On 27th June 2007 the defendant consented to an award that he pay the US$140,000 sum which the claimants had paid as the defendant's share of the advance.

12. On 15th November 2007 the tribunal made an award dealing with the costs of these matters, namely the hearing of the jurisdictional challenge, the advance on costs and the defendant's disclosure application. In this award (the Costs Award) the defendant was ordered to pay $140,000 and £172,373.47. The defendant has failed to make any payment at all in respect of this award. It will be recalled that under clause 14.5 of the Shareholders Agreement, each party was to bear its own costs but the defendant accepted and the panel awarded costs on the basis that section 60 of the English Arbitration Act prevented such an agreement from being valid, unless it was made after the dispute in question had arisen. The panel thus, with the acceptance of the defendant, applied the English Arbitration Act to the arbitration.

13. On 4th December 2007 the Commercial Court gave leave to the claimant to enforce the Costs Award against the defendant as if it were a judgment.

14. On 20th December 2007 the defendant sought to file a petition in the High Court of Delhi applying for an order under section 34(2)(iv) of the Indian Arbitration and Conciliation Act 1996 (IACA), asking that the Costs Award be set aside. The claimant became aware of this in January 2008 and the case number in the Delhi High Court is OMP4 of 2008.

LANBUK.COM
LANBUK
SIERRA LEONE

15. By an arbitration claim form dated 11th January 2008 the defendant sought to challenge the Costs Award in the Commercial Court under section 68 and 69 of the Arbitration Act 1996 but because the claim was made outside the requisite 28 day period, the claim form included an application under section 70(3) of the Arbitration Act for an extension of time. On 8th February 2009 Andrew Smith J dismissed the defendant's application for an extension of time and the section 68 and 69 applications with it, ordering that the defendant pay the claimants' costs of the application which he summarily assessed at £22,000.

16. Also on 11th January 2008 the defendant applied to the Commercial Court for the order giving leave to enforce the Costs Award to be set aside, but since this depended upon the sections 68 and 69 applications which had been dismissed, by a consent order dated 18th February 2008, that application was also dismissed with a provision that the defendant would pay the claimants' costs in the sum of £1,874.

17. Following the obtaining of a freezing order in England by the claimants in respect of sums owing by the defendant, an Interim Charging Order was obtained on 5th March 2008 against the interest of the defendant in a house in Hounslow in the UK which was owned by the defendant. On 16th May 2008 the defendant applied to the English court for an order that the interim charging order be set aside but this was dismissed on 10th June 2008 and a final charging order was made in the sum of £324,077.05 with interest and costs to be added. A 6 month stay of that charging order was obtained however because the defendant's representatives submitted that time was required to sell the house. Following a short extension to allow the matter to be argued, on 6th January 2009 the stay was lifted and the final charging order has been enforceable since that time.

18. In the meantime the defendant had been taking further steps in India. On 24th March 2008 the defendant filed an application before the Delhi High Court for an order restraining the claimants from taking any steps to enforce the Costs Award but the application was refused by the Delhi High Court on 26th March 2008. Against this the defendant appealed on 10th April 2008 but that appeal was dismissed on 21st July 2008.

19. On 29th November 2008 the defendant filed an application with the ICC Court seeking the removal of Mr Salve as arbitrator and annulment of all orders and awards rendered by the tribunal on the basis of an alleged failure by him to make proper disclosure under Article 7 of the ICC Rules. That was dismissed by the ICC Court on 22nd January 2009, but on 26th January 2009 the defendant's lawyer Mr Kapur wrote to the ICC Secretariat, referring to that decision and asking for further information which was said to be necessary for the defendant's "further recourse", an intimation that proceedings might be taken.

20. A number of hearings took place in India in relation to the defendant's section 34 IACA petition, launched back in December 2007 (see paragraph 14 above) to set aside the Costs Award, the application to similar effect in England having been dismissed as brought out of time. In these hearings relating to the section 34 petition before the Delhi High Court, the claimants have appeared by counsel but there are issues of fact and Indian law as to what was said at those hearings and whether the claimants reserved their position on jurisdiction or whether their appearances amounted to a submission to the Indian courts. The claimants maintain that the Delhi High Court has so far refused to accept the petition and has not "issued notice" to the claimants of it so that they have not been called on formally to respond to it. As with the issue relating to the 2005 section 9 Interim Measures of Protection Application made by the claimants in India, there is conflicting evidence before me both as to fact

LANBUK.COM LANBUK SIERRA LEONE

and as to Indian law which I cannot determine on the basis of evidence on paper. Any determination of the factual issues which arise and the issues of Indian law requires oral evidence and testing of it by cross-examination before I could conclude that one or more of the Indian lawyers who give evidence as to the facts and one of the retired Judges who give evidence of Indian law is wrong.

21. On 22nd January 2009 following the lifting of the stay of the charging order in England, the defendant filed an application before the Delhi High Court, seeking an order directing the claimants not to take any action to execute the charging order over the house in Hounslow, pending the final disposal of the section 34 petition in Delhi seeking to set aside the Costs Award.

22. Following the grant of the interim anti suit injunction by Andrew Smith J in the Commercial Court in this country on 29th January 2009, the defendant on 2nd February 2009 filed an application before the Delhi High Court in relation to his earlier application of 22nd January 2009, which had sought an order directing the claimants not to take any action to execute the charging order on the house in Hounslow. This further application sought to hold the earlier application in suspension, pending any further applications the defendant might make in the light of his contention that the Indian courts had jurisdiction to hear challenges to awards in the arbitration.

The Seat of the Arbitration/Applicable Curial Law

23. It is common ground between the parties that the basis for this court's grant of an anti suit injunction of the kind sought depends upon the seat of the arbitration. The significance of this has been explored in a number of authorities including in particular ABB Lummus Global v Keppel Fels Ltd [1999] 2 LLR 24, C v D [2007] EWHC 1541 (at first instance) and [2007] EWCA CIV 1282 (in the Court of Appeal), Dubai Islamic Bank PJSC v Paymentech [2001] 1 LLR 65 and Braes of Doune v Alfred McAlpine [2008] EWHC 426. The effect of my decision at paragraphs 23-29 in C v D, relying on earlier authorities and confirmed by the judgment of the Court of Appeal at paragraph 16 and 17 is that an agreement as to the seat of an arbitration brings in the law of that country as the curial law and is analogous to an exclusive jurisdiction clause. Not only is there agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration. Subject to the Front Comor argument which I consider later in this judgment, the Court of Appeal's decision in C v D is to be taken as correctly stating the law.

24. For this reason the parties focused initially on the issue of the seat of the arbitration provided for in the Shareholders Agreement.

25. The concept of the seat of an arbitration was known to English law prior to the 1996 Arbitration Act but section 3 of that Act set out a statutory definition as follows:-

> "3 The Seat of the Arbitration
>
> In this part "the seat of the arbitration" means the juridical seat of the arbitration designated –
>
> (a) by the parties to the arbitration agreement, or
>
> (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or

LANBUK.COM LANBUK SIERRA LEONE

(c) by the arbitral tribunal if so authorised by the parties,

Or determined in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."

26. The Shareholders Agreement provided that "the venue of arbitration shall be London, United Kingdom" whilst providing that the arbitration proceedings should be conducted in English in accordance with ICC Rules and that the governing law of the Shareholders Agreement itself would be the laws of India. It is accepted by both parties that the concept of the seat is one which is fundamental to the operation of the Arbitration Act and that the seat can be different from the venue in which arbitration hearings take place. It is certainly not unknown for hearings to take place in an arbitration in more than one jurisdiction for reasons of convenience of the parties or witnesses. The claimants submitted that in the ordinary way, however, if the arbitration agreement provided for a venue, that would constitute the seat. If a venue was named but there was to be a different juridical seat, it would be expected that the seat would also be specifically named. Notwithstanding the authorities cited by the defendant, I consider that there is great force in this. The defendant submits however that as "venue" is not synonymous with "seat", there is no designation of the seat of the arbitration by clause 14.4 and, in the absence of any designation, when regard is had to the parties' agreement and all the relevant circumstances, the juridical seat must be in India and the curial law must be Indian law.

27. In my judgment, in an arbitration clause which provides for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that the venue of the arbitration shall be London, United Kingdom does amount to the designation of a juridical seat. The parties have not simply provided for the location of hearings to be in London for the sake of convenience and there is indeed no suggestion that London would be convenient in itself, in the light of the governing law of the Shareholders Agreement, the nature and terms of that agreement and the nature of the disputes which were likely to arise and which did in fact arise (although the first claimant is resident in the UK).

28. The defendant relies upon the nature of the Shareholders Agreement, the provision for the proper law of the agreement to be that of India, the application of the ICC Rules and the Interim Measures Application made by the claimants in India as pointing to Indian law as, not only the curial law, but also that of the agreement to arbitrate. Furthermore reliance is placed on clause 14.5 of the Shareholders Agreement which provides that each party is to bear its own costs of the arbitration, which, on its face, is inconsistent with section 60 of the Arbitration Act. It is said that this conflict, when seen objectively, must militate against the application of English law to the arbitration and to the seat being London. In my judgment none of these matters will bear the weight which the defendant seeks to put upon them.

29. The defendant contends that the law of the agreement to arbitrate is Indian law, essentially because the proper law of the Shareholders Agreement is Indian law. As appears from the decided authorities however, although there have been dicta to this effect, recent decisions, where the focus has been on the seat of the arbitration and the agreement to arbitrate, establish that it is much more likely that the law of the arbitration agreement will coincide with the curial law. This does not therefore much assist the defendant and the argument that the nature of the Shareholders Agreement points to Indian law as the curial law is in reality no more than an argument that its nature points to Indian law as the substantive law of the Shareholders Agreement, which is in any event expressly provided. The submission on section 60 of the English Arbitration Act is a weak argument because it is most unlikely that the parties

LANBUK.COM LANBUK SIERRA LEONE

would have had that section in mind when agreeing the costs provision in the Shareholders Agreement. Moreover section 60 exists for the very reason that parties agree to English arbitration with clauses of this kind in their agreement. Clause 14.5 does not count for nothing in the sense that the arbitrators can take it into account but are not bound by it, as was accepted by the defendant in his submissions to the arbitrators and as reflected in the Costs Award. Moreover, there is in clause 14.1 reference to the possibility of an umpire which under the IACA is an impossibility, if Indian law is the curial law. Whilst the reference to arbitrator/umpire in that sub-clause is hardly a model of clarity, there is at least the possibility of an umpire in English law, even though the IACA require one or three arbitrators and, in this very case, the panel does consist of three arbitrators.

30. The two authorities relied on by the defendant, the Dubai Islamic Bank decision of Mr Justice Aikens and the Braes of Doune decision of Mr Justice Akenhead do not take the defendant's argument any further. In the Dubai Islamic case, there was no designation of any seat or venue at all. Having decided that there were no provisions indicating expressly or impliedly what law governed the arbitration agreement (in the governing Visa Regulations) or the arbitral procedure itself and that there was no specific reference to either the seat or the place of any arbitration under the Visa Regulations, the judge held that the seat had to be determined by the court at the date of commencement of the arbitration. He held that the location of the board meeting at which the appeal was heard was entirely adventitious, since it could have taken place in any number of places. Having weighed the various factors that are ordinarily taken into account in determining the proper law of an agreement, in looking for the law with which the Arbitration had its closest and most real connection, he concluded that this was California. The critical point was that the Visa Regulations which set up the dispute procedure appeared to contemplate that the appeal arbitral process would be handled through the Visa offices in California, but additional factors also supported that conclusion.

31. In the Braes of Doune decision, the EPC contract, under which the dispute arose, was governed by the laws of England and Wales and, subject to the arbitration clause, the contract provided that the courts of England and Wales were to have exclusive jurisdiction to settle any dispute arising out of or in connection with the contract. The arbitration clause provided for arbitration pursuant to the CIMA Rules and then stated in terms that "this arbitration agreement is subject to English law and the seat of the arbitration shall be Glasgow, Scotland". The CIMA Rules expressly referred to the Arbitration Act 1996 in many places. In looking therefore for the "juridical seat", the Judge searched for the jurisdiction which the parties are taken to have chosen to supervise the arbitration. Given the express references to English law as the law of the arbitration agreement itself and to the Arbitration Act, it is hardly surprising that the Judge found that there was a conflict between that and the reference to Glasgow as "the seat of the arbitration". As I pointed out at paragraph 26 in C v D and as the Court of Appeal accepted in paragraphs 22-26 in that case, it is rare for the law of the arbitration agreement to be different from the law of the seat of the arbitration. Mr Justice Akenhead was therefore persuaded that the reference to the "seat" of the arbitration was merely a designation of the place where the arbitration was to be held, whereas all the other references showed that the parties were agreeing that the seat and the curial law or law which governed the arbitral proceedings was that of England and Wales.

32. In Dicey, Morris and Collins on The Conflict of Laws, the authors at paragraph 16-035 state that the seat "is in most cases sufficiently indicated by the country chosen as the place of the arbitration. For such a choice of place not to be given effect as a choice of seat, there will need to be clear evidence that the parties…agreed to choose

LANBUK.COM LANBUK SIERRA LEONE

another seat for the arbitration and that such a choice will be effective to endow the courts of that country with jurisdiction to supervise and support the arbitration". Although the concept of the seat of the arbitration is a juridical concept and the legal seat must not be confused with the geographically convenient place chosen to conduct particular hearings, I can see no reason for not giving the express choice made in clause 14.4 full weight.

33. Whilst there is no material before me which would fully support an argument on estoppel, it is interesting to note that at an earlier stage of the history of this matter, the defendant had no difficulty in putting forward London as the seat of the arbitration. On 14th February 2006 the defendant's lawyers, when writing to the arbitral tribunal stated "the seat of the arbitration is London and the first respondent submits that the curial law of the arbitration is English law. That means the arbitration is governed by the Arbitration Act 1996". Further, when challenging the appointment of Mr Salve as an arbitrator, in its application to the ICC, the defendant said that "the fact that the present arbitration is an English seated ICC arbitration is undisputed. Accordingly ICC Rules shall be paramount in adjudicating the present challenge. Further, the curial seat of arbitration being London, settled propositions of English law shall also substantially impinge upon the matter. This position is taken without prejudice to the first respondent's declared contention that the law of the arbitration agreement is Indian law, as also that the substantive law governing the dispute is Indian law".

34. "London arbitration" is a well known phenomenon which is often chosen by foreign nationals with a different law, such as the law of New York, governing the substantive rights of the parties. This is because of the legislative framework and supervisory powers of the courts here which many parties are keen to adopt. When therefore there is an express designation of the arbitration venue as London and no designation of any alternative place as the seat, combined with a supranational body of rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion is, to my mind, that London is the juridical seat and English law the curial law. In my judgment it is clear that either London has been designated by the parties to the arbitration agreement as the seat of the arbitration or, having regard to the parties' agreement and all the relevant circumstances, it is the seat to be determined in accordance with the final fall back provision of section 3 of the Arbitration Act.

The Front Comor Argument

35. Mr Timothy Charlton QC on behalf of the defendant submitted that the landscape of anti suit injunctions had now been changed from the position set out by the Court of Appeal in C v D by the decision of the European Court of Justice in the Front Comor – Case C185/07 ECJ [2009] 1 AER 435. There, an English anti suit injunction to restrain an Italian action on the grounds that the dispute in those actions had to be arbitrated in London was found to be incompatible with Regulation 44/2001. Although it was conceded that the decision specifically related to countries which were subject to Community law, it was submitted that the reasoning of both the Advocate General and the court should apply to countries which were parties to a convention such as the New York Convention. Reliance was placed on paragraph 33 of the European Court's judgment where, having found that an anti suit injunction preventing proceedings being pursued in the court of a Member State was not compatible with Regulation No 44/2001, the court went onto say that the finding was supported by Article II(3) of the New York Convention, according to which it is the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, that will at the request of one of the parties refer the parties to arbitration, unless it finds that the said agreement is null and

LANBUK.COM LANBUK SIERRA LEONE

void, inoperative or incapable of being performed. The Advocate General, in her Opinion said "incidentally, it is consistent with the New York Convention for a court which has jurisdiction over the subject matter of the proceedings under Regulation No 44/2001 to examine the preliminary issue of the existence and scope of the arbitration clause itself".

36. It is plain from the way in which the matter is put both by the European Court of Justice and the Advocate General, that their concern was to show that there was no incompatibility or inconsistency between the position as they stated it to be, as a matter of European Law, and the New York Convention. This does not however mean that the rationale for that decision, which is binding in Member States, applies to the position between England on the one hand and a country which is not a Member State, whether or not that State is a party to the New York Convention. An examination of the reasoning of the European Court, and the Advocate General reveals that the basis of the decision is the uniform application of the Regulation across the Member States and the mutual trust and confidence that each state should repose in the courts of the other states which are to be granted full autonomy to decide their own jurisdiction and to apply the provisions of the Regulation themselves. Articles 27 and 28 provide a code for dealing with issues of jurisdiction and the courts of one Member State must not interfere with the decisions of the court of another Member State in its application of those provisions. Thus, although the House of Lords was able to find that anti suit injunctions were permitted because of the exception in Article 1(2)(d) of the Regulation which excludes arbitration from the scope of it, the European Court held that, even though the English proceedings did not come within the scope of the Regulation, the anti suit injunction granted by the English court had the effect of undermining the effectiveness of the Regulation by preventing the attainment of the objects of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters, because it had the effect of preventing a court of another member state from exercising the jurisdiction conferred on it by the Regulation (paragraph 24).

37. None of this has any application to the position as between England and India. The body of law which establishes that an agreement to the seat of an arbitration is akin to an exclusive jurisdiction clause remains good law. If the defendant is right, C v D would now have to be decided differently. Both the USA (with which C v D was concerned) and India are parties to the New York Convention, but the basis of the Convention, as explained in C v D, as applied in England in accordance with its own principles on the conflict of laws, is that the courts of the seat of arbitration are the only courts where the award can be challenged whilst, of course, under Article V of the Convention there are limited grounds upon which other contracting states can refuse to recognise or enforce the award once made.

38. The Regulation provides a detailed framework for determining the jurisdiction of member courts where the New York Convention does not, since it is concerned with recognition and enforcement at a later stage. There are no "Convention rights" of the kind with which the European Court was concerned at issue in the present case. The defendant is not seeking to enforce any such rights but merely to outflank the agreed supervisory jurisdiction of this court. What the defendant is seeking to do in India is to challenge the award (the section 34 IACA Petition) in circumstances where he has failed in a challenge in the courts of the country which is the seat of the arbitration (the section 68 and 69 Arbitration Act applications). Whilst of course the defendant is entitled to resist enforcement in India on any of the grounds set out in Article V of the New York Convention, what he has done so far is to seek to set aside the Costs Award and to prevent enforcement of the Costs Award in England, in relation to a charging order over a house in England, when the English courts have already decided the

LANBUK.COM LANBUK SIERRA LEONE

matters, which plainly fall within their remit. The defendant is seeking to persuade the Indian courts to interfere with the English courts' enforcement proceedings whilst at the same time arguing that the English courts should not interfere with the Indian courts, which he would like to replace the English courts as the supervisory jurisdiction to which the parties have contractually agreed.

39. In my judgment therefore there is nothing in the European Court decision in the Front Comor which impacts upon the law as developed in this country in relation to anti suit injunctions which prevent parties from pursuing proceedings in the courts of a country which is not a Member State of the European Community, whether on the basis of an exclusive jurisdiction clause, or an agreement to arbitrate (in accordance with the decision in the Angelic Grace [1995] 1 LLR 87) or the agreement of the parties to the supervisory powers of this court by agreeing London as the seat of the arbitration (in accordance with the decision in C v D).

The Content of the Anti Suit Injunction

40. In paragraph 4.4 of the draft order sought by the claimants, there appears a list of orders of this court, together with the Costs Award, which are to be the subject of the order. The claimants seek to prevent proceedings outside England and Wales that in substance challenge or impugn or have as their object or effect the prevention or delay in the enforcement of any of these items. It is however rightly accepted by the claimants that it is not open to this court to prevent the defendant from objecting to the recognition or enforcement of the Costs Award in a country where such recognition or enforcement is sought, on the limited grounds permitted by the New York Convention. What the defendant should not be allowed to do however is to challenge the validity of the Costs Award itself in India or anywhere else other than the courts of England and Wales. For exactly the same reasons, he should not be allowed to challenge the validity of any further awards made by the arbitrators, save in these courts. Moreover he should not be permitted to apply to the Courts of India to seek their intervention in enforcement proceedings in this jurisdiction, although I am confident that, as a matter of comity the Courts of India would not concern themselves with enforcement of English court orders in England any more than the English courts would concern themselves with enforcement of Indian court orders in India. If the claimants should seek to enforce English court orders in India, then once again it would be a matter for the Indian courts to determine whether there were valid grounds for refusing to recognise or enforce such orders within their own jurisdiction.

41. From the evidence put before me it is clear that the defendants are seeking to challenge the Costs Award by their section 34 petition before the Delhi High Court. It is also clear that, as part of that, the defendant is seeking to prevent the claimants from enforcing the final charging order made in the English courts in respect of a house within this jurisdiction. Furthermore there is a real risk, notwithstanding the protestations made in statements on behalf of the defendant, that an application might be made to the Indian court to seek further "recourse" in respect of Mr Salve's appointment as arbitrator. Whilst it is now said that English proceedings are contemplated for that purpose, that rings somewhat hollow in the face of the arguments put that India is the seat of the arbitration and the actions already taken by the defendant in India, in relation both to the arbitration and to orders made by these courts in relation to enforcement here of the award already made.

Delay

42. The defendant asserts that there has been more than one year's delay in contesting the jurisdiction of the Indian courts. It is right that the defendant's section 34 petition in

LANBUK.COM LANBUK SIERRA LEONE

India was launched in December 2007 and the claimants' application for an anti suit injunction was not made until January 2009. The claimants' case is that it was not necessary for them to seek such an injunction until January because none of the steps taken by the defendant in India up to that point appeared to have any imminent or realistic prospect of success or of causing difficulties or disruption to the arbitration itself or to enforcement in England. It was the defendant's conduct in January in making an application to the Indian court, seeking to challenge the enforcement of the English charging order in England that exhibited an imminent risk of disruption, combined with the intimations of an intention to seek recourse to the courts for the removal of Mr Salve from his position as arbitrator. The email from the defendant's Indian advocate gave rise to a real fear in that respect when he sought information because of the desire for "further recourse". The section 34 challenge has not as yet, on the claimants' evidence, even got to the point where they are required to make any response in India because of the absence of notice from the court and they have been making their jurisdictional objections clear throughout the period since they became aware of the Petition. Whilst this is the subject of dispute, it is not a matter upon which I can reach a decision without hearing oral evidence.

43. As I have already stated, I am unimpressed by the suggestion that the defendant only has it in mind to challenge Mr Salve's appointment in the courts of this country, given the prior history of the matter and it is noteworthy that he has not offered to give an undertaking to this court not to mount a challenge in India, whether or not he intends to mount a challenge in this country first or at the same time. It is noticeable that he has not, as yet, made any application of that kind here.

44. I am satisfied that the claimants took active steps to seek an anti suit injunction in the light of the 2 matters which they say operated as triggers for their application. I was referred to the decisions in Markel International v PMMM Craft [2006] EWHC 3150 and to Verity Shipping v NV Norexa [2008] EWHC 213 and the Angelic Grace (Ibid) where the proviso set out for the grant of an anti suit injunction was expressed in the following terms:

> "The English court ought not to feel any diffidence in granting the injunction providing it was sought promptly and before the foreign proceedings were too far advanced."

45. I am satisfied that, subject to the matters upon which I can reach no decision, the claimant does not fall foul of that proviso, particularly since the section 34 petition in India has hardly got off the ground yet, at least on the claimants' evidence.

The Claimants' Alleged Submission to the Jurisdiction of the Delhi High Court

46. The defendant submits that the claimants have submitted to the jurisdiction of the Delhi High Court by making an application in 2005 under section 9 IACA for interim protective measures. The claimants submit that under Article 23 of the ICC Rules, they were entitled, before the file was transmitted to the arbitral tribunal (and in appropriate circumstances thereafter) to apply to any competent judicial authority for interim or conservatory measures. By that Article the application to such a judicial authority for such measures is not to be deemed to be an infringement or waiver of the arbitration agreement and is not to affect the relevant powers reserved to the arbitral tribunal. It cannot therefore affect the seat of the arbitration, the agreement to the curial law and the exclusive supervisory powers of the English courts in relation to the conduct of the arbitration and the validity of the award.

47. The defendant also submits that the claimants' conduct before the Delhi High Court when making submissions to the Indian court in the context of the defendant's section

LANBUK.COM
LANBUK
SIERRA LEONE

34 petition throughout 2008 also amounts to a submission to the jurisdiction of that court, whilst the claimants maintain that, not only is it impossible for them to have submitted prior to notice being issued in the proceedings, but that, in any event, as a matter of fact, their counsel throughout made it plain that the claimants did object to the jurisdiction of the court to determine the matters which the defendant wished to put before it.

48. On both these matters there is a large body of factual evidence which is seriously in dispute. There are conflicting statements from Indian lawyers as to what actually took place in the Indian courts. There are also conflicting statements from 2 former Chief Justices of India on the law of India and the effect of what was and was not done in the Indian courts. Disputes on Indian law and practice constitute matters of fact for this court and it is therefore clear to me that I cannot decide either primary issues of fact or issues of Indian law and practice on the basis of the statements put before me. This inevitably means that a mini trial is required for determination of these points with oral evidence. Although it was contended that the burden of proof of submission to the jurisdiction lay upon the defendant and only went to the matter of this court's discretion in the context of the granting of the anti suit injunction, where the issues of principle have been decided by me in favour of the claimants, it is plain that my discretion would be influenced by a finding that the claimants had submitted to the jurisdiction of the Indian courts in the context of the section 34 application, whether that submission was seen through the eyes of Indian law or the principles of English private international law.

The Claimants' Alleged Non-disclosure

49. The defendant submits that, when obtaining the interim anti suit injunction from Andrew Smith J, the claimants failed to disclose the section 9 application made by the claimants to the Indian court for protective measures and that, regardless of the claimants' contention before this court that this application was irrelevant to the exercise of the court's jurisdiction, the claimant should have appreciated that there was, at the very least, room for argument so that the Judge should have been told about it. It was said that the English court should have been informed that there was a potential argument about submission to the jurisdiction of the Indian court. The court was of course told about the section 34 application but again, not told of the potential argument about the claimants' submission to the Delhi High Court in that respect. The claimants say that there was nothing relevant to disclose, in the light of their evidence about the proceedings before the Delhi High Court, and their evidence of Indian law about lack of submission to the jurisdiction and the impossibility of any such argument succeeding.

50. For the same reasons as set out above in the context of the arguments about submission to the jurisdiction of the High Court of Delhi, I am unable to come to a final conclusion about this without hearing full evidence about what took place and the effect of it from the perspective both of Indian law and the principles of English conflict of laws.

The Claimants' Motivation

51. The defendant suggested that there were legitimate doubts about the reasons for the claimants' delay in bringing the anti suit proceedings and that the true reason was a sudden change in tactics on the part of the first claimant, as the result of a company of which he has control being subjected to a penalty in relation to a failure to pay stamp duty on a transaction, amounting to something of the order of £2 million, which occurred on 29th December 2008. It was said that the first claimant had been happy to

LANBUK.COM LANBUK SIERRA LEONE

have matters heard in India until this order was made at the end of December. I was unable to see any real connection between these matters which were labelled by the claimants as no more than a "smear" as were other allegations made about the deceit of the court by the claimants' Indian counsel when a hearing was to be fixed in relation to the defendant's section 34 application at the end of January. This latter allegation was abandoned by the defendant.

52. The former allegation is tied in with the arguments about submission to the jurisdiction which, for the reasons set out above, I cannot finally decide without oral evidence.

Conclusion

53. Subject to arguments about the claimants' submission to the Indian court's jurisdiction, about non-disclosure of matters which took place in relation to the Indian proceedings and to arguments relating to delay which are linked to the Indian proceedings, I am satisfied that this is an appropriate case for an anti suit injunction to be granted, on the test enunciated in the authorities. The defendant has established no good reason why such an injunction should not be granted, let alone any strong or compelling reason. The defendant has taken action in India to challenge the Costs Award, this court's orders enforcing the Award and has applied to the Indian court in that context, even after the anti suit injunction was granted. There is good reason to believe he intends to challenge the appointment of Mr Salve in India. This whole stance is one of asking the courts in India to do that which should only be done by the courts of the country of the seat of arbitration. The defendant has submitted to the jurisdiction of these courts and sought its assistance in the past in relation to the arbitration but has pursued simultaneously and subsequently proceedings in India as described earlier in this judgment. Subject to the issues yet to be decided it is indeed a paradigm case for an anti suit injunction.

54. There was a little debate about the possibility of the issues relating to the alleged submission by the claimants to the jurisdiction of the High Court of Delhi being heard by that court, because it was best fitted to determine such issues under Indian law. Whilst I found this idea attractive initially, I am persuaded that it would be wrong in principle to allow this and that it would create undue practical problems in any event. On the basis of what I have already decided, England is the seat of the arbitration and since this carries with it something akin to an exclusive jurisdiction clause, as a matter of principle the foreign court should not decide matters which are for this court to decide in the context of an anti suit injunction. As I have said, the question of submission goes to the exercise of my discretion to grant an injunction and this is not simply a matter of Indian law. The principles of English private international law are called into play when deciding whether what took place in India and its effect in Indian law should impact upon the exercise of this court's discretion. If for example the claimants had submitted to the jurisdiction of the Indian courts as a matter of technicality, whilst making it plain that they had no intention of doing so, that would be a much less forceful point for the defendant than a full blown submission to the jurisdiction of the Delhi High Court, which would be recognised anywhere in the world as being a voluntary acceptance of that court's jurisdiction to act at the behest of the defendant to do all the things which the claimant now says it should not do. Whether there was a submission, the form which that submission took, the ambit of it and the nature of it are all matters which might well affect the decision of this court.

55. Moreover there are practical difficulties because the issue of submission to the jurisdiction in India does not arise as such there. It did not arise in the section 9 application in 2005 and it does not currently arise in the section 34 application. In

LANBUK.COM
LANBUK
SIERRA LEONE

practice there would have to be a specific hearing arranged to determine this point, not for the purpose of the Indian proceedings as such but in order to assist the English court. That does not seem to make sense. At the end of the day, the points of Indian law and Indian practice are susceptible of an answer here with evidence of the ordinary kind, albeit that these matters cannot be dealt with on statements alone.

56. On the handing down of this judgment I will therefore give directions, after hearing submissions from the parties, as to the appropriate time tabling of a further hearing when the matters which I cannot currently decide can be the subject of determination. In the meantime the anti suit injunction granted by Andrew Smith J will continue, subject only to a liberty to apply in the event that the defendant wishes to mount a challenge to recognition or enforcement of the award in a specific jurisdiction on grounds set out in Article V of the New York Convention. I am not prepared to insert a general proviso to the injunction for fear that it would give rise to further arguments as to whether or not any application did truly fall within the ambit of Article V. As is clear from the application on 2nd February 2009 filed by the defendant before the Delhi High Court, following the grant of the anti suit injunction by Andrew Smith J, the defendant either ignored this court's order or interpreted it so generously that it felt able to make an application which, in my judgment, it was enjoined from making. If the defendant therefore wishes to make applications to the Indian court, or to any other court in the world, the liberty to apply will enable him to come before this court, with a copy of the application he proposes to make, so that permission can be given, if it falls within the ambit of challenges to recognition and enforcement which are allowed by the Convention.

57. Although I cannot make a final decision because of the matters which remain yet to be decided, it is clear that the defendant has lost the arguments in relation to the major matters of principle on which it challenged the grant of the injunction and costs on those issues would, in the ordinary way, be payable by it. Subject to hearing the parties however, I consider that I should make no final decision on this, because, if there was non-disclosure or strong discretionary reason not to grant the injunction by reason of the matters I have yet to determine, the overall position would have to be considered before making any order about costs.

LANBUK.COM
LANBUK
SIERRA LEONE