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Chapter 15

ENGLAND AND WALES

Duncan Speller and Christopher Howitt[1]

I INTRODUCTION

Arbitrations seated in England and Wales,[2] both international and domestic, are governed by the Arbitration Act 1996 ('the Act').[3] The Act consolidated and reformed the existing law, introducing a modern and 'pro-arbitration' legislative regime. The Act is based in large part on the UNCITRAL Model Law, but also differs from the UNCITRAL Model Law in important respects.

Although comprehensive, the Act does not codify all aspects of English arbitration law.[4] In consequence, as one commentator puts it, '[t]o the extent that the 1996 Act was intended to be a "one-stop shop" it can be regarded as a comprehensive failure'.[5] Indeed, while the Act itself has remained in place since 1996, the courts have continued to shape and develop the law in interpreting and applying its provisions. In practice, this means that practitioners must consult the common law as well as the Act to determine the status of the law on many issues.

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2 There are three distinct jurisdictions in the United Kingdom, each of which has its own court system and laws. England and Wales together comprise a single jurisdiction; the other two are Scotland and Northern Ireland.

3 English Arbitration Act, 1996, Section 2(1).

4 For example, the Act contains no provisions as to the confidentiality of arbitrations, but the courts have continued to develop and refine the law on this issue: *Ali Shipping Corp v. Shipyard Trogir* [1999] 1 W.L.R. 314; *Glidepath BV v. Thompson* [2005] EWHC 818 (Comm); *Michael Wilson & Partners Ltd v. Emmott* [2008] EWCA Civ 184.

5 Merkin, Arbitration Act 1996, fourth edition, p. 1.

i The structure of the Act

The provisions of the Act are set out over four parts:

a Part I contains the key provisions relating to arbitration procedure, including the appointment of the arbitral tribunal, the conduct of the arbitration, and the powers of the tribunal and the court. Section 4 of Part I expressly distinguishes between those provisions that are mandatory (i.e., those that have effect notwithstanding any agreement to the contrary) and those that are non-mandatory (i.e., those that can be opted out of by agreement). The mandatory provisions are listed in Schedule 1 of the Act;

b Part II contains various miscellaneous provisions dealing with 'domestic arbitration agreements', 'consumer arbitration agreements', and 'small claims arbitration in the county court';

c the provisions of Part III give effect to the United Kingdom's obligations to recognise and enforce awards under Articles III to VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the New York Convention'); and

d Part IV comprises various miscellaneous provisions concerning the allocation of proceedings between courts, the commencement of the Act and the extent of its application.

ii The main principles of the Act

The Act is based on three general principles,[6] which were recently described as the 'philosophy behind the Act'[7] by a member of the Departmental Advisory Committee on Arbitration ('DAC'), which had helped draft the Act in consultation with arbitration practitioners and users.[8] Section 1 of the Act sets out these principles and provides that Part I is 'founded on' them and shall be 'construed accordingly'.

These principles are:

a fairness ('the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense');[9]

b party autonomy over the arbitration proceedings ('the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest');[10] and

6 Section 1 of the Act.

7 See Lord Mustill, 'Reflections on the English Arbitration Act 1996 after fifteen years', Chartered Institute of Arbitrators, 2012.

8 The DAC produced two reports which provide a useful commentary on many of the Act's provisions: (1) The Departmental Advisory Committee on Arbitration Law: Report on the Arbitration Bill (February 1996); and (2) The Supplementary Report on the Arbitration Act 1996 (January 1997), chaired by the Rt Hon Lord Justice Saville. The reports continue to be referred to by the courts (see e.g., *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647 at paragraph 80).

9 Section 1(a) of the Act.

10 Section 1(b) of the Act.

c the restriction of judicial intervention in proceedings ('in matters governed by the [Part I] of the Act, the court should not intervene except as provided by [that] Part').[11]

The general principles create a starting point for judicial reasoning and innovation in the application of the Act. In a string of recent cases, the English courts continue to refer to the guiding principles in resolving disputes as to how the Act should be interpreted and applied.[12]

iii The scheme of the Act

The provisions of the Act give expression to these guiding principles. The Act supports the general principle of fairness by imposing upon the parties the duty to 'do all things necessary for the proper and expeditious conduct of the arbitral proceedings', and upon the tribunal the duty to act 'fairly and impartially'[13] and to adopt suitable procedures 'avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined'.[14]

Party autonomy is reinforced by the non-mandatory nature of most of the provisions of Part I, these being default rules applicable only in the absence of the parties' agreement to the contrary.[15] The courts have, in their turn, emphasised the importance of party autonomy to the arbitral process in a number of judgments. Most recently, the Supreme Court in *Jivraj v. Hashwani*[16] upheld an arbitration clause requiring arbitrators to be drawn from a particular religious group, when the Court of Appeal had found the clause void for offending against European anti-discrimination legislation.[17] In that judgment, their Lordships approved the following statement of the International Chamber of Commerce ('ICC'):

> *The raison d'être of arbitration is that it provides for final and binding dispute resolution by a tribunal with a procedure that is acceptable to all parties, in circumstances where other fora (in particular national courts) are deemed inappropriate (eg because neither party will submit to the*

11 Section 1(c) of the Act.

12 *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647, per Lord Justice Rix at paragraph 100, 105; *Itochu Corporation v. Johann M.K. Blumenthal GMBH & Co KG & Anr* [2012] EWCA Civ 996 at paragraph 17ff; *Bitumex (HK) Co Ltd v. IRPC Public Co Ltd* [2012] EWHC 1065 (Comm) at paragraph 22; *Lombard North Central Plc v. GATX Corp* [2012] EWHC 1067 (Comm) at paragraph 15; *Nomihold Securities Inc v. Mobile Telesystems Finance SA* (No 2) [2012] EWHC 130 (Comm) paragraphs 26, 58; *Turville Heath Inc v. Chartis Insurance UK Limited* [2012] EWHC 3019 (TCC) at paragraph 53; *Jivraj v. Hashwani* [2011] UKSC 40 at paragraph 61ff.

13 Section 40 of the Act.

14 Section 33(1) of the Act.

15 See Section 4 of the Act.

16 [2011] UKSC 40.

17 Employment Equality (Religion or Belief) Regulations 2003.

courts or their counterpart; or because the available courts are considered insufficiently expert for the particular dispute, or insufficiently sensitive to the parties' positions, culture, or perspectives).[18]

The mandatory provisions of Part I, which apply notwithstanding any agreement to the contrary, include those providing limited rights of challenge of an award. Awards may be challenged on the basis that the tribunal lacked substantive jurisdiction (under Section 67 of the Act) or on grounds of serious procedural irregularity (under Section 68). However, these provisions are designed to support the arbitral process and reflect the third principle of the Act – namely, limited court intervention.[19] The tribunal has substantial powers to decide all procedural and evidential matters,[20] to give directions in relation to property or the preservation of evidence,[21] and to order relief on a provisional basis.[22] By contrast, the court has only a limited power to intervene in certain circumstances that will support the arbitration (such as appointing arbitrators where the agreed process fails[23] and summoning witnesses to appear before the tribunal),[24] and has the same powers for the purposes of and in relation to arbitral proceedings as it has in respect of legal proceedings, including in respect of the taking of evidence of witnesses, the preservation of evidence, and the granting of an interim injunction or the appointment of a receiver.[25] In this respect, the Act mirrors the UNCITRAL Model Law.[26]

In addition, the court is empowered to hear challenges to arbitrators[27] and applications to set aside awards.[28] For their part, the courts have tended to place a 'high hurdle' on parties seeking to set aside arbitral awards,[29] insisting that such challenges are

18 *Jivraj v. Hashwani* [2011] UKSC 40 at paragraph 61.

19 See e.g., *Itochu Corporation v. Johann M.K. Blumenthal GMBH & Co KG & Anr* [2012] EWCA Civ 996 ('The policy of thus restricting appeals, found in s.18 and a variety of other sections in the Act, is deliberate. It reflects the underlying general principles, as to party autonomy and protection of the parties from unnecessary delay and expense, enshrined in s.1(a) and s.1(b) of the Act').

20 Section 34 of the Act.

21 Section 38(4) and (6) of the Act.

22 Section 39 of the Act.

23 Section 18 of the Act.

24 Section 43 of the Act.

25 Section 44 of the Act.

26 Section 17 J of the UNCITRAL Model Law.

27 Section 39 of the Act.

28 Sections 67, 68, 69 of the Act.

29 *In Bandwidth Shipping Corporation Intaari (the 'Magdalena Oldendorff')* [2007] EWCA Civ 998, [2008] 1 All ER (Comm) 1015, [2008] 1 Lloyd's Rep 7, Waller LJ stated, at para 38: 'In my view the authorities have been right to place a high hurdle in the way of a party to an arbitration seeking to set aside an Award or its remission by reference to section 68 and in particular by reference to section 33 [...] It would be a retrograde step to allow appeals on fact or law from the decisions of arbitrators to come in by the side door of an application under section 33 and section 68.'

'long stop[s] only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected'.[30] Challenges of awards on the grounds of serious procedural irregularity under Section 68, unlike appeals on points of law under Section 69, do not require leave. It has been suggested that this looser requirement has encouraged frivolous litigation. However, a recent survey has shown that in 2009, 12 applications were made under Section 68, and 62 under Section 69; and in 2012, challenges under Section 68 were fewer than those under 69, being seven and 11 respectively.[31]

iv Court relief in support of arbitration

A consistent theme in recent case law has been the affirmation and application by the English courts of their power to make orders in support of arbitrations seated in England and Wales. The High Court of Justice has noted that the court has jurisdiction to grant an anti-suit injunction under Section 37 of the Senior Courts Act 1981 ('SCA') even where there are no arbitral proceedings in contemplation or no statutory basis under the Act for an injunction, in circumstances where the court is seeking to support arbitration by requiring parties to refer their disputes to arbitration.[32]

v Applications under the Act

Two specialist subdivisions of the High Court in London hear most arbitration-related claims under the Act,[33] namely the Commercial Court (for general commercial arbitration) and the Technology and Construction Court (for construction disputes).

II THE YEAR IN REVIEW

i Developments affecting international arbitration in England and Wales

The LCIA

The London Court of International Arbitration ('LCIA'), established in 1892, remains one of the world's pre-eminent international arbitration institutions. The LCIA continues to develop new rules and expects that these will be submitted to the LCIA Court for approval towards the latter half of 2013.

In 2011, a total number of 224 disputes were referred to the LCIA for arbitration.[34] The nature of the contracts seen in the 2011 referrals to the LCIA remained diverse, ranging from emissions trading and sponsorship of sporting events, to oil exploration

30 *Lesotho Highlands Development Authority v. Impregilo SpA and Others* [2005] UKHL 43.

31 www.olswang.com/articles/2013/03/do-the-2012-stats-reveal-an-abuse-of-the-right-to-challenge-an-arbitral-award-for-serious-irregularity/.

32 *BNP Paribas SA v. Open Joint Stock Company Russian Machines & Joint Stock Asset Management Company Ingosstrakh-Investments* [2011] EWHC 308 (Comm).

33 See the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, as amended.

34 LCIA Director General's Report 2011, www.lcia.org/LCIA/Casework_Report.aspx.

and the sale and purchase of commodities.[35] Commodity transactions (especially in steel and carbon products) made up 13 per cent of 2011 referrals, as against 6 per cent in 2010. An increase was also seen in loan or other financial agreements, including guarantees, with these constituting 17.5 per cent of 2011 referrals, compared with 11.5 per cent in 2010.[36] There was a decrease in the number of arbitrations concerning joint venture and shareholders' agreements, which accounted for 13 per cent of LCIA referrals in 2011, as opposed to 23 per cent in 2010.

The LCIA appointed 325 arbitrators to a total of 151 tribunals, again slightly down from the 168 tribunals established by the LCIA in 2010.[37] In LCIA arbitrations, 2011 also saw a preference for a three-member tribunal as opposed to a sole arbitrator, and a shift towards party nomination.[38] 52 per cent of arbitrators were selected by parties in 2011.[39]

ICC arbitration

England and Wales continues to be a popular seat in arbitrations conducted under the rules of other international arbitration institutions, including the ICC.

London was the second most chosen seat of arbitration under ICC rules in 2011, with 62 cases.[40] In addition, English law was the second most popular choice by parties (10.7 per cent) of the 84 per cent of cases registered in 2011 where parties had included a choice-of-law clause in the contract relating to their dispute.[41]

LMAA and other arbitral institutions

England and Wales is also frequently chosen as a seat in arbitrations under rules developed for specific industry sectors, such as the London Maritime Arbitration ('LMAA').

In 2011, the LMAA made 3,555 appointments, and 3,849 in 2012.[42] 592 awards were also rendered under LMAA rules in 2011, with an increase to 631 awards in 2012.[43]

ii Arbitration developments in the English courts

In 2012 and 2013 the English courts once again witnessed a significant inflow of arbitration-related cases.

The West Tankers saga

The year has seen two important developments in the long-running *West Tankers* saga. The underlying dispute involving West Tankers is between the insurers of voyage

35 LCIA Director General's Report 2011, www.lcia.org/LCIA/Casework_Report.aspx.

36 Ibid.

37 Ibid.

38 Ibid.

39 Ibid.

40 ICC 2011 Statistical Report.

41 Ibid.

42 www.lmaa.org.uk/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce.

43 Ibid.

charterers of the vessel *The Front Comor* and its owners about responsibility for a collision that occurred during the voyage charter. The charter party contained an arbitration agreement under which all disputes arising out of the charter were to be referred to arbitration in London with English law to apply. The owners commenced arbitration in London against the insurers pursuant to the terms of the charter party, but the insurers commenced proceedings against the owners in the Italian courts in Sicily in relation to the same proceedings.

The owners obtained an anti-suit injunction from the Commercial Court restraining the insurers from pursuing the Italian court proceedings. This decision was appealed to the House of Lords, which in turn referred to the European Court of Justice ('ECJ') the question whether it was consistent with Regulation 44/2001 ('the Regulation') for the court of a Member State to make an order restraining a person from continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement. The ECJ concluded that an anti-suit injunction would be inconsistent with the Regulation.

There has been extensive commentary on whether the inability of the English courts to grant an anti-suit injunction in these circumstances would diminish the appeal of London as a seat (particularly compared to seats where the courts could still grant anti-suit injunctions in the same circumstances, such as Hong Kong and Singapore).[44] However, in two recent decisions in 2012, the English courts have confirmed that practical recourse may remain available to a party faced with a breach of an agreement to arbitrate.

West Tankers round one

The owners applied to the Commercial Court in London for an order enforcing the arbitral award and converting it to a judgment under Section 66 of the Act.[45] The court granted the order because the owners' objective was to establish the primacy of the declaratory award over the potentially inconsistent judgment, and the order sought would make a positive contribution to securing the material benefit of the award.

The Court of Appeal upheld this decision on appeal, reasoning that Field J's interpretation of Section 66 is closer to the purpose of the Act. The decision reflected the pro-arbitration attitude of the English courts:

> *Ultimately the efficacy of any award by an arbitral body depends on the assistance of the judicial system, as Lord Hobhouse observed. Judges may give force to an arbitral award by a number of means, including by applying the doctrine of issue estoppel [...] As with any judgment or award, so in the case of a monetary judgment or award its enforcement is the enforcement of the right (a right to payment) which the award has established. In the present case, as in Associated Electric and Gas Insurance Services Ltd v. European Reinsurance Co of Zurich [2003] 1 WLR 1041, the owners want to enforce the award through* res judicata, *and for that purpose they seek to have the award entered as a judgment.*

44 The Brussels I Regulation recast, S.L.T. 2011, 7, 31-35; Arbitration and anti-suit injunctions in the EU, L.Q.R. 2009, 125 (Jul), 365-369.

45 *West Tankers Inc v. Allianz SpA (The Front Comor)* [2011] EWHC 829 (Comm).

In the event that the Italian court issues a judgment irreconcilable with the English judgment on the arbitral award, the insurers may seek to enforce that judgment in the English court against the owners. The English court would then be faced with, on the one hand, an enforceable judgment of the English court and, on the other, the later conflicting judgment of the Italian court that normally it would be bound to enforce under the Regulation. The Court of Appeal did not determine which judgment would prevail in those circumstances. As discussed further below, however, recent revisions to the Regulation may answer this question.

The High Court decision was followed in *African Fertilizers and Chemicals NIG Ltd v. BD Shipsnavo GmbH & Co Reederei KG.*[46] Beatson J characterised submissions that declaratory relief should not be available as 'inimical to the underlying policy considerations in this area' and pointed to the observation in Briggs' *Civil Jurisdiction and Judgments* at paragraph 7.22 that: 'once an English court has given leave to enforce an arbitral award, it would be gravely damaging to legal certainty for it to be required to recognise and enforce a foreign judgment which undermined or contradicted that arbitral award.'[47]

West Tankers round two

In the second *West Tankers* decision,[48] the High Court considered an appeal under Section 69 of the Act against a further award issued by the arbitral tribunal. The owners of *The Front Comor* had sought to recover damages for losses suffered as a consequence of the insurers initiating proceedings in Italy in breach of the arbitration agreement. The tribunal considered that while the Regulation did not apply to arbitration by virtue of Article 1, the principle of effectiveness, or effective judicial protection, protecting insurers' right to sue the operator in Italy under Article 5(3) circumscribed its jurisdiction to grant damages for breach of the obligation to arbitrate or an indemnity.

The High Court overturned this decision on the basis that arbitration fell outside the Regulation and an arbitral tribunal was thus not bound to give effect to the principle of effective judicial protection. The court observed that the Attorney General in the ECJ *West Tankers* case recognised the possibility of conflicting decisions on the merits between an arbitral tribunal and a national court.[49]

These two decisions have important practical consequences for a party faced with proceedings in another EU state that it believes to be in breach of an agreement to arbitrate. Post-*West Tankers*, it will not be open to that party to seek an anti-suit injunction. However, the party can claim declaratory relief and/or damages from the arbitral tribunal (under the *West Tankers* round two analysis discussed above) and can then seek to enforce that award in the English courts. In principle, this conclusion appears consistent with the recent changes to the Regulation discussed below and also provides a party with a practical remedy.

46 [2011] EWHC 2452 (Comm).

47 Paragraph 28(c).

48 See [2012] EWHC 854, Paragraph 25 (Comm).

49 [2012] EWHC 854, Paragraph 54 (Comm).

Recent revisions to the Regulation

In December 2012, after many years of consultation, a recast of the Regulation was published in the Official Journal of the European Union ('the recast Regulation'). The recast Regulation will be applied by Member State courts from 10 January 2015, two years after it comes into force. As was the case under the Regulation, the recast Regulation will not apply to arbitration.[50]

The recast Regulation expressly acknowledges the issues that flared up in the *West Tankers* saga. The explanatory memorandum to the proposed amended Regulation says:

> *[t]he interface between arbitration and litigation needs to be improved. Arbitration is excluded from the scope of the Regulation. However, by challenging an arbitration agreement before a court, a party may effectively undermine the arbitration agreement and create a situation of inefficient parallel court proceedings which may lead to irreconcilable resolutions of the dispute. This leads to additional costs and delays, undermines the predictability of dispute resolution and creates incentives for abusive litigation tactics.*

The recast Regulation attempts to resolve this tension by making expressly clear in Recital 12 that the New York Convention 'takes precedence over this Regulation'.[51] Recital 12 also confirms that the Regulation should not apply to any action or judgment concerning the review, appeal, recognition or enforcement of an award. This would suggest that a court can refuse to enforce a judgment from another EU Member State conflicting with an arbitral award on the basis that its New York Convention obligations take precedence. On that ground, the court could potentially refuse to enforce the judgment under the public policy exception in the Regulation itself.

The recast Regulation, once effective, should provide useful clarity as to the steps an English court can take in respect of an action in the courts. In circumstances where a party commences proceedings in an EU Member State in breach of an arbitration agreement, the English court will remain unable to issue an anti-suit injunction by virtue of the decision of the European Court of Justice in the *West Tankers* case. However, the English court will be able to recognise and enforce an arbitral award (including an arbitral award granting declaratory relief or damages in respect of a breach of the agreement to arbitrate) under the recast Regulation. Most importantly, the recognition and enforcement of such an arbitral award should, in principle, take precedence over a conflicting judgment of a court of another EU Member State.

If this is correct, the recast Regulation may provide a party in these circumstances with the same outcome as would have been achieved by an anti-suit injunction, albeit by a more circuitous route. In practice anti-suit injunctions do not actually stop foreign proceedings but expose a party breaching them to remedial measures (e.g., damages) in the English courts. A party could obtain similar remedial measures by enforcing an arbitral award (although it would, of course, first have to jump through the additional hoop of obtaining such an arbitral award).

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50 Recital 12.

51 This is further reinforced by a new Article 84(1)(a), expressly stating that the Regulation shall not affect the application of the New York Convention.

Ust-Kamenogorsk

In *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC*,[52] the Court of Appeal was asked to decide whether the English courts can issue anti-suit injunctions in order to protect arbitration agreements at a time when there are no arbitral proceedings under way and none are intended.

The underlying dispute here related to a concession agreement between the owner and the operator of hydroelectric facilities in Kazakhstan, which contained an arbitration clause governed by English law and providing for arbitration in London. In an earlier dispute in Kazakhstan, the Kazakhstan Supreme Court held that the arbitration clause was contrary to Kazakhstan public policy and thus invalid. Subsequently, the Kazakhstan Economic Court allowed the owner of the hydroelectric facilities to bring a claim against the operator for information about the value of the concession's assets. The operator then sought and obtained from the High Court an anti-suit injunction to prevent the owner from bringing proceedings falling within the arbitration agreement in the Kazakhstan court.[53]

The owner appealed to the Court of Appeal. By this time, the parties had agreed that the claim for further information before the Kazakhstan Economic Court should be withdrawn. However, the operator remained concerned that this claim might be reinstated in Kazakhstan, or some other claim made in breach of the arbitration agreement. It was accepted by all parties that there were no arbitration proceedings under the arbitration clause contemplated.[54]

Before the Court of Appeal, the principal and most extensively argued issue was whether the court had jurisdiction to grant a declaration or an anti-suit injunction in a situation where there was no actual, proposed or intended arbitration. The Court of Appeal dismissed the appeal and upheld the injunction.

In striking that balance, the Court of Appeal concluded that it had a broad jurisdiction to grant an anti-suit injunction under Section 37 of the SCA, even though it was accepted by all parties that there was no jurisdiction under Section 44 of the Act. Section 37 gives the courts power to issue injunctions 'in all cases in which it appears to the court to be just and convenient to do so'. The Court of Appeal decision confirms, therefore, the willingness of the English courts to intervene in order to restrain a party from bringing tactical litigation in breach of an agreement to arbitrate in England.

The Court of Appeal's decision has been appealed to the Supreme Court and is listed for a hearing beginning on 1 May 2013.

U&M Mining Zambia Ltd v. Konkola Copper Mines Plc[55]

In *U&M Mining Zambia Ltd v. Konkola Copper Mines Plc*, the High Court considered whether the English court, and the English court alone, had the power to grant interim

52 [2011] EWCA Civ 647.

53 *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2010] EWHC 772 (Comm).

54 Paragraph 16.

55 [2013] EWHC 260 (Comm).

relief in respect of arbitrations seated in England and Wales. The dispute was between two Zambian companies, and arose out of mining contracts governed by Zambian law and providing for LCIA arbitration in London. Konkola obtained *ex parte* injunctive relief from the Zambian court under Zambia's Arbitration Act, asserting that it intended to protect its contractual rights pending LCIA arbitration in London. U&M then commenced an LCIA arbitration in London and applied for an anti-suit injunction restraining Konkola from taking further steps in the Zambian proceedings.

The Court refused the injunction, referring in particular to Article 25.3 of the LCIA Rules which, by expressly stipulating that the power of the arbitral tribunal to order interim and conservatory measures is not to prejudice a party's right to apply to a state court before the formation of the arbitral tribunal, implicitly recognises the party's right to do so.[56] The court also found that the natural forum for such proceedings was Zambia rather than England, so far as judicial assistance by way of interim measures was required, pending the appointment of the arbitrators.[57]

***Yukos Capital SARL v. OJSC Rosneft Oil Company*[58]**

The decision of the Court of Appeal in *Yukos Capital SARL v. OJSC Rosneft Oil Company*[59] shows the willingness of the English courts to entertain the enforcement of an arbitral award pursuant to the New York Convention, even where the award has been set aside at the seat. This is likely to be viewed as a welcome development by award creditors seeking to enforce awards against counterparties in England, including where those counterparties have funds flowing through the London market.

In *Yukos Capital SARL v. OJSC Rosneft Oil Company*[60] the Court of Appeal enforced four Russian arbitral awards that had previously been set aside by the courts of Russia, where the arbitration had been seated.

The Russian Arbitrazh courts had set aside the awards in May 2007. Yukos, before seeking leave to enforce these awards in the English courts under Section 101 of the Act and the New York Convention, had already enforced the awards in the Netherlands under Dutch law and the New York Convention. In its decision to grant leave to enforce the awards, the Dutch Court of Appeal had found that the Russian proceedings were 'not impartial and independent but [had been] guided by the interests of the Russian state and [had been] instructed by the executive'.[61] Rosneft resisted enforcement of the award in England by referring to the act of state doctrine, which precludes an English court from sitting in judgment on the sovereign acts of a foreign government or state within its territory.

56 Paragraph 68.

57 Paragraph 71.

58 [2012] EWCA Civ 855.

59 Ibid.

60 Ibid.

61 Ibid., Paragraph 21 (the English Court of Appeal quoting the Dutch Court of Appeal judgment).

There were therefore two distinct issues before the English Court of Appeal. First, whether Yukos' claims alleging abuse of process in the Russian annulment actions were barred by the act of state doctrine. Yukos alleged that the Russian court had engaged in an unlawful conspiracy to destroy Yukos through its tax authorities and court system. Here, the Court of Appeal held for the first time that the act of state doctrine does not apply to allegations of impropriety against foreign court decisions, whether in the case of particular decisions or in the case of a systemic dependency on the dictates or interference of the domestic government.[62] Where a foreign court acts in a way that is an abuse of its own responsibilities as a court of law, the English courts are not obliged to give effect to the potential jurisdiction or past acts of such foreign court, provided that the failings of the foreign court are sufficiently cogently brought home to the English court.[63]

The second issue was whether Rosneft was issue estopped by the decision of the Dutch Court of Appeal from disputing that the Russian proceedings were 'partial and dependent'. The Court of Appeal, reversing the decision of the High Court, held that the issues before the two courts were different and thus no issue estoppel could arise: whereas the Dutch court had determined whether the Russian annulment decisions were 'partial and dependent' by considerations of Dutch public order, the English court had to determine this question by reference to English public policy.

The English courts have historically been reluctant to set aside foreign arbitral awards on the grounds of public policy and indeed have held that the pro-enforcement bias in the New York Convention is itself a matter of English public policy.[64] *Yukos Capital SARL v. OJSC Rosneft Oil Company* takes this pro-enforcement approach one, or arguably two, steps further by confirming that the English courts will apply English public policy even where the award has been set aside at the seat and even where the courts in another jurisdiction have applied their own (possibly different) conceptions of public policy.

Sulamérica SA v. Enesa Engelharia SA[65]

The judgment of the Court of Appeal in *Sulamérica* provides helpful guidance on the approach the English courts will apply in determining the proper law of an arbitration agreement in a commercial contract.

In *Sulamérica*, the Court of Appeal considered whether Brazilian or English law governed an arbitration agreement, in circumstances where the underlying contract (an insurance policy) contained an express choice of Brazilian law as the governing law, an exclusive jurisdiction clause in favour of Brazilian courts, and a multi-tiered dispute resolution clause providing for mediation and arbitration with London as the seat. The

62 Ibid., Paragraph 73.

63 Ibid., Paragraph 90.

64 *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd the Convention* [1999] 2 Lloyd's Rep 65 (CA). In that case, there were allegations of corruption but these were rejected by the arbitral tribunal and the courts in Switzerland, where the arbitration was seated, had rejected an application to set aside the award. The English court enforced the arbitral award.

65 [2013] 1 WLR 102 (CA).

court found that English law, as the law of the seat providing the necessary supporting and supervisory jurisdiction, had the 'closest and most real connection' to the arbitration agreement.

The Court proposed a three-stage inquiry in determining the proper law, these stages to be considered separately and in the following order: express choice; implied choice; and closest and most real connection.

As there was no express choice of law governing the arbitration agreement, the court moved directly into the implied choice or closest and most real connection analysis. The Court reasoned that this analysis should start 'from the assumption that, in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law'.[66] As there was an express choice of substantive law in favour of Brazilian law, the assumption was in favour of Brazilian law.[67] The court also mentioned two further factors in favour of Brazilian law, namely that there was an exclusive jurisdiction clause choosing Brazilian courts and the contract has a close commercial connection to Brazil.

However, the Court ultimately found that the arbitration agreement's closest and most real connection was with English law. The choice of London as the seat of the arbitration, the Court found, 'inevitably imports an acceptance that the law of the country relating to the conduct and supervision of arbitrations will apply to the proceedings'.[68] The Court suggested that this factor also supported the inference that the parties intended English law to govern all aspects of the arbitration agreement, including matters on formal validity and jurisdiction of arbitrators. The Court also found that there was a serious risk that the arbitration agreement will be found invalid under Brazilian law, since under Brazilian law arbitration agreements are only enforceable with the parties' consent.[69]

iii Investor–state disputes

The Convention on the Settlement of Disputes Between States and Nationals of Other States 1965 ('the ICSID Convention') came into force in the United Kingdom on 18 January 1967.[70] The United Kingdom also ratified the Energy Charter Treaty 1994 on 16

66 Ibid., Paragraph 11 (CA).

67 Ibid., Paragraph 26 (CA) ('A search for an implied choice of proper law to govern the arbitration agreement is therefore likely [...] to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion.').

68 Ibid., Paragraph 29 (CA).

69 Ibid., Paragraph 30 (CA).

70 https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English.

December 1997.[71] In addition, the United Kingdom is currently party to 102 bilateral investment treaties ('BITs').[72]

Under the Treaty of Lisbon, which took effect on 1 December 2009, the EU's competence was extended to cover foreign direct investment, which includes BITs concluded between EU Member States and third countries ('extra-EU BITs'). The EU subsequently enacted Regulation No. 1219/2012, which came into force on 9 January 2013, in order to clarify the status of the more than 1,200 extra-EU BITs entered into before Lisbon came into force, as well as the ability of Member States to negotiate new extra-EU BITs.

Regulation 1219/2012 confirmed that extra-EU BITs signed prior to December 2009 will remain in force until they are replaced by new treaties between the EU and the relevant third countries.[73] The Regulation required Member States to notify the Commission of any extra-EU BITs they wished to remain in force by 8 February 2013, and requires new Member States to provide notification within 30 days of their accession.[74] The Commission will publish a list of the BITs of which it has been notified by 8 May 2013, and update this list every 12 months.[75] The list has not yet been published. In the event, however, that the Commission considers an existing extra-EU BIT to represent a serious obstacle to the EU's negotiation of a replacement BIT, the Commission will consult with the relevant Member State to resolve the matter, which may result in the revision or termination of the relevant extra-EU BIT.[76] The Regulation is silent about the 'sunset provisions' in many extra-EU BITs, which guarantee protection for existing investments for 10 to 15 years after termination, and these provisions would appear to be unaffected by the Regulation.

The Commission will authorise the entry into force of those extra-EU BITs signed between 1 December 2009 and 9 January 2013, unless it determines that a BIT conflicts with EU law or provisions, or would constitute a serious obstacle to the EU's negotiation of a replacement BIT.[77] Member States may negotiate to enter into new, or to amend existing, extra-EU BITs.[78] However, they must notify the Commission with drafts of the provisions to be negotiated at least five months in advance,[79] and the Commission may require them to include or remove provisions in order to ensure compatibility with EU law or investment policy.[80]

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71 www.encharter.org/fileadmin/user_upload/document/ECT_ratification_status.pdf.

72 See https://icsid.worldbank.org/ICSID/FrontServlet for information about the United Kingdom in the ICSID database.

73 Article 3 of the Regulation.

74 Articles 2, 3 and 5 of the Regulation.

75 Article 8 of the Regulation.

76 Articles 5 and 6(2)-(3) of the Regulation.

77 Article 12(1) of the Regulation.

78 Article 7 of the Regulation.

79 Article 8 of the Regulation.

80 Article 9(1) and (2) of the Regulation.

III OUTLOOK AND CONCLUSIONS

England and Wales remains one of the most frequently selected seats for international arbitration. The practical attractions of England and Wales as a seat are built not just on the firm foundation of the Act but also on judicial willingness to apply the guiding principles that underpin the Act.

2012 was perhaps a less controversial year for the English courts than 2011 (in which the Supreme Court overturned the Court of Appeal's much-debated decision in *Jivraj v. Hashwani*[81]). Recent court decisions have confirmed the willingness of the English courts to intervene in support of arbitration.

The steps the English courts can take to restrain parties from bringing foreign proceedings in breach of an agreement to arbitrate continue to be a focal point of judicial attention. The possible resolution of some of the lingering uncertainties from the *West Tankers* saga – both through case law and the introduction of the recast Regulation – are to be welcomed. These changes should provide greater clarity in the steps that English courts can, and cannot, take where proceedings are commenced in another EU state in alleged breach of an agreement to arbitrate. The impending appeal to the Supreme Court in the *Ust-Kamenogorsk*[82] case may resolve remaining disputes as to the scope of the jurisdiction of the English courts to grant anti-suit injunctions to restrain parties from bringing proceedings in courts outside the EU.

The Court of Appeal judgment in the *Yukos Capital SARL*[83] reflects the continuing emphasis the English courts give to the primacy of their enforcement obligations under the New York Convention. This underscores the attractions of England and Wales as a venue for the enforcement of arbitral awards, even of awards issued in arbitrations seated outside England and Wales.

81 [2011] UKSC 40.

82 [2011] EWCA Civ 647.

83 [2012] EWCA Civ 855.