



INTERNATIONAL ARBITRATION: THE GAMES LAWYERS PLAY TO MESS UP, DODGE AND MAKE PEOPLE PAY UP AFTER ARBITRATIONS

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Setting the scene

As the ingenuity of man increases, so do the bright ideas for wrecking a perfectly reasonable arbitration. Ever so often, statutes emerge which stop some of us using some of these bright ideas and people go back to the drawing board to come up with others.

The pre-emptive jurisdiction strike

The classic Anglo-American way to halt an arbitration is to apply for a declaration or an injunction to stop an unwanted case. In England, this was outlawed in the 1996 Arbitration Act but only for parties who participate in the arbitration. If the application is brought before then, the required chaos is caused.¹ If the application fails, the applicant can always go back to the arbitration. In the US, the common law injunction received a form of statutory recognition when in 1988, someone dropped mention of it into a reform of the Federal Arbitration Act. In Sweden, even under the new statute, the declaration can be applied for but only before the commencement of the arbitration. Once the case starts, an application has to await the ruling on jurisdiction except where a consumer is trying to evade an arbitration.²

All the other major arbitration centres, including the UNCITRAL Model Law countries, have blocked off this route of attack. This is actually a shame since it is in the interest of the winning side in the arbitration to have any jurisdictional objection cleared up once and for all. As we will see, it deprives someone wrongly sucked into an arbitration of some much-needed protection.

Ongoing jurisdictional fun

The conventional wisdom reflected in Swiss, English, Swedish and the UNCITRAL Model Law is to give the arbitrator the right to choose whether to issue an award or decision on jurisdiction.³ If they do so, one can attack it. If they do not, one has to wait until a final award is delivered to attack the arbitration. By then, it may be too late. France, Belgium and Holland do not seem to give the arbitrator the choice of rendering a decision upholding

¹Arbitration Act 1996, s 72

² Lag om skiljeförfarande, ss 2(2), 4 & 4(a). A consumer can still apply to court even after the commencement of the arbitration.

³ LDIP, art. 186(3) although note the use of the term “decision incidente” which is not an award; Arbitration Act s 32(2) although the court will rule on this with the parties’ consent or that of the tribunal; Lag om skiljeförfarande, ss 2(2) & 4a(1); UNCITRAL Model Law, art. 16(3).

jurisdiction during the arbitration and leaving it open to attack.⁴ According, it is “final award” or bust.

More creativity is needed. The ideal move has always been to start a lawsuit and thereby force the court to resolve the jurisdictional issue when the defendant moves for a stay or dismissal of proceedings. This always looks better on paper than in reality. After all, one has to find a forum, ideally the place of arbitration, where the customer can be sued and a way to formulate a claim that the country concerned will adopt.

Nevertheless, where all the other elements fit together, it has a reasonably good strike record for flushing out jurisdictional disputes. Courts will look at the merits in a more detailed way than they would consider a problem with appointing an arbitrator in Holland, Belgium and UNCITRAL Model Law countries.⁵ The Swiss will do a superficial review if the seat is in the Confederation but will wheel out the full guns on a foreign arbitration.⁶ Either way, this can produce our first interjurisdictional war. Even in France, before the arbitration has begun, the court may rule on the authority of the arbitrator if the decision is obvious.⁷

The antisuit injunction – alive and well and being used against Russia⁸

Where countries, or sometimes just judges, hold different views on a given case, a French court may reject an application to dismiss and an English court can see the case another way. This happened in the case of *The Heidberg*.⁹ There, the problem related to the incorporation of an arbitration clause contained in a charterparty into a bill of lading that was then assigned by transfer to the consignee of goods. The Belgian courts ruled that the consignee was not bound in that situation. Where there are clear words of incorporation in the bill of lading, the English courts do not have the same problem. This all goes back to the English Bill of Lading Act 1855. The traditional approach of the English courts was straightforward. They will issue an antisuit injunction. This was done in support of arbitration in the *Tracomina*¹⁰ affair involving Switzerland. Judge Diamond QC felt correctly that he was bound by the Belgian Court decision.

The *West Tankers* case¹¹ limited the English (but not the US') use of such injunctions to court proceedings outside the EU. After all, the original Brussels Convention and now

⁴ Belgian Code judiciaire, art 1690(4); Dutch Burgerlijke rechtswording, art. 1052(3); the French CPC is essentially silent here.

⁵ In Holland and Belgium, there is ostensibly no review at all when appointing arbitrators. Dutch Burgerlijke rechtswording, art. 1022 seems to provide for a full review on a stay/dismissal application.

⁶ *CNT c/ MSC*, ATF 121 III 38 (1995) and *Fondation M*, ATF 122 III 139 (1996); LDIP, art. 1(2).

⁷ CPC, art. 1448

⁸ [2020] UKSC 38

⁹ *Partenreederei M/S Heidberg v Grosvenor Grain & Feed Co Ltd (The Heidberg) (No.2)* [1994] 2 Lloyd's Rep. 287

¹⁰ *Tracomina v Sudan Oil Seeds* [1983] 1 WLR 1026

¹¹ *Allianz v West Tankers Inc* (Judgments Convention/Enforcement of judgments) [2009] EUECJ C-185/07 [2009] 1 AC 1138.

Regulation contain no exception to jurisdiction for a valid arbitration agreement unlike the English Civil Jurisdiction and Judgements Act.

The problem anyway with antisuit injunctions is that one needs in personam jurisdiction against the defendant to make them work. This is often a great deal easier said than done. One case where it could have worked involved Kenya a few decades ago. There, the respondent to the arbitration issued proceedings in Nairobi alleging fraud against his former hotel partner. The allegation was trumped up and was clearly designed to use the old English law argument that in fraud cases, arbitration cannot be used to defend the honour of a gentleman. The error in that argument should be apparent in that the Before the rule's abolition in the 1996 Act, the English courts always held that it only applied to the defendant not the claimant.¹² However, a now-deceased judge who was rumoured to be "ethically unaligned" ruled that the equivalent Kenyan enactment applied and allowed the court case to proceed. His decision was reversed on appeal after about five years of pointless litigation. The defendant was actually amenable to English jurisdiction and should have been on the receiving end of an antisuit injunction.

As the *Laker Airways* litigation of the 1980s showed, antisuit injunctions have one structural flaw: they can be used both ways simultaneously!¹³ One country's courts can stop the defendant from either continuing with the injunction or the underlying suit or arbitration. It then becomes a matter of chance or commercial risk as to which courts' orders either side least minds ignoring. Here, though, common law countries do have some type of "edge" in that their continental European counterparts do not seem to have an antisuit or anti-arbitration weapon in their civil procedure armouries. Excessive use of these types of weapons may yet make a French or Swiss court invent an appropriate process. (After all, both of these countries discovered a "common law" way of reversing awards by way of "révision" in the 1990s.¹⁴)

The last classic way of messing up an arbitration is to fail to appoint an arbitrator. This device has never worked well in England where the default process whereby the other party can have its nominee made the sole arbitrator has usually prevented this method working.¹⁵ Countries such as Belgium and Holland will simply decline to hear any challenges to jurisdiction in this context. Others, notably France and Switzerland allow the respondent to argue that there is obviously no valid arbitration agreement covering the dispute.¹⁶ A delaying party can now challenge jurisdiction twice over at the appointment stage and then after the ruling on jurisdiction. The English Act is unclear and other countries such as the US and Sweden permit full jurisdictional challenges anyway. The English caselaw limits

¹² *Cunningham-Reid v Buchanan-Jardine* [1988] 1 W.L.R. 678; S. 24(2) Arbitration Act 1950

¹³ *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d. 909 (1984) & *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58

¹⁴ Now, incorporated into LDIP, art. 190a & CPC, arts. 1502 & 1506(5).

¹⁵ S. 17 Arbitration Act 1996; formerly s 7 Arbitration Act 1950.

¹⁶ CPC 1455, incorporated into international arbitration by art. 1506(2) & LDIP 179(3).

jurisdictional challenge on Swiss lines.¹⁷ However, that can be overcome by applying for an injunction under section 72 of the 1996 Act.

Messing up the appointment process may not deliver any extra results. Increasingly, though, failing to appoint an arbitrator has proved an ineffective way of wrecking an arbitration. Many arbitration agreements have either institutional clauses or even ad hoc ones with default appointment provisions.

Another trick of doubtful appropriateness has always been for the Respondent to refuse to pay the advance to cover the costs in an institutional case. This can put so much cash flow pressure on your opponent that it may force an early settlement. Article 37 of the ICC Rules still makes this a weapon when money is tight on the part of the claimant.

The English approach to protecting vulnerable arbitration proceedings has always been to blindly slap on a freezing order, formerly known as Mareva injunction. This reached its high-water mark in the early 80s.¹⁸ A slightly more restrained attitude is taken now. The sheer threat of it and the corresponding dislocation of banking facilities produces bank guarantees and keeps things reasonably solid.

The other route much favoured in shipping circles is the arrest of the ship. This was a doubtful proposition in Beirut during the height of the civil war there. Otherwise, it works reasonably well. The extent to which English courts will issue injunctions in aid of a foreign arbitration was of course the subject of the *Channel Tunnel* case¹⁹ the decision in which is reversed by the 1996 Act, a view reinforced by the insertion of an Article 185a into the Swiss LDIP.²⁰ Certainly, the English have been far more asset-freezing happy than other countries. The consensus on the continent is the provisional measures should only be available if the arbitrator clearly lacks those powers and as a last resort. Clear arguments can be raised to say that cases fit within both categories.

Unfortunately, where the position is fairly woolly, protracted litigation and erratic results can result. The US position since *McCreary*²¹ has been nothing short of chaotic. It is something of a mystery how a case so widely criticised by commentators has lasted so long. It basically says that the New York Convention precludes the use of interim measures by the courts. Vast numbers of courts have evaded, distinguished and in some cases just ignored this decision. Most modern arbitration statutes expressly state that the courts remaining empowered to deal with problems concerning New York Convention cases.²² It remains, though, an obstacle that can be hit by the unwary. Increasingly, the concern switches to the

¹⁷ *Crowther v Rayment* [2015] EWHC 427 (Ch) refusing to appoint nevertheless.

¹⁸ *Ninemia Maritime Corp v Trave Schiffahrts GmbH & Co KG (The Niedersachsen)* [1983] 1 W.L.R. 1412 probably represents the turning of the tide against Marevas being granted almost automatically against one ship companies with substantial backers.

¹⁹ *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334

²⁰ S. 2(3)(b)

²¹ *McCreary Tire & Rubber Co. v CEAT, SpA*, 501 F 2d 1032, 1038 (3rd Cir, 1974)

²² UNCITRAL Model Law, art. 9; Belgian Code judiciaire, art. 1683.

question of whether a party needs to use the emergency arbitrator powers under arbitration rules before going to court.²³ The smart thing to do is to use the two in tandem, obtaining the arbitrator's ruling first.

An almost unimaginative way of derailing an arbitration is to apply to remove an arbitrator. There are risks involved. If the tribunal rejects the application and any arbitration institution or court dealing with the problem, does the same, the prospects of success in the arbitration have been seriously damaged. In some cases, it may be better to have an arbitrator appointed by the opponent who is obviously biased. This tends to push the other two arbitrators into ignoring the input of the third panel member. The art is to gently point out the unacceptable behaviour of the latter without applying for his or her removal.

Having said that, an application to court in a non-institutional case may take years to resolve. The UK Supreme Court in *Halliburton*²⁴ laid down some important principles while rejecting an application to remove an arbitrator. The process took three years and was concluded two and a half years after the tribunal reached a unanimous decision. Removing an arbitrator in the situation concerned would have been completely pointless in terms of the overall case outcome. Increasingly municipal laws treat a choice of an institutional arbitration as excluding the right to go to court. This is true of Swiss, French, Belgian, Swedish and Dutch law.²⁵ The Model Law and the English 1996 Act provide better options for delay by requiring the exhaustion of institutional remedies first.²⁶

So, you have your award. You merely now have to collect on it. Your opponent bristles (perhaps justifiably) that the arbitrator seems to have taken his jurisdiction from a contract between the parties which has nothing to do with the dispute in question, the relevant agreement being silent on the subject. This is the accepted wisdom. Do not waste time. Apply for enforcement wherever the customer has any assets of a size worth seizing. After decades of caselaw, we know that the New York Convention does not allow the parties to delay in enforcement while waiting for the outcome of setting aside proceedings. Unless the award is fairly useless or you run into a sovereign immunity from execution from problem, you should at least obtain security for the award. Your application for enforcement should carry with it at least a possible application for a freezing and/or if appropriate a garnishee order.

It is, though, an interesting tactical question as to whether you should first apply to convert your award into a judgement. The judgement will fall outside the various regulations on the enforcement of judgements. That, though, does not make it a useless weapon. You can of course enforce in the place of arbitration. Swiss bank accounts after a Geneva arbitration

²³ *Shapoorji Pallonji & Company Private Ltd v Yumn Ltd* [2021] EWHC 862 (Comm)

²⁴ *Halliburton Company v. Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48

²⁵ LDIP art 180a(1) & 180b(2); CPC, art. 1456(3) & 1506(2); Code judiciaire, art. 1687(1) ; Lag om skiljeförfarande, ss 10(1) & 11, Burgerlijke Rechtswordering, art. 1035(7)

²⁶ Model Law, art. 13(3); s 24(2) Arbitration Act 1996,

are not to be taken lightly (if only you can identify them). There is English and US caselaw to show that one can enforce a judgement confirming an arbitration award as a judgement.²⁷ This blocks out any non-public policy concerns about whether the arbitrator had jurisdiction. Where a reasonable result is reached even if the arbitrator did not give a proper hearing or behave terribly well, it can help.

In the US, in domestic cases, a drafting hole in the Federal Arbitration Act led courts to hold that unless personal jurisdiction could be established or the parties agreed to it, one could not have an arbitral award confirmed. This changed at least for international cases with the 1970 ratification of the New York Convention. Chapter 2 of the FAA has a confirmation provision which turns every enforcement case involving foreign elements into a mandatory federal jurisdiction. This does, though, explain some rather claustrophobic drafting in arbitration clauses prepared by American lawyers. A more recent issue has been some US courts deciding that forum non conveniens applies to an application to enforce an arbitration award.²⁸ Apart from being a breach of the New York Convention when applied to a foreign award, this emphasises the need to go back to the practice of stating that the parties agree to enforcement in any US court.

The worry about applying to confirm an award in the place of arbitration where there may be no assets is that one may be provoking setting aside proceedings. One solution is to wait until the deadline has passed. That, though, may take away one of the advantages of confirmation, triggering a submission to the jurisdiction which will enable the judgement to be enforced elsewhere. The best scenario is where an application has been made by the losing party but rejected as being out of time. In some countries, such as Switzerland, that will block a defense to enforcement.

The first concern, though, is setting aside proceedings. At various times since the war, Switzerland, France, Belgium and Sweden have flirted with the notion that an award rendered there without any great connection to a location in that country might not be subject to setting aside proceedings in the seat.²⁹ Belgium eventually repealed its bizarre statute which barred setting aside proceedings when all parties were non-Belgian in almost every way.³⁰ The trend now is to allow exclusion agreements by statute. We see this in Switzerland, Sweden and now Belgium.³¹ A party who will accept any arbitral outcome however horrific may agree to one of these exclusions. Where, though, the arbitrator has strayed from the scope of the arbitral agreement in tackling a dispute which lacks the

²⁷ *The Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313 at pp. 1317-1323 (CA 2d 1973); *East India Trading Co. Inc. v. Carmel Exporters & Importers Ltd.* [1952] 2 QB 439. See A Samuel, *Jurisdictional Problems in International Commercial Arbitration*, Schulthess, Zurich 1989 at p. 301.

²⁸ *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011).

²⁹ *SEEE v Yugoslavia* JT 1958 III 107; *General National Maritime Transport Company c/ Götaverken Arendal A.B.*, [1980] *Rev. Arb.* 524, Code judiciaire, art 1717(4); *Republic of Uganda v. Solel Boneh International* 14 December 1983

³⁰ Formerly Code judiciaire, art. 1717(4)

³¹ LDIP 191(2), Belgian Code judiciaire, art. 1718; Lag om skiljeförfarande s 51(1)

appropriate connection, one can argue that the exclusion agreement does not cover the case. This argument is likely to remain fairly elusive since exclusion agreements are very unusual.

Now, though, in almost all cases, the losing party in an arbitration can apply to set aside the award of arbitration. If applying to set aside an award where enforcement proceedings are pending, you should be forced to put up security at least. The court, though, may follow the lead of the Swedish Supreme Court in *Götaverken* and order enforcement anyway.³²

You could apply for an injunction to stop enforcement. This is one of those subjects that apparently bind India and Pakistan together. Their courts have both issued these types of injunctions. The English courts have done so in one case which was reported on every subject but that one. There the English High Court had given leave to appeal under the 1979 Act when a French court ordered enforcement of the award. (The appellant in London had actually missed the deadline for appealing against the *exequatur* (provisional enforcement order). The English courts then dismissed the appeal and so the case quietly died.

If you have had to pay out on an award that has subsequently been set aside elsewhere, can you recover the money? There are legal problems with the different laws of restitution which tend to require that the enrichment be somehow unlawful or be based on a mistake. This all presupposes that the assets of the successful claimant are subject to a jurisdiction where you can make your claim.

Anyway, can you resist enforcement on the basis that the award has been set aside in its place of origin? The straight answer in the French courts is: no. This explains why countries who prevent a party from stopping the arbitration pre-award create real problems where relevant assets may be located in France. The old French code did not list setting aside in the place of origin as a ground for resisting enforcement which led to the Cour de cassation decision in *Pabalk c/ Norsolor*.³³ The NCPC is even clearer on the subject.³⁴ Article VII of the New York Convention merely states what is apparent from the rest of the Convention. That document does not prevent municipal laws and treaties from making enforcement easier than is provided for under the Convention. It just cannot be made more difficult. Against this background, the French courts' decisions in *Hillmarton*³⁵ and *Chromalloy*³⁶ could hardly have been a surprise. The only complicating factor was the way in which, in the former case,

³² NJA 1979, p. 527.

³³ *Pabalk Ticaret Ltd. Sirketi c/ Soc. Annon. Norsolor*, [1985] Dalloz101 with a note by J Robert & B Moreau; As a keen 24-year-old, I bounced up to Jean Robert at a conference and asked him about whether enforcement of a setting aside award was possible. He calmly replied that it had already happened and kindly gave me the reference.

³⁴ CPC arts. 1520 & 1525.

³⁵ *Hillmarton v. Omnium de Traitement et de Valorisation*, Cour de cassation, Mar. 23, 1994, [1994] *Revue de l'Arbitrage* 327 & *Omnium de Traitement et de Valorisation c/ Hillmarton*, Cour de cassation, June 10, 1997, [1997] *Rev. Arb* 376

³⁶ *République arabe d'Egypte v. Société Chromalloy Aero Services*, Cour d'appel de Paris 14 Jan. 1997, [1997] *Rev. arb.* 395.

the Swiss arbitrator to whom the matter was remitted then reached the opposite conclusion to his predecessor. In effect, there were now two awards in circulation: the first dismissing the claim, the second upholding it. Faced with applications to enforce or recognise both, the French courts had to give precedence to the first award (which was also the first receive recognition) to prevent logical chaos.³⁷ What was far more disturbing was the way in which the District Court Judge handled *Chromalloy* in the US. There the Egyptian courts set aside the award in the place of arbitration. The judge somehow referred herself back for the grounds for resisting enforcement to Chapter 1 of the FAA relying on the catch-all provisions of §208 which apply that chapter where it is not in conflict with the Convention. §9 says that awards can be confirmed unless they are vacated in accordance with the next section. From this court deduces that an award set aside on a ground that is not listed in §10 cannot be refused enforcement on that basis. It is neat and it makes complete nonsense of the wording and context of the Act. §§9-10 do not relate to setting aside abroad. There is no conflict between the New York Convention which chapter 2 applies to the enforcement of foreign and international awards and Chapter 1 which does not deal with that subject. To howls of juridical derision, enforcement was ordered.

The Second Circuit appeared to repair some of the damage in *Baker Marine v. Chevron*.³⁸ In that case, the court applied Article V(1)(e) to decline enforcement of a Nigerian award that the Nigerian courts had set aside. The court seems to say that where an arbitration agreement provides for arbitration abroad under the local law, there is no place for applying §§9-10 of the Federal Arbitration Act. That would straighten out the first problem in *Chromalloy*. It then quite rationally rejects the argument based on the fact that the Convention gives the enforcing a court a discretion as to whether to permit enforcement of an award coming within one of the article V(1) defenses. The judge remarks that he cannot see any particular reason not to recognise the decision of the Nigerian court.

Perhaps, unfortunately, in an attack of judicial politeness, the court distinguishes *Chromalloy* on the basis that the Egyptian court there failed to apply its own law and the agreement expressly provided for no appeals. This is simply not good enough. Either way, one is left with US courts happily exercising their discretion as to whether to enforce awards set aside in their place of origin. The original rejection of the mandatory “shall” during the travaux préparatoires of the New York Convention is finally coming back to haunt people. Since then, the Dutch in the *Yukos* case have enforced an award set aside in Russia by a court of which the Dutch did not approve³⁹ and there is a case which suggests a similar outcome in England on the same award.⁴⁰

³⁷ 939 F. Supp. 907 (D.D.C 1996)

³⁸ 191 F.3d 194 (2nd Cir. 1999)

³⁹ A J van den Berg, “Enforcement of Arbitral Awards annulled in Russia, 27 *J Int’l Arb.* 179 (2010) The Høge Raad rejected the appeal.

⁴⁰ *Yukos Capital SARL v OJSC Rosneft Oil Company* [2012] EWCA Civ 855; [2014] 1 QB 458.

The mess created by any refusal of the enforcing court to recognise the setting aside decision of the court of the seat is well documented. The losing side in the arbitration has to fight enforcement proceedings wherever he has assets. If his claim has been wrongly rejected in the arbitration, he has to find a forum to generate an enforceable judgement outside France and possibly elsewhere.

At the end of the day, though, the winning side in an arbitration needs to obtain enforcement. That unfortunately is not the same as obtaining money, as the winning party in the surreal *Dalmia Dairies* litigation of the 1970s⁴¹ will tell you. The award strangely ordered the loser to pay money in a particular location. Enforcement proceedings in England failed initially under the New York Convention on the basis that such an order could not be converted into an English judgement. The poor claimant had to start a writ action claiming damages for breach of the agreement to arbitrate.

The last thirty years has seen a proliferation of messy cases where the losing party to the arbitration is slightly the wrong party. The bank account in a jurisdiction has been identified but it belongs to a parent or sister company. The lawyer should never forget his corporate veil and agency argument. In France, we add the group of companies' category.⁴² The position there is that where the contracting party is part of a group and another part of the group plays a significant role in performing the contract, it becomes a party to the agreement. The phenomenon could almost be an example of the *Eurymedon* phenomenon much beloved of English and Commonwealth law students but generally ignored or rejected by the English courts since the early 1960s.⁴³ The idea is that there is an offer issued to a third party to perform the contract with its original terms which is accepted by the third party's starting to perform. All these pieces of ammunition must be used. The Swiss courts can be fairly severe when asked to mess with the corporate veil unless the law governing the underlying contract is French as a result of a quirk in the LDIP.⁴⁴ The American courts have shown partiality in some cases at least for the agency argument.⁴⁵

Beyond all these arguments, there is one other trick to be used with care and in the right situation. In *Soinco*,⁴⁶ the sister companies were trading on the London Metal Exchange. Magically, though, the defendant didn't seem to have any assets; the other company did. So, a garnishee order was slapped on the bank account of the "senior sister" company. It was reinforced by a Mareva injunction and eventually by the appointment of a receiver. The

⁴¹ *Dalmia Dairy Industries Ltd v. National Bank of Pakistan* [1978] 2 Lloyd's Rep 223

⁴² *Kout Food Group c/ societe Kabab-Ji SAL*, Cour d'appel de Paris, 23 June 2020 [2020] Rev. Arb. 839 at pp. 845-846, a recent example of a long string of cases.

⁴³ *New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co. Ltd.* [1974] 2 WLR 865; *City of London v Sancheti* [2008] EWCA Civ 1283; [2009] 1 Lloyd's Rep 117

⁴⁴ LDIP, art. 178(2)

⁴⁵ *Bridas S.A.P.I.C v. Government of Turkmenistan*, 345 F.3d 347, 356-358 (5th Cir. 2003); *Landry v Transworld Systems Inc.*, 485 Mass. 334 for an example of the argument failing before the Massachusetts Supreme Judicial Court.

⁴⁶ *Soinco v Novokuznetsk Aluminium* [1998] QB 406



thinking was that the company with the account had to owe money to the company that did not. Otherwise, how come money was clearly being funnelled from one to the other? A large seven figure sum of money was recovered through this.

What is a little curious about this case is that nobody ever relied on the Swiss judgement that was obtained on the award. Yet it may have had a benign influence for the claimants. The award had two potential problems with it: a possible illegality/public policy under Russian law and some fairly loose reasoning on jurisdiction in the award. Nevertheless, only the public policy point was ever taken in the English courts. This is in spite of a clear submission to the Swiss jurisdiction brought about by a failed application to set aside the award in that country.

The ugly truth is that in the messy world of international arbitration, the going can become rather less “the Wings of Silence”⁴⁷ than Wim Wenders’ angel coming crashing down to the earth in *Wings of Desire*. After all the esoteric discussions about the amicable conciliatory nature of the arbitral process, there is occasionally a nasty job to be done.

⁴⁷ J Paulsson, “Delocalisation of International Commercial Arbitration: When and Why It Matters”, 32 ICLQ 53 (1983).