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Case No: 2004 Folio 579

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 November 2007

Before:

THE HON. MR JUSTICE TOMLINSON

- -

Between:

THE REPUBLIC OF KAZAKHSTAN	**Claimant**
- and -	
ISTIL GROUP INC	**Defendant**

- -
- -

Ali Malek QC, Matthew Parker
(instructed by **Messrs Reed Smith Richards Butler LLP**) for the **Claimant**
Richard Siberry QC (instructed by **Messrs Shaw-Lloyd**) for the **Defendant**

Hearing dates: 5 October 2007

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Judgment

The Hon. Mr Justice Tomlinson :

1. This is an application for an injunction restraining the Defendant from pursuing any further proceedings in respect of claims advanced by it against the Claimant in an arbitration conducted under London Court of International Arbitration Rules and designated No. 1305. It raises a question as to the proper ambit of judicial restraint in relation to the conduct of international arbitration. Such restraint is enjoined by section 1(c) of the Arbitration Act 1996 which provides:

> "The provisions of this Part are founded on the following principles, and shall be construed accordingly –
>
> …
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

"This Part", Part 1 of the Act, comprises sections 1 to 84 which deal with "arbitration pursuant to an arbitration agreement". Each side has for its own reasons and from its own standpoint described the case as extraordinary. The circumstances are indeed unusual from the standpoint of the disinterested observer, so much so that I have begun to wonder whether the proper analysis may not be that the intervention of the

court is here sought in matters which are not in fact governed by Part 1 of the Act. Happily I do not need to decide that point because Mr Richard Siberry QC for the Defendant concedes for the purposes of the hearing before me that the court retains a residual jurisdiction under section 37(1) of the Supreme Court Act 1981 to intervene by injunction in arbitration proceedings where "it appears to the court to be just and convenient to do so". Mr Siberry reserves the right of the Defendant to contend to the contrary should the case go further. Nonetheless the jurisdiction, if it exists, should he submits be exercised most sparingly, and with due regard to the principles and provisions of the Arbitration Act.

2. Mr Siberry's concession was made in the light of four decisions at first instance and of obiter dicta in two cases in the Court of Appeal, *Intermet FZCO v Ansol Limited* [2007] EWHC 226 (Comm) (Gloster J), *Elektrim SA v Vivendi Universal SA (No. 2)* [2007] 2 Lloyds Rep 8 (Aikens J), *J Jarvis & Sons Limited v Blue Circle Dartford Estates Limited* [2007] EWHC 1262 (TCC) (Jackson J), *Albon v Naza Motor Trading Sdn.Bhd.* [2007] EWHC 1879 (Ch) (Lightman J), *Cetelem SA v Roust Holdings Limited* [2005] 2 Lloyds Rep 494 per Clarke LJ at paragraph 74 and *Weissfisch v Julius* [2006] 1 Lloyds Rep 716 per Lord Philips CJ at paragraph 33(v). Since the conclusion of the argument before me the Court of Appeal has upheld the decision of Lightman J in *Albon* – [2007] EWCA Civ 1124 – although I note that before that court the existence of jurisdiction in the formal sense was not challenged. By way of emphasis as to the extreme caution with which the court should nonetheless proceed Mr Siberry referred me to an address given by Judge Stephen Schwebel, former President of the International Court of Justice, on the topic of "Anti-Suit Injunctions in International Arbitration" – Juris Publishing, 2003. Judge Schwebel there suggested that for a court to interfere by injunction with international arbitration proceedings is in violation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, in violation of customary international law and in violation of the general principles of international arbitration. Judge Schwebel did however envisage that there might be exceptional circumstances "in which there is or may be legal ground for issuance of such an injunction". He continued:

> "For example, where a party has already litigated or arbitrated and lost, arguably it would be reasonable for a national court to enjoin pursuance of arbitration of the same matter elsewhere. But even in such a case, one may ask whether that is the optimum procedure, or whether it should rather be left to the arbitrators in the second jurisdiction to dismiss the duplicative proceeding."

The present is a case in which the Defendant first litigated in Paris and established that there was no applicable arbitration agreement, but lost its action because it was held that the Claimant enjoyed sovereign immunity. The French court directed the Defendant to litigate in Kazakhstan. The Defendant then arbitrated in London in defiance of the French court ruling. This time the Defendant won but arguably it has now been deprived of the fruits of victory following a four-day trial on jurisdiction before David Steel J at the conclusion of which he ruled that the arbitrators had no jurisdiction, the Claimant not being party to any agreement to arbitrate. The Defendant says that the judgment and order of David Steel J does not prevent it from

returning to the arbitrators and inviting them to proceed to a further award on the merits of the dispute. One point which I have to decide is whether, if I form the view that the arbitrators have no jurisdiction so to proceed, I should nonetheless leave it to them to consider what is the effect of the judgment of David Steel J. Before doing so however I must first set out as briefly as I can the unusual context in which this question arises. In doing so I borrow gratefully from the judgment of Longmore LJ in the Court of Appeal when the matter was before that court on an application for permission to appeal, I borrow also from the judgment of David Steel J and yet further from the skeleton argument of Mr Ali Malek QC who appeared before me for the Claimant.

3. The Claimant is the Republic of Kazakhstan, to which I shall refer hereafter as "ROK". The Defendant, Istil Group Inc to which I shall refer as "Istil" is a Delaware corporation. Istil is the successor to a company called Metalsrussia (BVI) Limited. This latter company changed its name to Metalsrussia Corporation Limited in 1991 and then, in early April 2002, merged into its parent company Metalsrussia Group Holdings Limited. This company then in turn merged into Istil in mid April 2002. The consequences of each merger was that Metalsrussia Corporation Limited and, later, Metalsrussia Group Holdings Limited, ceased to exist by virtue of section 78 of the British Virgin Island International Business Companies Act. As it happens in December 2005, before David Steel J gave judgment, Istil merged with Metalsukraine Corporation Limited, "Metalsukraine", another BVI company. Istil ceased to exist as a separate corporate entity but under the law of both the British Virgin Islands and of Delaware proceedings to which Istil was party at the date the merger became effective may be pursued either in the name of Metalsukraine as the surviving company or in the name of Istil, or indeed in the name of Metalsrussia Group Holdings Limited or Metalsrussia Corporation Limited. It was argued that Metalsukraine should be joined as an additional Defendant and this may be relevant to the form of any order but I can otherwise ignore this most recent merger. I shall continue to refer to the Defendant as Istil that being the company to which reference was made in the judgment of David Steel J and indeed in whose name the unsuccessful application for permission to appeal was made to the Court of Appeal and an unsuccessful petition for permission to appeal was made to the House of Lords.

4. Between June 1994 and July 1995 Metalsrussia Corp Ltd made three contracts for the purchase of rolled steel. All three contracts contained a London arbitration clause requiring disputes to be resolved under the auspices of the London Court of International Arbitration, to which I shall refer hereafter as "the LCIA". The counterparties to those contracts were as to the first contract an organisation called State Foreign Trade Company Kazakhstan Sauda ("Sauda"), and as to the second and third contracts, Oltex Trading Limited ("Oltex").

5. Metalsrussia and their successors in title Istil have from an early stage contended that Sauda and Oltex made the sale contracts as agents for the owners or operators of the steel mill from which the steel was to be provided, pursuant to those contracts, Karaganda Metallurgical Combine ("Karmet"). No steel has ever been delivered pursuant to the sale contracts.

6. In late 1995 Karmet was experiencing severe financial difficulties and, on 17 October 1995, ROK passed decree No. 1338 by clause 6 of which all exports sales and agreements for supply of raw materials were suspended with effect from 18 October

1995. Istil now contends that Karmet was not a legal entity distinct from ROK, and that ROK itself was liable on the contracts as principal. As I shall demonstrate, this has not always been Istil's case. Alternatively it is said that ROK agreed as part of the subsequent sale of Karmet's assets, by way of privatisation to a company called Grupo Ispat UK, that it would discharge the debts and liabilities of Karmet. One such debt was said to arise from various "verification of debt" documents signed on 17 and 18 October 1995 whereby Karmet acknowledged that various sums in excess of US$7million were due to Metalsrussia. Neither payment nor damages for non-delivery has or have been forthcoming.

7. Metalsrussia therefore started proceedings in the Paris Commercial Court on 7 November 1997. Since any claim under the contracts themselves would be subject to the arbitration clause, it seems that Metalsrussia put its claim mainly, if not entirely, not on the basis that ROK was party to the original contracts but rather on the basis that ROK was responsible for Karmet's debts. It was also said however that Karmet was an emanation of ROK and that ROK was liable for Karmet's debts for that reason also. ROK responded by relying on the arbitration clause in the contracts and claiming that, in any event, ROK was entitled to sovereign immunity. The Paris Commercial Court in its judgment of 23 June 1999 pointed out that the arbitration clause would not apply to a claim that ROK was responsible for Karmet's debts by reason of the privatisation agreement and that the privatisation agreement was for the benefit of Ispat, not of third parties. The Paris Court upheld the plea that the French courts had no jurisdiction, and directed the parties "to go before the courts having jurisdiction in Kazakhstan".

8. Metalsrussia sought to challenge this decision by means of a "contredit". The two parties repeated the earlier arguments in their submissions to the Court of Appeal. The Court of Appeal gave judgment on 1 March 2000. The conclusion was that a contredit was not admissible since the judgment was in part a judgment on the merits and, thus, any challenge to the judgment should have been dealt with by way of an appeal. However in identifying the scope of the decision on the merits the Court of Appeal found:

> "In this case the first judges ruled on the merits by … upholding the plea in bar arising from the immunity from jurisdiction invoked by the Republic of Kazakhstan which they more specifically defined as an exception of non-jurisdiction. They also ruled on the jurisdiction, explicitly as regards the grounds and implicitly, by sending the parties to go before 'the Kazakhstan court having jurisdiction' in the dispositif, by excluding the application of the arbitration clauses claimed by the Republic of Kazakhstan and the National Bank of the Republic of Kazakhstan."

Metalsrussia did in fact lodge an appeal on 20 March 2000 but this appears to have been "cancelled" in October 2000 by reason of delay in summoning ROK.

9. Thus rebuffed, Metalsrussia did not in fact start proceedings in Kazakhstan but resorted to arbitration proceedings in London by a Notice of Arbitration dated 5 July 2001. The LCIA duly appointed three arbitrators, Dr Volker Triebel of Dusseldorf being the Chairman. ROK disputed the jurisdiction of the arbitrators, and the tribunal

dealt with the question of jurisdiction in what they called a Partial Award of 15 January 2003. In addition to denying that they were party to any arbitration agreement ROK naturally relied upon the decision of the Paris Commercial Court to that effect. The tribunal found that the decision of the Paris court on this point gave rise to no issue estoppel because it had, in their view, been unnecessary to its decision. Before David Steel J it appears to have been common ground that this was a mischaracterisation of the decision of the French court. The arbitrators decided that they did indeed have jurisdiction. However by the time they issued their Partial Award on 15 January 2003 Metalsrussia had merged into its parent company Metalsrussia Group Holdings Limited which had in turn merged in mid-April 2002 into Istil. As I have already recorded under British Virgin Island law that meant that both Metalsrussia and its parent company had ceased to exist. No-one however informed the arbitrators of this fact so that their Partial Award deciding that they did indeed have jurisdiction was in favour of Metalsrussia.

10. On 14 April 2003 Istil by its solicitors Messrs Penningtons, Paris informed the tribunal of the mergers and that "consequently Istil Group Inc is now the proper name for the claimant in the arbitration having acquired all the rights and liabilities of Metalsrussia Corp Limited by virtue of these mergers. We would be grateful if you would kindly note the change of claimant in this matter".

11. ROK subsequently discovered that there was another company called Metalsrussia Corporation Limited which had been incorporated in Hong Kong but struck off on 30 June 2000. I shall refer to this company hereafter as "HK Metalsrussia". Metalsrussia Corp Limited and HK Metalsrussia both apparently had offices in the same building in Hong Kong. ROK believed that the arbitration had been commenced by HK Metalsrussia and that the Partial Award had been given in its favour. ROK therefore disputed the jurisdiction of the tribunal in respect of any claim asserted by Istil into which Metalsrussia Group Holdings Limited but not apparently HK Metalsrussia had merged.

12. On 11 June 2004 the tribunal issued a Final Award. In that award the arbitrators recorded:

    i) Istil's contention that "in the course of two mergers [Istil] became entitled to sue under the Three Contracts and to be substituted for [Metalsrussia] as a party to the arbitration proceedings" and that "The Award on Jurisdiction of the Tribunal had not been affected by the two mergers"; and

    ii) ROK's contention that "Whilst maintaining its objection to the jurisdiction of the arbitral tribunal, the Award on Jurisdiction had been rendered on a false basis that HK Metalsrussia, in the alternative [Metalsrussia] as Initial Claimant, was still in existence, and that the tribunal had no power to add the Claimant as a new party to the arbitration proceedings".

13. The tribunal held that because Metalsrussia (which it accepted as the original claimant in the arbitration) had ceased to exist by the time the Partial Award was made, that award was a nullity. It said at paragraph 6.3, "As the award on jurisdiction is a nullity, it is necessary for the Arbitral Tribunal to decide on its jurisdiction anew". Nevertheless the tribunal concluded that Istil was entitled to be substituted as claimant in the arbitration proceedings (paragraph 6.4) and held that it had jurisdiction in

respect of the claims brought by Istil (paragraphs 6.6 and 12.1). The tribunal proceeded to make an award on liability (paragraphs 7-8), and ordered ROK to pay Istil US$5,937,213.69 plus interest, and costs of US$202,159.94 (paragraph 12). The tribunal's decision that the award on jurisdiction was a nullity was unsolicited by either side and was, I am told, entirely unheralded. As appears below, David Steel J recorded his lack of surprise that the tribunal regarded the validity of the Partial Award as being in issue bearing in mind (a) that Istil was claiming that it should be substituted for the original claimant and (b) that ROK was claiming that the initial and Partial Award had been rendered on a false basis in that the initial claimant, whoever that might have been, had not at the time of the award been in existence.

14. On 13 July 2004 ROK commenced these proceedings seeking, under section 67 of the Arbitration Act 1996, to set aside the Final Award on liability on the basis that the tribunal had no jurisdiction in respect of the claims brought by Metalsrussia. The grounds for the application were that neither ROK nor Istil was or became party to the arbitration agreements contained in the contracts, and that Istil was in any event estopped from contending otherwise as a result of the decision of the French court to which I have already referred. Istil for its part maintained that the tribunal did have jurisdiction. Istil further claimed that by reason of section 73(2) of the Arbitration Act 1996 ROK had lost its right to challenge the Final Award because it had not challenged the Partial Award by means of which the tribunal had ruled that it enjoyed substantive jurisdiction. Section 73(2) of the Act provides:

> "Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling –
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> (a) by any available arbitral process of appeal or review, or
>
> (b) by challenging the award,
>
> does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling."

15. On 18 February 2005 Morison J ordered that the trial of these proceedings would be "a full re-hearing of the question of jurisdiction and shall not be restricted to a review of the arbitrators' decision and [that] the evidence shall not be restricted to that evidence which was before the arbitrators". Istil was granted permission to appeal against that order, but did not do so.

16. The trial of this action took place over four days before David Steel J in December 2005. The court heard oral evidence of fact and received oral evidence as to the content of French law from two distinguished French jurists. There was also evidence of Kazakh law before the court.

17. David Steel J handed down judgment on 3 April 2006. David Steel J held:

> (1) that ROK was not a party to the three contracts upon which Istil's claim was based;

(2) that ROK never became a party to those three contracts;

(3) that Istil was in any event as a result of the decisions made in the French proceedings estopped from contending that ROK was, or had become, a party to any arbitration agreements;

(4) that there was no ad hoc agreement to arbitrate as a result of ROK's stance in the French proceedings followed by Istil issuing its request for arbitration; and

(5) that ROK made no ad hoc agreement during the course of the arbitration proceedings that the tribunal's award on jurisdiction should be final.

18. Although it formed no part of the argument before me David Steel J also pointed to the fact that the Paris Commercial Court had found that ROK could invoke the defence of sovereign or state immunity and that that defence had "on any view not been waived". I say no more about that because it is the contention of Istil that ROK is bound by the Partial Award on jurisdiction the premise of which is that ROK is in turn bound by an arbitration agreement, adherence to which would of course deprive ROK pro tanto of immunity – see section 9 of the State Immunity Act 1978.

19. The outcome of the conclusions at which David Steel J arrived was that he set aside the Final Award on grounds of lack of substantive jurisdiction.

20. I must next set out some of the critical passages in the judgment of David Steel J without which the argument before me cannot be understood. These include:

> "**Finding of nullity**
>
> 36. It was Istil's case that the arbitrators had no power to make a finding that the Partial Award was invalid or a nullity.
>
> 37. This proposition involves two issues:
>
> (a) was the tribunal right to find that its Partial Award was a nullity and
>
> (b) are the parties bound by the tribunal's decision that its Partial Award was a nullity?
>
> 38. It is convenient to consider the second question first. The stages of the argument, on Istil's case, appear to be these:
>
> (a) ROK did not challenge the Partial Award as regards jurisdiction to hear Metalsrussia's claim.
>
> (b) ROK could have challenged it pursuant to section 67.
>
> (c) By reason of section 73 of the Act it could not thereafter challenge the tribunal's substantive jurisdiction.

(d) Accordingly ROK cannot challenge the final award which found in favour of jurisdiction to determine Istil's claim again ROK.

39. The essential issue is whether the tribunal was to be treated as functus as regards the determination of its own jurisdiction. It is clear the tribunal did not think so. Given Istil's case that it should be substituted for the original claimant and ROK's case that the Partial Award had been rendered on a false basis in that the initial claimant (whoever that may have been) had not then been in existence, it is perhaps not surprising that the tribunal regarded the validity of the Partial Award as being in issue.

40. ROK's position is to the effect that it would only have lost its right to challenge the final award by reason of the Partial Award if the circumstances set out in Section 73(2) of the Act applied:

> '73.2 Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings could have questioned that ruling – a) by any available arbitral process of appeal or review or b) by challenging the award - does not do so or does not do so within the time allowed by the arbitration agreement or any provision of the Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.'

41. The short answer is that, whether invited to or not, the tribunal clearly treated the Partial Award as open to question by an available arbitral process of review. Neither side thereafter challenged that approach. It seems to me that, if Istil/Metalsrussia took the view that in responding to an application to substitute Istil as claimant the tribunal was exceeding its powers in setting aside the Partial Award, this irregularity should have been the subject of an application under section 68 of the Act, time for which of course has expired.

42. Accordingly, I accept ROK's submission that Istil has lost its right to object to the making of the final award on the jurisdiction issue and thereby short circuit ROK's challenge to the jurisdiction thereby determined in the final award.

Was the Partial award a nullity?

43. In the light of that conclusion, it is strictly unnecessary to go on to consider the question whether the arbitral tribunal

were correct in their conclusion that the Partial Award was a nullity. However, since the point was debated at some length, I will express a provisional view on the topic."

21. David Steel J then went on to consider various authorities on assignment and the requirement for notice thereof and on universal succession and concluded:

> "56. With those authorities in mind I turn to the question whether the Partial Award was in fact a nullity. The issue traverses, as has been seen, well trodden but tricky territory. It is accepted, as I understand it, that the merger did not render the arbitration a nullity – it merely nullified, on ROK's case, the Partial Award made prior to notice being given to the other parties and to the arbitrators.
>
> 57. I can summarise my conclusions as follows: -
>
> (a) I accept that section 78 of the BVI International Business Company Act is to the same effect as the Bahamian Statute considered in *Baytur***.**
>
> (b) It makes provision for universal succession in respect of all proceedings including, in my judgment, arbitration proceedings.
>
> (c) Accordingly, as a matter of BVI law, no notice of merger is required to establish the right to claim in the proceedings.
>
> (d) As regards English law, notice is required, but once given it allows the arbitration to continue and reinstitutes any orders or awards already made by the tribunal.
>
> 58. I would conclude that the Partial Award was not a nullity. But, as already explained, that is not to the point."

22. David Steel J then dealt with the two contentions as to the making of some form of ad hoc agreement as follows:

> "**Ad hoc agreement**
>
> 59. The next issue that must be grappled with is the contention by Istil that an ad hoc agreement was entered into by the parties conferring jurisdiction on the tribunal to make a final determination of the issue of jurisdiction by virtue of the correspondence between Maitre Bidet (for ROK) and Penningtons in the lead up to the arbitration.
>
> 60. I accept that Monsieur Bidet was not an experienced English commercial solicitor and thus might more readily proceed to conduct an arbitration outside the terms of an

> arbitration clause. But in my judgment it is quite clear that Monsieur Bidet did not do so. His reservation of rights in his letter of 8 November 2001 in response to ROK's notification of its intention to ask the tribunal to decide the issue of jurisdiction as a preliminary issue contains nothing to suggest that ROK was abandoning its right to challenge the award on jurisdiction if appropriate. Nor indeed did Istil treat the letter as such. It was only later that the parties exchanged submissions identifying "squarely" what the issue on jurisdiction was (including the relevance or otherwise of the French proceedings). It is also notable that there is no suggestion that the tribunal regarded themselves as having an enlarged jurisdiction to make a final decision on the issue.
>
> **Agreement for arbitration in the course of the French proceedings**
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> 61. A supplementary contention is made by Istil that the reliance on the arbitration clause by ROK in the French proceedings constituted an offer to submit the claims to arbitration. It was contended that this offer was last repeated in the submissions filed by ROK on 17 January 2000 as referred to in the Court of Appeal judgment.
>
> 62. No copy of those submissions is in fact available. In any event, I am quite unable to agree with the proposition that, in issuing its request for arbitration in July 2001, Istil was accepting any such offer, not forgetting that it was all against the background that the finding of state immunity remained in place."

23. David Steel J then examined the question whether ROK was an original party to the contracts on either of two alternative grounds:

> "64. However, I have not forgotten that, before me, Istil also seeks to press the argument that ROK was an original party to the contracts. I have some doubt whether this is open to Istil. But putting those doubts aside, it is to be noted that this contention is based on two alternative grounds:
>
> (a) that the contracts were concluded by Sauda and Oltex as agents for the Republic, or
>
> (b) that the contracts were concluded by Sauda and Oltex as agents for Karmet which was not a separate legal entity from ROK."

David Steel J had some doubt whether these arguments were open to Istil. At paragraph 70 of his judgment he said this:

> "70. Moreover, throughout the French proceedings it is to be noted that Metalsrussia's contention was that the second and third contracts were concluded by Oltex on behalf of Karmet. Whilst obviously Metalsrussia is not precluded from asserting an entirely contrary case in relation to the issue of the jurisdiction of the arbitrators, the stance clearly throws some doubt on the credibility of such a submission - the more so when the notice of arbitration itself relied only on the alleged agreement during the French proceedings. It was never contended that ROK was itself a party to the contracts."

The notice of arbitration had earlier been set out and discussed by David Steel J at paragraph 30 of his judgment in these terms:

> "**The LCIA proceedings**
>
> 30. The arbitration was commenced by notice given by Metalsrussia dated 5 July 2001. It is to be noted that the notice made the following point as regards the scope of the claim and thus the question of jurisdiction:
>
> > 'The Republic is not directly a party to the contracts. The contracts were in fact entered into by companies wholly owned or controlled by the Republic. Despite the fact that the Republic was not a signatory of the contracts, the Republic has pleaded in the French proceedings on various occasions that the arbitration clause in the contracts bind it……There is therefore a voluntary acceptance by the Republic to submit to the jurisdiction of the arbitral tribunal, alternatively the submissions constitute an offer that MCL hereby accepts by commencing proceedings before the LCIA'."

David Steel J also made the following observation at paragraph 63 of his judgment:

> "**Parties to the contracts**
>
> 63. I have already made the finding that Metalsrussia sought to pursue their claim before the French court on the basis that ROK was not a party to the arbitration agreements but was responding to a claim which was based on the proposition that ROK had become responsible for Karmet's debts on one basis or another. I have also found that, in reality, the claims advanced in the arbitration were formulated in the same way. I return to this topic below."

Nonetheless he concluded that there was no basis for the contention either that ROK was a party to the contracts or that ROK became parties to the arbitration clauses.

24. Finally David Steel J dealt with the question of res judicata as follows:

> "**Res judicata**
>
> 75. As has already been noted, ROK raised two jurisdictional defences in the French proceedings: that the claims were subject to an agreement to arbitrate and that ROK enjoyed sovereign immunity in regard to the claims.
>
> 76. In considering the impact of the French judgments at first instance and in the Court of Appeal, I have had the benefit of oral evidence from two distinguished French jurists: Professor Loic Cadiet for ROK and Professor Jean-Jaques Daigre for Istil. As might be expected there was little in issue between them."
>
> 77. I approach their evidence on the basis of the conclusion that I have already reached earlier in this judgment that the claim in the French proceedings was in all material respects the same as the claim made in the arbitration. Indeed this is clear from the letter giving notice of the arbitration and the content of the awards.
>
> 78. As I have already outlined, leaving aside the proposition advanced in both sets of proceedings that Karmet was simply an emanation of ROK, it was Istil/Metalsrussia's primary contention throughout that ROK's liability for Karmet's debts arose by virtue of the decrees and the sale and purchase agreement. This coterminosity of the scope of the claims in the two sets of proceeding is further confirmed by the acceptance on the part of Metalsrussia that the commencement of the French proceedings interrupted the relevant period of limitation.
>
> 79. Furthermore it was Metalsrussia's case before the French court, not that the claim fell outside the scope of the arbitration agreements (which were very wide and covered "all possible disputes and differences that might arise" out of the contract) but that ROK was not a party to any arbitration agreements. This stance is confirmed by the judgments of the Court of Appeal which recorded Metalsrussia's challenge to the judgment as involving the submission that ROK "could not invoke an arbitration clause in a contract it did not sign and which it never accepted".
>
> 80. Thus it was rightly common ground between the experts that the jurisdictional defence based on the arbitration clause had to be decided first. The two defences were alternatives. Only if it was not bound by an arbitration agreement could the defence raised by ROK of sovereign

> immunity arise. In this respect it was, as I understood it, accepted that the tribunal was wrong to find that it was "not necessary for the Paris Commercial Court to decide on the issue of the application or non-application of the arbitration clause in order to reach its decision on sovereign immunity.
>
> 81. Moreover, both experts accepted that the French Court had impliedly determined ROK's arbitration defence in its dispositif, a view confirmed by the judgment in the Court of Appeal. (In this respect Professor Daigre took the view that the Court of Appeal was wrong but given that the purpose of expert evidence is to identify what conclusions would be reached by the relevant state court on the issue, I feel unable to look behind that decision).
>
> 82. It follows in my judgment (again this is not a contentious matter as between the experts), the judgment of the French Court is a judgment on the merits for the purposes of res judicata, despite the fact that the ruling was implicit rather than explicit. It thus constitutes an issue estoppel for the purposes of the present proceedings. On that basis, it has been accepted that ROK cannot be said to be a party to the arbitration clause and must be entitled to the relief claimed in the present application.
>
> 83. Indeed, I also accept the argument that Istil's case that ROK was a party to the contracts and/or the arbitration agreements cuts across the unequivocal and explicit finding of the French Commercial Court that ROK could invoke the defence of sovereign immunity. Since that defence on any view has not been waived, I accept the proposition that Istil is estopped from contending that the legal consequence of the decree and the SPA were that ROK had become a party to the contracts."

25. David Steel J thus set aside the Final Award. He varied the order for costs therein by requiring that Istil pay ROK's costs of the arbitration. He also ordered Istil to pay ROK US$350,000 by way of an interim payment on account of its costs of and occasioned by the application to set aside the Final Award, but stayed payment pending an application by Istil to the Court of Appeal for permission to appeal.

26. David Steel J himself refused permission to appeal. The effect of section 67(4) of the Arbitration Act is of course that such refusal is final subject to any procedural unfairness or, if this is different, failure to engage with the arguments on the limited question whether there should be permission to appeal – see *CGU v AstraZeneca* [2007] 1 Lloyds Rep 142 and per Longmore LJ in this case [2007] EWCA Civ 471 at paragraph 11. Istil nonetheless sought permission to appeal from the Court of Appeal. The Court of Appeal ruled that it had no jurisdiction to entertain the application. In dealing with the suggestion that David Steel J had failed to engage with Istil's argument Longmore LJ said this:

> "28. As I have already said, Mr Page has withdrawn the second submission that he made. I therefore turn to deal shortly with his third submission, that the judge has here failed to engage with his argument. The position here is that it is said that he failed to deal with the argument that the Partial Award was a fully enforceable award which ROK had not sought to set aside and that, pursuant to section 58 of the Act, Istil therefore had an unassailable right to rely on it.
>
> 29. In my judgment this is incorrect for two reasons. First, the Partial Award would be likely to be useless to Istil because it was in favour not of Istil but in favour of Metalsrussia. Secondly, a Partial Award which a later award has declared is a nullity can scarcely be said to be an enforceable award, whether by reason of section 58 of the Act or at all. More importantly however, contrary to Mr Page's submissions, the judge did in fact engage with that argument by saying that Istil would have had first to apply to set aside the decision in the final award that the Partial Award was a nullity but had never sought to do so. The learned judge gave an oral judgment on the application for permission to appeal. In the course of that he said this at paragraph 4:
>
> > 'The position it seems to me is perfectly plain. The arbitrators if and to the extent they exceeded their powers in setting aside the Partial Award were responsible for an irregularity which if either party had objected to they could and should challenge. The Metalsrussia group, if I may call them that, did not do so and the time for that has expired, so I confidently feel that the submission that the Metalsrussia group's objection to ROK's attempt to set aside the final award because there was in existence an earlier award is not made out and thus there is no reasonable prospect of success on any appeal'."

Toulson LJ agreed with Longmore LJ, but Arden LJ entered a caveat:

> "36. I agree with both judgments and would add three short points. First, Lord Justice Longmore said that the Partial Award would be useless to Istil. This was only one of the reasons which my Lord gave. I would like to leave this question open. We have not heard full argument on that point, which was one of the points dealt with by Steel J in his judgment. The effect of a merger on the liabilities of a company absorbed by a merger may well depend on the law of its domicile."

27. The Court of Appeal also ordered that, unless Istil by 9 May 2007 provided US$350,000 security in respect of the costs that it had previously been ordered to pay

ROK, David Steel J's stay of that order for costs would be lifted. Istil has not provided that security. Istil was also ordered to pay by 9 May 2007 ROK's costs of the application to the Court of Appeal for permission to appeal in the sum of £20,000. Again, as I understand it, Istil has failed to comply with this order just as it has failed to comply with all other orders directing it to pay costs to ROK.

28. The Court of Appeal dismissed Istil's application on 25 April 2007. On 25 May 2007 Istil petitioned the House of Lords for permission to appeal. Paragraph 18 of Istil's Petition read:

> "Steel J refused permission to appeal on Istil's main argument, which was that pursuant to section 58 of the 1996 Act, the 2003 Award remained final and binding on the parties, absent a challenge under section 67 or by an agreed arbitral process of appeal or review. The arbitrators' finding, that their original award was a nullity, was made when they were functus and could have had no legal effect. Steel J did not offer any answer to this point in the course of the permission application, and there is none."

Istil's application for permission to appeal was refused by the Appeal Committee of the House of Lords on 26 July 2007.

29. Meanwhile, on 2 May 2007 Istil's French lawyers, now called Messrs Penlaw, wrote to the tribunal as follows:

> "We refer to the Award on jurisdiction dated 15th January 2003 ("the Jurisdiction Award") and to the Final Award dated 1st June 2004 ("the Final Award") in the above mentioned arbitration.
>
> The Republic of Kazakhstan applied to the High Court of England to set aside the Final Award. We attach a copy of the Judgment of the High Court ("the judgment") setting aside the Final Award. The Court ruled that the Final Award was null and void because the arbitral tribunal lacked jurisdiction.
>
> ISTIL Group Inc has tried to appeal but there is no right of appeal and the Court of Appeal will not grant permission under its inherent powers.
>
> The judgment does not however affect the validity of the tribunal's Jurisdiction Award. The High Court found, and the Court of Appeal agreed, that the Jurisdiction Award was valid, and that the merger of the original claimant (Metalsrussia Corporation Limited) into ISTIL Group Inc did not affect the situation. The judgment confirms that the Jurisdiction Award is final and cannot be challenged by the Republic of Kazakhstan under the terms of the Arbitration Act 1996.

Also, given the terms of [the] decision of the High Court, the arbitral tribunal is not functus officio as regards liability and quantum even though it is functus officio as regards the issue of jurisdiction.

Consequently, we ask the arbitrators to reconvene and make a new award on liability only based on the evidence already presented. No new evidence was presented to the High Court even though the appeal was by way of a new trial rather than a review of the arbitration. As the arbitrators have already had full submissions on this subject we invite the arbitrators to proceed to determine and make their award as soon as possible or to set a short timetable for further submissions.

The arbitrators are invited to make the award, as they consider most convenient or appropriate, in favour of:

(i) Metalsrussia Corporation Limited of the British Virgin islands, the party in whose favour the Jurisdiction Award was made, or

(ii) ISTIL Group Inc (successor to Metalsrussia Corporation Limited), or

(iii) Metalsukraine Corporation Limited, because ISTIL Group Inc amalgamated into that company on 31 December 2005 and Metalsukraine Corporation Limited is the surviving entity. Certificates of merger are attached.

The position is that the Claimant can rely on the applicable status and generally on the principles of universal succession to enforce the Award despite a number of mergers that have taken place. By virtue of the statutory provisions, the surviving company is entitled to enforce any judgment or award expressed to be in favour of one of the companies merged into the surviving company.

Finally we would ask the arbitral tribunal to make an immediate award for costs in respect of the Jurisdiction Award in the amount of Euros 250,000 for legal costs and in addition reimbursement of the arbitrators fees paid to the LCIA. The reason is that the Republic of Kazakhstan has been awarded nearly US$1million in costs in the English court proceedings and, as the tribunal is aware, the Republic refused to pay or contribute to the costs of the LCIA arbitration. So, it is very possible that the Claimant will have to pay the Republic a very substantial sum but not be able to recover a single dollar from the Republic even if the tribunal makes a further award in its favour."

30. Unsurprisingly this request provoked a considerable exchange of correspondence. On 12 July ROK issued this application in the light of which it was sensibly agreed that the tribunal should take no further steps pending the outcome of the application.

The arguments on this application

31. Mr Siberry, who has not hitherto during this long saga appeared for Istil, contends that by reason of sections 58(1) and 73(2) of the Arbitration Act the award on jurisdiction became final and binding and ROK had lost the right to object to the tribunal's substantive jurisdiction long before publication of the Final Award. Section 58(1) of the Act provides:

> "Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them."

Istil was, Mr Siberry submitted, as David Steel J provisionally concluded, entitled to take the benefit of that final and binding award on jurisdiction. The tribunal's decision, in its Final Award, that the award on jurisdiction was a nullity was not only unsolicited, unheralded and wrong but it had also itself been set aside together with the rest of the Final Award by the order of David Steel J. The tribunal's erroneous decision that the award on jurisdiction was a nullity must therefore be disregarded. But for that erroneous decision of the tribunal, and the fact that, as a result, the Final Award dealt with both jurisdiction – revisited – and the merits, Istil would, submitted Mr Siberry, have had a Final Award in its favour which would have been unassailable. It was, submitted Mr Siberry, that erroneous decision alone that gave to ROK the opportunity to attack the Final Award. Furthermore, submitted Mr Siberry, it is clear that neither David Steel J nor the Court of Appeal considered the effect that the setting aside of the Final Award would have on the Partial Award on jurisdiction. The view expressed by Longmore LJ to the effect that the award on jurisdiction would be likely to be useless to Istil because it was in favour of Metalsrussia was, submitted Mr Siberry, obiter, tentative, wrong and expressly disclaimed by Arden LJ. Furthermore, Longmore LJ's remark that a Partial Award that a later award had declared to be a nullity can scarcely be said to be an enforceable award was, submitted Mr Siberry, likewise obiter and wrong, leaving out of account, as it does, the fact that the later award had itself been set aside.

32. In the result, contended Mr Siberry, the judgment and order of David Steel J setting aside the Final Award left the award on jurisdiction in place, not the subject of any court order, unchallenged and unchallengeable. In those circumstances, submitted Mr Siberry, it would certainly not be appropriate for the court to exercise its assumed jurisdiction to interfere. The award on jurisdiction must be given effect. The arbitrators should be free to consider the merits of the dispute over which, as the Partial Award determined in a now final and binding manner, they had jurisdiction.

33. Mr Siberry also took me through the extensive exchanges of submissions on the merits which had taken place after publication of the award on jurisdiction and before the arbitrators proceeded to their final award. He pointed out that in the course of those submissions ROK did not expressly continue to maintain its objection to the

jurisdiction of the tribunal. Indeed ROK had he said at one point expressly invoked the Partial Award as when in its submissions of 15 January 2004 it said:

> "The Jurisdiction Award has already established as a matter of fact that the Buyer in all three contracts was Metalsrussia Corporation Limited. No issue is, or can be, taken with that."

This was Mr Siberry suggests the invocation by ROK of an issue estoppel arising out of the first, partial, award. By their submissions, he suggested, ROK had agreed that the merits of the dispute could be resolved by the tribunal. Mr Siberry noted that on 18 February 2004 ROK's submissions had included the following paragraph:

> "Without prejudice to its previous submissions regarding the Tribunal's lack of jurisdiction in general, the non-existence of the Claimant in particular, the false basis on which the Jurisdiction Award was made, and that the claim should be dismissed with costs, the Respondent confirms its position that, to the extent there is any valid claim before it, the Tribunal has no jurisdiction or power either under LCIA Rules or in any other way (and certainly not on the grounds of mere 'convenience' to the Claimant) to change the name or legal identity of the Claimant, established as Metalsrussia Corporation Limited in the Jurisdiction Award."

The preamble to this paragraph was Mr Siberry suggested either to be understood as a historical reference to the position before the issue of the Partial Award or alternatively it was simply the attempted revival of the objection as to jurisdiction too late to have any effect.

34. In its Final Award the tribunal said this at paragraph 3.2:

> "**Contentions of and Relief sought by the Respondent**
>
> The Respondent contends that:
>
> - BVI Metalsrussia had never been a party to the Three Contracts and never had a cause of action under the Three Contracts;
>
> - Whilst maintaining its objection to the jurisdiction of the Arbitral Tribunal, the Award on Jurisdiction had been rendered on the false basis that HK Metalsrussia, in the alternative BVI Metalsrussia as Initial Claimant, was still in existence, and that the Tribunal had no power to add the Claimant as a new party to the arbitration proceedings;"

The tribunal was, said Mr Siberry, wrong to recite that ROK had maintained its objection to the jurisdiction, but since the award in which they made that error had been set aside that was nothing to the point.

35. So far as I can discern it was not argued before the tribunal that ROK had by its conduct since the issue of the Partial Award made an ad hoc agreement to submit the merits of the dispute to resolution by the tribunal. That is in my judgment unsurprising since the stance of ROK was that the counterparty both to the contracts to which ROK was not itself party and to the arbitration itself and also to the French proceedings which came before that was HK Metalsrussia whereas Messrs Penningtons or Penlaw were asserting that the client for whom they had always acted was a BVI company. It would be difficult in such circumstances to spell out of ROK's conduct an intention to conclude an arbitration agreement with a BVI company.

36. Similarly so far as I can discern the point as to an ad hoc agreement made since the issue of the Partial Award was not argued before David Steel J. Two quite separate alleged ad hoc agreements were relied upon before him, with which he dealt at paragraphs 59 to 62 of his judgment which I have set out above. The first was an alleged ad hoc agreement that the tribunal should have jurisdiction to make a final determination on the issue of jurisdiction. Neither of the arguments however relied upon the conduct of ROK subsequent to the issue of the Partial Award as giving rise to an ad hoc agreement that the tribunal should have jurisdiction over the merits.

37. The short answer to this point is, as I see it, that the undoubted ratio of the judgment of David Steel J to the effect that the arbitrators lacked substantive jurisdiction to resolve disputes between the parties before the court is simply inconsistent and incompatible with any ad hoc agreement between those parties to confer just such competence upon the arbitrators. Either Istil argued this point before David Steel J and lost or they could have argued it, albeit it is in my view a bad point, and failed to do so. It is too late for Istil now to seek to rely on an ad hoc agreement to arbitrate arising out of events subsequent to the issue of the Partial Award.

38. That however brings me back to Mr Siberry's point that, as he contends, neither David Steel J nor the Court of Appeal considered the effect that the setting aside of the Final Award would have on the Award on Jurisdiction. The decision of David Steel J was he submitted made only in the context of a challenge to the Final Award – the Partial Award was never challenged and amounted to a final decision of the arbitrators capable itself of giving rise to an estoppel per rem judicatem. Why, he asked rhetorically, should preference be afforded to the decision of David Steel J.

39. In my judgment the premise of this argument is simply incorrect. The status of the Partial Award was central to the debate before David Steel J. Istil argued before David Steel J that ROK had by reason of section 73(2) of the Arbitration Act lost its right to challenge the Final Award because it had not challenged the Partial Award. David Steel J rejected that argument. The tribunal had in fact treated the Partial Award as open to question by an available process of review, viz, their own reconsideration of the matter, something which they no doubt thought was required of them by reason of the parties' respective stances since the Partial Award. Neither side had challenged that approach, which would have required a separate challenge to the Final Award under section 68 of the Act and it was now too late to do so.

40. It is in my view important to notice the course taken by events after ROK issued its challenge to the Final Award under section 67 of the Act. Istil responded to the

challenge with a witness statement from its solicitor, Mr Page, dated 15 October 2004 in which he said, at paragraph 32:

> "The Tribunal issued its award, deciding that it did have jurisdiction and dismissing the Republic's lis alibi pendens arguments, on 20th January 2003. The Republic made no application to the court under section 67. The Claimant does not accept that the award on jurisdiction was a nullity due to the mergers. The Claimant will rely on the decision in *The Sardinia Sulcis* [1991] 1 Lloyds Rep 201 and on Articles 22.1, 27 and 32.2 of the LCIA Rules, and will address this issue in argument at the appropriate time."

Then on 8 February 2005 Mr Page put in a further witness statement in which he said, at paragraph 2:

> "I make this Witness Statement in support of the Defendant's (Istil's) application for the trial of the following preliminary issue:
>
> > Whether the Claimant is precluded from making an application under section 67 of the Arbitration Act 1996 by virtue of its consent, without reserve, to the Tribunal's ruling on its own jurisdiction and/or by virtue of its failure to challenge the Tribunal's award dated 20 January 2003 and/or by virtue of section 73(1) or (2) of the Arbitration Act 1996."

The matter came before Morison J on 18 February 2005 with the result that I have already described. Morison J directed that the trial should be a full re-hearing of the question of jurisdiction, not restricted to a review of the arbitrators' decision, and furthermore a full re-hearing at which the evidence would not be restricted to the evidence which was before the arbitrators. Morison J gave Istil permission to appeal against this part of his order. They did not do so.

41. In such circumstances it was in my judgment necessarily implicit in the exercise in which the parties and David Steel J were involved that the question of jurisdiction, however it manifested itself, was at large before the court. When it came to the hearing Istil again argued that in fact that whole question was not at large, because ROK had lost the right to object to the Partial Award and Istil had an unchallengeable right to rely upon it. David Steel J rejected that argument because of the failure of Istil to challenge the propriety of the arbitrators' own reconsideration of the question of jurisdiction. As it happens Istil had had the opportunity to pursue that point before the Court of Appeal but had not taken it. It is in my judgment idle to suppose that David Steel J did not consider the effect that setting aside the Final Award would have on the Partial Award on Jurisdiction. As he explained, by the time the arbitrators came to issue their Final Award the matter was proceeding upon the basis that the question of jurisdiction had been again at large. The Partial Award on Jurisdiction was by now out of the equation. That is no doubt why he observed, at paragraph 58 of his judgment, that his conclusion that the Partial Award was not in fact a nullity was, as he had already explained, not to the point. It had been overtaken

by events. Furthermore, given that the context of this four day trial with oral evidence was that it was a full re-hearing of the question of jurisdiction, not simply a review of the arbitrators' decision, it was necessarily implicit in David Steel J's conclusion that the arbitrators lacked substantive jurisdiction, and that their Final Award should be set aside, that that did not have the effect of reviving the Partial Award on Jurisdiction. Such a result, a revival of the Partial Award, would have rendered otiose the entire exercise directed by Morison J. David Steel J simply could not have found that the arbitrators lacked substantive jurisdiction to make their Final Award if the Partial Award on Jurisdiction was binding on the parties.

42. It is therefore in my judgment implicit in the approach of David Steel J that he found that Istil had lost the right to rely upon the first, partial, award. He gave full consideration to the question what would be the effect on the first award on jurisdiction of the setting aside of the Final Award. It would have no effect. The status of the award on jurisdiction was no longer to the point. It was no longer to the point because by reason of the course of events that award had been treated as open to review, had been set aside, and in consequence the court had become seised of the issue of jurisdiction.

43. I should add that it is of course no part of my function on this application to determine whether the conclusions of David Steel J, a judge of co-ordinate jurisdiction, were correct. As the Court of Appeal pointed out, that was not even their function given the limited power of that court to review the fairness of the process of the determination of the question whether leave to appeal should be given. I would however simply observe that an examination of the arbitrators' jurisdiction to make their Final Award necessarily in my view involved an examination of their jurisdiction to make any award, so that had the first, partial, award not already been regarded by the arbitrators themselves as of no effect, an application pursuant to section 79 of the Arbitration Act 1996 to extend the time within which an application could be made to set it aside would in my view have been irresistible. In the light of the finding of both this court, in the person of David Steel J, and the Paris Commercial Court as to the lack of any jurisdiction in the arbitral tribunal a substantial injustice would be done were Istil now at liberty to rely upon the Partial Award as investing the arbitrators with jurisdiction to determine the merits of the dispute between themselves and ROK. Substantial injustice is of course the criterion to be applied under section 79(3)(b) of the Act.

44. Mr Siberry suggests that it is not entirely realistic to have expected Istil to have applied to challenge the Final Award on the grounds that the arbitrators had exceeded their power in setting aside or regarding as a nullity the Partial Award and were thus responsible for a serious irregularity. Istil had a Final Award in their favour, why should they challenge it. I see the force of this point, but I would again emphasise that it is not my function to review the decision of David Steel J but rather to give effect to it. In any event, given the confusion that the Istil side had introduced in consequence of the various mergers and their failure to inform the arbitrators of them, they would have been well advised to pay careful regard to the structure of the arbitrators' Final Award if they wished to seek to uphold it not on the merits of its conclusion as to jurisdiction but rather on the basis that it had not been open to the tribunal to reconsider that question.

45. By the same token, I cannot regard as ultimately determinative Mr Siberry's point that but for the erroneous decision of the tribunal to regard its First Award as a nullity and to revisit the question of jurisdiction, Istil would have had an unimpeachable award on the merits in its favour against ROK for about US$6,000,000. That may be so, but litigation and arbitration of disputes is a process in which accidents and unexpected consequences often occur. Istil cannot escape all responsibility for the fact that the arbitrators thought it incumbent upon them to re-examine the question of jurisdiction. Furthermore the merits in the broader sense are not all one way. Metalsrussia sought to pursue their claim before the Paris Commercial Court on the basis that ROK was not a party to the arbitration agreements but had in one way or another become responsible for Karmet's debts. Neither in the Notice of Arbitration nor in the arbitration itself was it suggested that ROK was a party to the underlying contracts. The Notice of Arbitration suggested that Metalsrussia was by invoking arbitration under LCIA Rules accepting an offer to arbitrate made by ROK in the course of the French proceedings. The principal propositions advanced to the arbitrators as to the reason why ROK should be held liable to Metalsrussia were, David Steel J found, exactly the same as those advanced before the Paris Commercial Court. The Paris court determined, in a manner which, David Steel J found, gave rise to an issue estoppel between the parties, that ROK was party to no arbitration agreements. Before David Steel J it was common ground that the arbitrators were wrong to regard this part of the judgment of the Paris court as unnecessary to its decision. That leaves only the argument that there was an ad hoc agreement to arbitrate arising out of ROK's stance in the French proceedings combined with Metalsrussia's subsequent invocation of arbitration, an argument to which David Steel J gave understandably short shrift.

46. In *Fiona Trust and Holding Corporation v Privalov* [2007] Bus LR 686, affirmed by the House of Lords at 2007 UKHL 40, Longmore LJ pointed out at page 701 that the scheme of the Arbitration Act is that it will in general be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute. Leaving aside the irony that Metalsrussia in fact first resorted to a court, arguing strenuously that ROK was not a party to any agreement to arbitrate, there has been full respect for that general principle in that the arbitral tribunal has indeed, vis a vis the English supervisory court, been the first tribunal to consider the question of jurisdiction. Now there has been a full re-hearing of the question, not just a review of the arbitrators' decision, on the basis of evidence not all of which was before the arbitrators. Istil had the opportunity to appeal against the direction that there be such a hearing but they did not avail themselves of it. The question arises, in the words of Judge Schwebel, whether the optimum procedure is that the court should now enjoin further pursuance of the claim in arbitration or whether the court should leave it to the arbitrators to dismiss the duplicative proceedings. Implicit of course in Mr Siberry's submissions is that the further arbitration proceedings would not be duplicative because the arbitrators would simply give effect to that by which the parties were already bound, the first award on jurisdiction. However I have already held that the parties are not so bound. No question therefore arises of the court failing to comply with obligations undertaken pursuant to the New York Convention. In my judgment it would be invidious to leave it to the arbitrators to decide whether they should give preference to their own earlier decision over that of the supervisory court on precisely the same subject matter. The supervisory court has held in proceedings between Istil and ROK that there is no basis upon which the arbitrators have been invested with

jurisdiction to determine the dispute between those parties. That should be an end of the matter.

47. I am fortified in that view by my conclusion that, were the arbitrators now to proceed to an award on the merits in favour of Istil, the court would be bound to accede to an application to set aside any such award. Furthermore it is the more reasonable for the court to enjoin further pursuit of the arbitration in circumstances where Istil decline to comply with costs orders made in these proceedings both by this court and by the Court of Appeal. If the court were to decline now to intervene it would simply condemn ROK to the expenditure of yet further costs which they may have grave difficulty in recovering having regard to the corporate location of Istil and Metalsukraine and the various corporate reorganisations which have evidently taken place.

48. I do not essay any formulation of the admittedly rare circumstances in which the court should restrain a party from pursuing arbitration proceedings, not least because I am by no means persuaded that I am in these unusual circumstances concerned with "matters governed by" Part 1 of the Arbitration Act 1996. A Final Award has been made and set aside. The debate has been as to the effect thereof on an earlier award which, in making their Final Award, the arbitrators treated as of no effect. The supervisory court has decided that the arbitrators simply lacked competence to determine disputes between the parties. Further pursuit of those arbitration proceedings by Istil would at the very least be oppressive, vexatious and in consequence unconscionable. In my judgment it is for all the reasons I have given both just and convenient and, in these unusual circumstances, the optimum procedure, to restrain Istil from further pursuit of their claim against ROK in LCIA Arbitration proceedings No. 1305. I shall grant an injunction accordingly.

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