Neutral Citation Number: [2007] EWHC 571 (Comm)

Case No: 2007/91

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/03/2007

Before :

THE HONOURABLE MR JUSTICE AIKENS

- -

Between :

ELEKTRIM S.A.

Claimant

- and -

(1) VIVENDI UNIVERSAL S.A. **Defendant**
(2) VIVENDI TELECOMMUNICATION INTERNATIONAL S.A.
(3) ELEKTRIM TELEKOMUNIKACJA Sp. z.o.o
(4) CARCOM WARSZAWA Sp. z.o.o.

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Mr Richard Millet QC and Mr Paul McGrath (instructed by **Barlow Lyde & Gilbert, Solicitors, London**) for the **Claimant**
Mr Toby Landau and Mr Ricky Diwan (instructed by **Watson Farley & Williams, Solicitors, London**) for the **Defendants**

Hearing date: 2nd March 2007

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Judgment

Mr Justice Aikens :

A. The Immediate background to the present claim

1. In this action the claimant ("Elektrim") claims an order for a final injunction under ***section 37*** of the ***Supreme Court Act 1981*** to restrain each of the defendants from pursuing an arbitration (Number 2488) that is currently being conducted before the London Court International Arbitration (respectively: the "LCIA" and the "LCIA Arbitration"). Elektrim claims that the injunction should continue until the final determination of an ICC Arbitration which is under way in Geneva. The LCIA Arbitration was started in August 2003 by two of the defendants in the current action, the two Vivendi companies, (together "Vivendi") as Claimants. It is against Elektrim and two other companies. The ICC Arbitration was also started by Vivendi and two other companies by a Request dated 13 April 2006. In that arbitration, Elektrim and eight other companies are the defendants.

2. The injunction is sought on the ground that the relief claimed by the defendants in this action (or at least the two Vivendi companies) in the LCIA Arbitration is inconsistent with the position adopted and the relief sought in the ICC Arbitration. Elektrim claims that the simultaneous pursuit of both arbitrations by the Vivendi companies is vexatious and oppressive to Elektrim.

3. This is the second occasion in which the LCIA Arbitration has come before the Commercial Court. On the previous occasion Elektrim applied to set aside a Partial Award of the LCIA Tribunal dated 22nd May 2006 ("the Partial Award"). That application was made under ***section 68(2)(g)*** of the ***Arbitration Act 1996*** ("***the 1996 Act***" or "***the Act***"). After a three day hearing in December 2006, I handed down a judgment on 19th January 2007, ruling that this application must be dismissed. I also dismissed Elektrim's further application for a declaration that the LCIA Arbitration Agreement had been repudiated or renounced and so was at an end.

4. The LCIA Arbitration is continuing. I was told that a hearing of the next stage on 19th March 2007.[1] The claim form in the current proceedings was issued on 23rd January 2007. In view of the imminence of the LCIA hearing, it was agreed between the parties (with the court's approval) that each party would serve written evidence in support of its position for and against the injunction claimed, but pleadings and the other formalities associated with a claim for final relief would be dispensed with. The hearing of the claim was fixed for one day on 2nd March 2007. Counsel prepared full written submissions and I had very helpful oral argument from Mr Richard Millett QC on behalf of Elektrim and Mr Toby Landau on behalf of Vivendi.

5. At the end of the hearing, I said that I would give my decision on Monday 5th March 2007 and that I would hand down reasons for my decision as soon as possible thereafter. On Monday, 5th March 2007 I told the parties that the

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[1] After the hearing, on Wednesday 7 March 2007, I was informed that the hearing of 19 March had been adjourned but no new hearing date had been fixed.

application for an injunction would be dismissed. These are my reasons for that decision.

B. The parties and the underlying disputes

6. As I said in my judgment of 19th January 2007, Elektrim and Vivendi are two protagonists in a complicated and very hard fought corporate campaign in several theatres of war for the control of Polsca Telefonia Cyfrowa Sp. z.o.o. ("PTC"). PTC runs the largest mobile telecoms network in Poland. It was incorporated in 1995. Elektrim SA subscribed to a large number of its shares issued upon incorporation. So also did De TeMobil Deutsche Telekom MobilNet GmbH. There were also other subscribers to the initial share issue. In October 1999, the supervisory board of PTC passed Resolutions granting consent for the transfer of shares in PTC owned by Elektrim SA to a new company called Elektrim Telecommunikacja Sp. z.o.o. ("Telco" – the third defendant in the present action). Telco was a joint venture company established by Elektrim SA ("Elektrim") and Vivendi Universal SA and Vivendi Telecom International SA (together "Vivendi").

7. Telco was created after Elektrim and Vivendi had entered into two agreements which have become known as the First and Second Investment Agreements. The object of these Agreements was to prevent Deutsche Telecom ("DT"), the parent of the other larger shareholder in PTC, from gaining control of PTC. By December 1999, Telco owned 51% of the shares in PTC. DT owned the other 49%. Elektrim owned 51% of the shares of Telco. Vivendi owned the remaining 49% of the Telco shares.

8. As I have described in paragraphs 10 – 14 of my judgment of 19th January 2007, this transfer of PTC shares to Telco was challenged by DT in two separate arbitrations in Vienna. I need not go into the details of those arbitrations. A Second Partial Award of the Second Vienna Arbitration (between Elektrim and DT), which was made on 26th November 2004, held that the transfer of PTC shares from Elektrim to Telco was ineffective. That part of the Second Partial Award of the Second Vienna Arbitration then became the subject of litigation in Poland. Both DT and Elektrim have tried to obtain recognition of part of the Second Partial Award. Recently, the Supreme Court of Poland has ruled that the Second Partial Award of the Second Vienna Arbitration should not be recognised.

9. Meanwhile there were developments in the relationship between Elektrim and Vivendi. In the summer of 2001, Elektrim was under considerable financial pressure from its bondholders and other creditors. Elektrim was very anxious for cash. At that time Vivendi was also keen to obtain a controlling interest in Telco and thereby a controlling interest in PTC. That would enable Vivendi to maximise the value of its holding in PTC and it would also prevent DT from obtaining control of PTC.

10. The aims and intentions of Elektrim and Vivendi were set out in a Letter of Understanding ("LOU") between Elektrim and Vivendi dated 27th June 2001. The LOU contemplated an initial Public Offering of Telco shares within twelve months of closing the deal between Elektrim and Vivendi, provided

that PTC had by that time reached a minimum equity value of US$4 billion. For reasons of Polish competition law, the sale of Telco shares by Elektrim to Vivendi had to go through an independent third party. This was eventually identified as Ymer Finance SA of Luxembourg ("Ymer").

11. On 3rd September 2001, a Third Investment Agreement ("TIA") was concluded between the two Vivendi companies (ie. the first two defendants in the present action), Telco, Carcom Warsawa Sp. z.o.o. ("Carcom" – the fourth defendant in the present action) and Elektrim. The TIA provided for 2% of the shares in Telco which were owned by Elektrim to be transferred into the name of Ymer. Elektrim and Vivendi intended that, ultimately, those shares be transferred to Vivendi. The TIA provided that upon the transfer of the 2% shareholding in Telco to Vivendi, protections in favour of Elektrim would come into force, because Elektrim would then be a minority shareholder in Telco.

12. The TIA was agreed to be subject to Polish law: see section 5.11. The parties also agreed to submit disputes to arbitration in accordance with the Arbitration Rules of the LCIA. There were to be three arbitrators. Section 5.11(c) of the TIA provided that the seat of any such arbitration was to be in London and the language of the arbitration should be English.

13. After the TIA was signed, the transfer of the Telco and other shares to Ymer was effected. However, Vivendi did not then seek any Polish Government Approvals for the transfer of shares from Ymer to Vivendi. Nor did Vivendi attempt to obtain Government Approvals for some 20 months afterwards.

14. On 7th May 2003, Elektrim wrote to Vivendi requesting that Vivendi apply for Polish Government Approvals for clearance to permit the Telco shares, then owned by Ymer, to be transferred to Vivendi. Vivendi responded, effectively denying that it was obliged at that stage to apply for Polish Government Approvals in respect of the proposed transfer of shares from Ymer to Vivendi.

15. On 22nd August 2003, Vivendi filed a request for arbitration, pursuant to the terms of section 5.11(b) of the TIA. Vivendi sought a declaration that it was not obliged under the TIA to apply for Polish Government Approvals and for other relief. Elektrim wrote to Vivendi on 12th December 2003 stating that Vivendi had not complied with its obligations under the TIA to apply for Government Approvals for merger clearance. Subsequently on 20th February 2004 Elektrim sent Vivendi a letter declaring the avoidance of the TIA.

16. Three LCIA arbitrators were appointed. They ruled, in Procedural Order No. 2 published on 25th May 2005, that the first phase of the LCIA arbitration proceedings would focus on three issues:

    (1) The validity of the TIA;

    (2) Whether Vivendi was obliged to apply for Polish Government Approvals under the TIA; and

(3) Whether the "Effective Date"[2] under the TIA had occurred.

17. In my judgment of 19 January 2007 I have set out the subsequent history of the interlocutory stages in the LCIA arbitration leading up to the first Partial Award of 22nd May 2006. I need not repeat the details.

18. The LCIA tribunal was not unanimous in making its Partial Award.[3] The majority concluded that Elektrim was not entitled to impugn the validity of the TIA on any of the grounds it had raised. Accordingly, the majority declared that the TIA was and always had been valid since it was executed.

19. The LCIA tribunal then set a timetable for Phase 2 of the arbitration. In this stage, Vivendi claims a declaration that Elektrim is in breach of various provisions of the TIA. Vivendi seeks an order for specific performance of Elektrim's alleged obligations under the TIA. It also claims damages of Euros 1.994 billion. Vivendi asserts that because of Elektrim's alleged breaches of the TIA, Elektrim has purportedly transferred PTC shares that were owned by Telco to Elektrim without consideration. Vivendi alleges that this conduct "*eviscerates the very premise of the TIA and of Vivendi's original Euros 1.7 billion investment*" (that is ownership of the PTC shares), so that Elektrim should be held liable for damages as a result.

20. Elektrim has counterclaimed. It asserts that Vivendi has been in breach of contractual obligations or duties of loyalty and cooperation because Vivendi has refused to permit the PTC shares to be re-registered in the name of Elektrim, following the second Partial Award of the second Vienna arbitration. That had held that the transfer of the PTC's shares from Elektrim to Telco was ineffective, but it had no power to force Telco to re-register the shares in the name of Elektrim.

C. The ICC Arbitration

21. By March 2006, the war for control of PTC shares between Elektrim, Vivendi and DT had been carried into several theatres of litigation and arbitration. Besides the LCIA arbitration and three Vienna arbitrations, there had been proceedings in courts in Poland and Paris. In March 2006, the various groups of protagonists determined that they should try and settle their disputes and resolve the question of who should own the share capital of PTC. The aim was to reach an agreement by which Vivendi and DT would each hold 50% of the share capital of PTC.

22. A draft Settlement Agreement was produced on 28th March 2006. It is said by Vivendi that a fully effective Settlement Agreement was concluded during the course of a closing meeting between it, DT and Elektrim (and other relevant parties) in Warsaw on 29th March 2006, following several weeks of settlement discussions. However, the Settlement Agreement was not signed.

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[2] Very broadly, this was the date at which various protections in favour of Elektrim had to be put in place.

[3] The majority Award was that of Mr Alan Redfern (appointed by Vivendi) and Mr Wolfgang Peter, the Chairman of the panel. The minority Award was that of Professor Jerzy Rajski, appointed by Elektrim. All three are very experienced and highly respected international arbitrators.

This was because, apparently, the parties learnt at the closing meeting that the Polish Court of Appeal had upheld a partial recognition of the Second Vienna Award. This decision (which has subsequently been reversed by the Supreme Court of Poland) was adverse to Vivendi's interests. DT and Elektrim refused to sign the Settlement Agreement. However, it is Vivendi's case that all parties had expressly agreed to conclude the Settlement Agreement whatever the decision of the Court of Appeal might be.

23. Therefore, Vivendi alleges that a legally binding Settlement was concluded on 29th March 2006, despite the fact that the document was not signed by any parties. This is challenged by both DT and Elektrim.

24. The draft Settlement Agreement states that it is governed by Swiss law. Clause 22 provides for disputes to be submitted to arbitration according to ICC Rules. The seat of any arbitration is stated to be Geneva, Switzerland.

25. By clause 4 of the draft Settlement Agreement each of the parties agreed not to start any new proceedings and undertook to settle all existing proceedings. The relevant proceedings were set out in ***Schedule D3*** of the draft. The first proceeding listed is the LCIA arbitration. In column 3 of Schedule D3, it sets out the details of what the relevant parties are to do in relation to the LCIA arbitration in order to fulfil their obligations under article 4 of the Settlement Agreement. Clauses 1.1 and 1.2 in that column states:

> "SCHEDULE D3
> TERMINATION OF CERTAIN NON-POLISH PROCEEDINGS
>
> ……
>
> 1. ……..
>
> 1.1 Pursuant to Article 4 of the Settlement Agreement each party to the LCIA Arbitration shall request the LCIA Arbitral Tribunal to issue a consent award confirming the mutual settlement and waiver of all claims.
>
> 1.2 Upon the execution of the Settlement Agreement and on the same day, the Parties shall jointly execute and send a letter (in the exact form attached as Schedule D4) to the arbitral tribunal (the "LCIA Arbitral Tribunal") requesting that it render a consent award (the "Consent Award") recording that the parties to the LCIA Arbitration have reached an agreement especially on the following issues:
>
> ……..".

26. Clause 1.3 in the same column provides:

> "……..

> 1.3 The parties to the LCIA Arbitration agree that they will also request in the letter that the LCIA Arbitral Tribunal confirm in its Consent Award that: (a) the Interim Measures Orders are terminated and are null and void; (b) by issuance of the Consent Award, the LCIA Arbitration proceedings terminate and the LCIA Arbitral Tribunal is discharged of its duties; and (c all of the Parties' respective claims, counterclaims, and defences asserted in the LCIA Arbitration are unconditionally terminated, waived, and withdrawn with prejudice.
>
> …….".

27. Clause 1.4 in the same column is difficult to understand but it appears to confer jurisdiction on the LCIA tribunal jurisdiction to consider disputes arising out of the Settlement Agreement in so far as they relate to the TIA.

28. I have set out what I believe are the relevant terms of the draft Settlement Agreement in Appendix 1 to this judgment.

29. Because neither Elektrim nor DT were prepared to recognise the validity of the Settlement Agreement, Vivendi wrote to the ICC International Court of Arbitration on 13th April 2006 and requested arbitration. The proposed claimants were the Vivendi companies, Telco, Carcom and Elektrim Auto Invest. The proposed respondents were Elektrim, DT, PTC and allied companies. In its letter of Request for Arbitration, Vivendi stated that it sought declarations that the Settlement Agreement was binding and enforceable against each of the proposed respondents. Vivendi also sought orders that the respondents comply with their obligations under the Settlement Agreement, including the obligation to ensure that all proceedings as defined in the settlement are terminated, discontinued or withdrawn.

30. Following exchanges of submissions by the proposed parties to the ICC Arbitration, the ICC International Court of Arbitration constituted the ICC Arbitration tribunal on 10 November 2006. The arbitrator nominated by the claimants is Dr Jacques Werner. The arbitrator nominated by the respondents is Professor Dr Karl Hempel. The chairman of the tribunal is Mr Yves Fortier CC, QC. The seat of the arbitration is Geneva, Switzerland.

31. The claimants in the ICC Arbitration (led by Vivendi) asked the Tribunal to grant "Interim and *ex parte* Relief". This concerned possible dispositions of PTC shares by Elektrim and possible actions by Elektrim in relation to the management of PTC. But the Tribunal ruled, on 8 January 2007, that no interim relief should be granted.

32. The Terms of Reference of the ICC Tribunal were signed on 13 January 2007. Paragraph 49 sets out the relief sought by the claimants. In summary, the claimants (including Vivendi) claim a declaration that the Settlement Agreement of 29th March 2006 is binding and enforceable against each of the respondents. The claimants also want an order for "specific performance" by the respondents of the terms of the Settlement Agreement, in particular, "*the*

obligation to ensure that all Proceedings as defined in the Settlement Agreement, are terminated, discontinued or withdrawn". I have set out the relevant relief sougth by Vivendi in Appendix 2 to this judgment.

33. Various further steps have been taken by the parties in the ICC Arbitration. On 26th January 2007, the ICC Tribunal issued its Procedural Order No. 1, setting out the timetable for the arbitration. This leads up to a hearing on the merits of the claims and counterclaims. The hearing is currently fixed for 8th – 19th September 2008.

D. Further steps in the LCIA Arbitration since April 2006

34. On 21 April 2006,[4] the Polish lawyers acting for Elektrim (Soltysinski Kawecki and Sclezak - "SKS") wrote to the LCIA arbitrators and informed them of Vivendi's request to the ICC and the nature of the relief sought by Vivendi in the proposed ICC arbitration. The letter continued:

> "*As the tribunal will no doubt appreciate the ICC arbitration directly impacts the present proceedings. In particular, in the event that Vivendi and the other ICC claimants are correct …. The present arbitration should be settled and terminated on the terms set forth in the pertinent agreements.*
>
> *Therefore Elektrim respectfully requests the Arbitral Tribunal to stay the present arbitration proceedings (including refraining from issuing an Award on Phase 1 issues) until the ICC arbitration is finally resolved.*
>
> *This letter is without prejudice to Elektrim's position in the ICC arbitration.*"

35. On 28th April 2006, Salans, the lawyers acting for Vivendi, wrote to the LCIA arbitrators opposing the application for a stay. Salans' letter said:

> "*It should be noted that in neither the Settlement Agreement nor the negotiations leading thereto has it been agreed that these LCIA arbitration proceedings should be <u>stayed</u>. In these circumstances it is clear that there is no basis whatsoever for a stay of these proceedings.*"

36. The letter urges the LCIA arbitrators to proceed and to issue the Partial Award on Phase 1 of the LCIA proceedings.

37. On 5th May 2006, SKS wrote to the LCIA arbitrators again and argued that there was an inconsistency in the position being adopted by Vivendi.

38. On 9th May 2006 the LCIA arbitrators issued their ruling on Elektrim's application. The tribunal's letter to the parties stated:

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[4] That is eight days after Vivendi had sent its request for arbitration to the ICC on 13 April 2006.

"*Given that there is no agreement between the parties on the stay of the proceedings, the arbitral tribunal shall issue its Partial Award and set a date for a conference call with parties to discuss the next steps of the proceedings.*"

39. The LCIA Tribunal's Partial Award was issued on 22nd May 2006.

40. On 27th June 2006 Elektrim made another application for a stay of the LCIA Arbitration. This was done in the course of a conference call with the LCIA tribunal concerning directions for the next stage of the LCIA arbitration. That application was also rejected by the tribunal.

41. A further application for a stay of LCIA proceedings was made by Elektrim on 8th September 2006, on the ground that there were applications pending before the Commercial Court in relation to the Partial Award. That application was refused in the LCIA tribunal's order on Interim Measures No. 7 dated 23rd October 2006.

42. In June 2006, the LCIA tribunal had fixed 19th March 2007 as the hearing date for Phase 2 of the arbitration. The parties prepared for that hearing by exchanging pleadings and so forth.

43. On 16 January 2007 Barlow Lyde and Gilbert ("BLG"), who had been appointed London solicitors for Elektrim in June 2006, wrote to the LCIA Arbitrators and re-informed them of the fact that Vivendi had started the ICC Arbitration by its Request of 13 April 2006. The letter summarised Vivendi's case in the ICC Arbitration and asserted that Vivendi's pursuit of the LCIA Arbitration *"…is wholly inconsistent with its case and the relief that it is seeking in the ICC Arbitration"*. The letter continues:

"……..

It will be immediately apparent that Vivendi's pursuit of the LCIA arbitration is wholly inconsistent with its case and the relief in respect of their alleged rights under the alleged settlement agreement. That application was rejected by the Tribunal.

1. The very basis for the LCIA arbitration, namely a dispute in relation to the TIA, depends upon the outcome of the ICC arbitration. If, as Vivendi allege, there was a settlement agreement concluded on or about 26 March 2006, all disputes, concerning the TIA have been settled and the LCIA arbitration must cease.

2. Vivendi's continued pursuit of its claims in the LCIA arbitration simultaneously with the pursuit of its claim in the ICC arbitration (a) expose Elektrim to the

risk of wholly inconsistent awards and, indeed, double jeopardy and (b) forces Elektrim to devote huge amounts of management time and resources to fighting what could turn out (on Vivendi's own case) to be an entirely baseless and futile proceeding.

3. It follows, as a matter of logic, fairness and common-sense, that the ICC arbitration must reach a conclusion on the existence of the alleged settlement agreement before any further steps in the LCIA arbitration is taken by any party. It is and cannot be right that Elektrim is required, pending the ICC Tribunal's determination to continue to fight an arbitration which Vivendi claims has been and must be terminated. It is abusive and unconscionable.

For the above reasons, Elektrim calls upon Vivendi either (a) finally to withdraw its claims in the ICC arbitration (and finally to terminate that arbitration) or (b) to stay the LCIA arbitration pending the outcome of the ICC arbitration.

Vivendi must communicate its unequivocal decision by close of business on 18 January 2007.

……"

44. BLG's letter stated that if Vivendi would not comply with these requests, then the LCIA Tribunal should order a stay of the LCIA Arbitration pending the outcome of the ICC Arbitration. The letter also stated that if the Tribunal was not prepared to make that order, then Elektrim would:

> *"…be forced to make an application for an injunction under s.37 of the Supreme Court Act 1981 enjoining Vivendi and the Tribunal from proceeding with the LCIA arbitration pending the outcome of the ICC Arbitration. We would hope that that step would not be necessary"*

45. However, the LCIA Tribunal rejected this application for a stay in a letter sent to the parties on 17 January 2007. This decision was confirmed in the Tribunal's Procedural Order Number 8, dated 22 January 2007, which was made after the Tribunal had received further submissions from Vivendi, as it had requested. The Tribunal noted that similar requests for a stay had been made by Elektrim in April and May 2006, which the Tribunal had refused.

46. Paragraph 7 of the Procedural Order Number 8 states:

> "……..
>
> *7. In the present case, Elektrim has renewed a request to stay the proceedings, pending the outcome of the ICC Arbitration, but has not advanced any new*

circumstances which the Arbitral Tribunal would have to consider when reviewing its decision of May 9, 2006 not to stay the proceedings. In particular, the relief sought by Vivendi in the ICC arbitration regarding the termination of all Proceedings between the Parties to the ICC arbitration was reflected in the Request for Arbitration of 13 April 2006 (p. 3 and 12), which was filed in this arbitration by Elektrim on 21 April 2006 at Exhibit R-74. There is thus no strong reasons to stay the LCIA proceedings pending the resolution of the ICC arbitration.

…..."

E. The arguments of the parties.

47. Mr Millett QC, for Elektrim, makes the following submissions:

(1) It is accepted that there is no provision in the 1996 Act giving the English courts a power to grant either an interlocutory or final injunction to restrain a party from pursuing an arbitration. However, despite the passage of the 1996 Act, the court has retained the power to grant an "anti – arbitration" injunction, by virtue of ***section 37*** of the ***Supreme Court Act 1981 ("the SCA provision").*** Such a jurisdiction is consistent with ***section 1(c)*** and ***section 81(1)*** of the 1996 Act.

(2) The court's jurisdiction to grant an anti – arbitration injunction may be invoked in two possible situations. First, where the arbitration is brought in breach of contract; secondly where the prosecution of the arbitration is oppressive, or vexatious or unconscionable. The present case is in the latter class. In each case a "legal or equitable right" of the party seeking the injunction is being infringed by the party against whom an injunction is sought.

(3) The factors that the court should take into account when deciding whether to grant an "anti – arbitration" injunction in the second class of case are the same or analogous to those considered when an anti – suit injunction is granted to restrain proceedings that are vexatious, oppressive or unconscionable. Reliance was placed on the very recent decision of Gloster J in ***Intermet FZCO v Ansol Ltd [2007] EWHC 226 Comm.*** In that case the judge reviewed the authorities and summarised the principles that apply to the grant of anti – suit injunctions and applied them to a claim for an anti – arbitration injunction.[5]

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[5] Mr Millett accepted that the arbitration in question in that case was not an "English" arbitration in the sense that its seat was in England and Wales. He also accepted that the law applicable to the Zurich arbitration in that case was not English law. In fact, Gloster J refused the interim injunction sought.

(4) If Vivendi were allowed to continue both the ICC and the LCIA arbitrations, its conduct would be unconscionable, vexatious and oppressive. In particular, there would be a considerable risk of inconsistent awards if both arbitrations are pursued. The LCIA arbitration may make an Award that either Vivendi (or Elektrim) has substantial rights and remedies under the TIA. But the ICC arbitration may subsequently conclude in an Award that all rights of the parties in the TIA have been subsumed in the Settlement Agreement. Both would be enforceable as New York Convention Awards.

(5) Pursuit of the two arbitrations means that Elektrim is incurring huge costs. Vivendi knows Elektrim is in financial difficulties, but is using the many proceedings as a weapon to force Elektrim to submit. This is oppressive.

(6) Elektrim has not unduly delayed in making the application to court for an injunction. But, in any event, Vivendi cannot show any prejudice by virtue of any delay. In particular, although the LCIA hearing of Phase 2 has been fixed (although now adjourned), that hearing will only deal with liability issues. Questions of what remedies should be granted to either Vivendi or Elektrim will not be dealt with then.

48. Mr Landau, for Vivendi, submits:

(1) Whilst it is conceded,[6] at least for present purposes, that the court has jurisdiction to use the SCA provisions to grant an anti – arbitration injunction, ***section 37*** constitutes a very limited residual power to intervene in an arbitration. It can only be used in exceptional circumstances and this case is not one of them.

(2) In the context of the 1996 Act, the court can only consider using the power granted by the SCA provision if it is consistent with the regime established by the Act: see ***section 1(c).*** Moreover, the 1996 Act denied the court any general supervisory powers over arbitration;[7] but gave the court only limited powers to intervene by interlocutory injunction (***section 44).*** The Act also gave arbitrators the power to determine their own jurisdiction: see ***section 30;*** and imposed on arbitrators a duty to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined: ***section 33(1)(b)*** and ***(2).***

(3) In the present case, Vivendi and Elektrim agreed to submit disputes under the TIA to LCIA arbitration. If Vivendi is correct in saying that the Settlement Agreement is valid and binding, then Vivendi and

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[6] Mr Landau accepted this jurisdiction, for the present, in the light of the remarks of the CA in ***Cetelem SA v Roust Holdings Ltd [2005] 2 Lloyd's Rep 494 at para 74 per Clarke LJ;*** and ***Weissfisch v Julius [2006] 1 Lloyd's Rep 716 at para 33 (v) at page 722 per Lord Phillips CJ.***

[7] This reflected the previous well established law as confirmed by the House of Lords in ***Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd [1981] AC 909. See per Lord Diplock at page 979 E-F.***

Elektrim have also agreed to submit disputes arising out of that agreement to ICC Arbitration. Disputes under both contracts are to be resolved by the dispute resolution tribunals that the parties have agreed. The courts should not use the ***SCA provisions*** to interfere with the parties' choices of dispute resolution tribunal. If there are issues about jurisdiction, they can be dealt with by the arbitration tribunal concerned. If need be, the court having jurisdiction can reconsider a tribunal's decision on jurisdiction.

(4) Such an approach is consistent with the ***New York Convention 1958, on the recognition and enforcement of foreign arbitral awards,*** to which the UK is a party. If the court interfered with the LCIA arbitration before the tribunal had made its next award, it would be acting in a manner contrary to the Convention provisions.[8]

(5) Vivendi is relying on what it says are its contractual rights in pursuing the LCIA arbitration and the ICC arbitration. These actions therefore cannot amount to (a) the infringement of any legal or equitable right of Elektrim; or (b) vexatious, oppressive or unconscionable behaviour. It is the action of Elektrim, in denying the validity of the Settlement Agreement, that has necessitated the ICC Arbitration and the need to continue with the LCIA arbitration.

(6) In any event, even if Elektrim were otherwise entitled to an injunction, its delay in starting the present action is extraordinary. This precludes the court from granting a final injunction to restrain the LCIA arbitration.

F. Issues for Decision

49. In the light of these arguments, I think that the following issues arise for decision:

(1) Can Elektrim demonstrate that one of its legal or equitable rights has been infringed or is threatened by the continuation of the LCIA arbitration. Alternatively has it demonstrated that the continuation of the LCIA arbitration would be vexatious, oppressive or unconscionable?

(2) Does the inter-relationship between the court's jurisdiction to grant injunctions, (in particular in relation to arbitral proceedings), pursuant to ***section 37*** of the ***SCA*** and the scheme of the 1996 Act permit the grant of an injunction on the facts of this case?

(3) As a matter of discretion, should a final injunction be granted to Elektrim to restrain the LCIA arbitration, pending the resolution of the ICC Arbitration?

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[8] Mr Landau particularly relied on the provisions of ***Art. II(3), Art. III,*** and ***Art V(1).***

G. Issue One: Can Elektrim demonstrate that one of its legal or equitable rights has been infringed or is threatened by the continuation of the LCIA arbitration. Alternatively, has it demonstrated that the continuation of the LCIA arbitration would be vexatious, oppressive or unconscionable?

50. I think that it is helpful to begin by asking: what Elektrim is trying to achieve by this action? Although the action is for a final injunction to restrain the LCIA arbitration pending the outcome of the ICC arbitration, its real aim is "case management" of the two arbitrations. Elektrim does not claim that the LCIA arbitration must stop for all time. Elektrim simply does not wish to fight in these two theatres of war at once. Presumably it judges the ICC arbitration to be the better battle ground at present and its chances of success there are greater. Although Elektrim has invoked the remedy of a final injunction to achieve its objective, I think that the form of the relief sought does not matter. A stay would do just as well. Mr Millett's attempt to draw a clear distinction between an injunction, which he described as a substantive remedy, and a stay of the LCIA arbitration, which he characterised as a procedural matter only, is misplaced. Both would have the same effect.[9]

51. I do not intend to explore generally the question of whether the court has any jurisdiction at all under ***section 37*** of the ***SCA*** to grant either interim or final injunctions to restrain arbitrations that are subject to the 1996 Act. I must assume that there is such a jurisdiction, given the comments of the Court of Appeal in the cases of ***Cetelem SA v Roust Holdings Ltd [2005] 2 Lloyd's Rep 494*** at para 74 ***per Clarke LJ;*** and ***Weissfisch v Julius [2006] 1 Lloyd's Rep 716*** at para 33 (v) at page 722 ***per Lord Phillips CJ.*** Nonetheless, I must consider whether the jurisdiction is wide enough to provide a base on which an injunction might be granted on the facts of this case.

52. There is no dispute, of course, that the court has jurisdiction to invoke ***section 37*** to grant an injunction to restrain a party from engaging in court proceedings in another jurisdiction, in breach of an English arbitration clause in a contract by which the parties are bound.[10] But in this case Mr Millett urges the court to use ***section 37*** for a very different purpose. It is to grant a final injunction to restrain the prosecution of an arbitration whose seat is in England, so is governed by Part 1 of the 1996 Act. The LCIA arbitration results from an admittedly valid arbitration clause which is itself a term in a contract (the TIA) which the arbitrators have held[11] is valid and binding on Elektrim and Vivendi. As far as the English courts are concerned, Elektrim cannot challenge either the validity of the TIA, nor the validity of the current LCIA arbitration, nor the authority of the arbitrators. Elektrim does not try to do any of those things in the present proceedings.

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[9] It is to be recalled that before the Judicature Acts introduced the remedy of a "stay" of proceedings, the way to stop an action was to obtain an injunction from a court of equity: see the ***Judicature Act 1873 s 24(5)*** and ***Gore v Van Der Lann [1967] 2 QB 31 at 43 per Harman LJ.***

[10] See, eg. ***Aggeliki Charis Compania Maritima SA v Pagnan SpA ("The Angelic Grace") [1995] 1 Lloyd's Rep 87 at 96*** per Millett LJ. Whether there is such a jurisdiction in relation to proceedings in a country within the EC Judgments Regulation (Council Regulation EC No 44/2001) has just been referred by the House of Lords to the ECJ: ***West Tankers Inc v RAS Riunione Aadriatica de Sicurta SpA [2007] UKHL 4.***

[11] They did so in the Partial Award dated 22 May 2006.

53. It seems to me that there are two initial difficulties that Elektrim has to overcome before the court could consider granting an injunction to restrain an arbitration that is governed by the 1996 Act. First, it must demonstrate that the prosecution of the LCIA arbitration is an act which would entitle the court to invoke the jurisdiction to grant injunctions under ***section 37.*** Secondly, it must show that the grant of an injunction to restrain the LCIA proceedings is consistent with the statutory scheme of the 1996 Act. In my view, Elektrim faces great difficulties in respect of each of these issues. In this section I will deal with the first of these. In the next section I will deal with the second.

54. ***Section 37(1)*** and ***(2)*** provide:

> *"(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases where it appears to the court to be just and convenient to do so.*
> *(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just"*

55. It has been firmly established by the House of Lords that an injunction (whether interlocutory or final) cannot exist in isolation. It is granted to enforce a substantive right or to protect against vexation or oppression. [12] Moreover, except in the case of interim relief, ***section 37*** can only be invoked if the underlying right to be enforced is subject to the jurisdiction of the English Court.[13]

56. Although the present case involves a claim for a final injunction to restrain an arbitration, I think it is useful at this stage to consider, by analogy, the basis on which the court grants an injunction (often interim) to restrain *proceedings* in a foreign court. An injunction can be granted on one of two bases. First, if the proceedings are an infringement of a legal or equitable right of a party; secondly, where those proceedings are vexatious, oppressive or unconscionable. The first analysis is usually applied to cases where the parties have contractually agreed to submit disputes to a particular court or to arbitration and one party has started proceedings in breach of that agreement.[14] The second analysis applies where there is no such agreement but the court concludes that the ends of justice require an injunction to restrain foreign proceedings that are vexatious or oppressive.[15] In each case the court has a discretion to grant or refuse the injunction sought, depending on the particular facts of the case.

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[12] See, eg: ***Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA [1979] AC 210 at 256 per Lord Diplock; South Carolina Insurance C v Assurantie Maatschappij "De Zeven Provincien" NV [1987] AC 24 at pages 39 – 40 per Lord Brandon of Oakbrook; Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334 at 362 per Lord Mustill.***

[13] ***Ibid.*** On interim relief, see ***s 25(1) and (3) of the Civil Jurisdiction and Judgments Act 1982 and IS 1997/302,*** which permits the court to grant interim relief under ***s.37*** in support of foreign proceedings. The present case concerns final relief, however.

[14] See, eg. ***Donohue v Armco Inc [2002] 1 Lloyd's Rep 425 at para 24 per Lord Bingham of Cornhill.***

[15] As in ***Airbus Industrie GIE v Patel [1999] 1AC 119.***

57. Mr Millett did not argue that there was any different juridical basis for invoking ***section 37*** to grant an injunction to restrain an arbitration. Indeed, his argument is that the continuation of the LCIA arbitration is vexatious and oppressive to Elektrim. So, the first difficulty for Elektrim is this: what legal or equitable right of Elektrim has been infringed by Vivendi that entitles the court to consider restraining the LCIA arbitration from continuing? Alternatively, on what basis is it vexatious or oppressive or unconscionable towards Elektrim for Vivendi to continue the LCIA arbitration, so as to entitle the court to consider restraining the LCIA arbitration from continuing? Because Elektrim claims a final injunction, the court has to be satisfied (on a balance of probabilities) that Elektrim has demonstrated that one or other of these bases exists.

58. I put these questions to Mr Millet in the course of argument. The compendious answer that he gave was that Elektrim had a legal or equitable right to have a fully and unquestionably enforceable award, which right is reflected in the duty placed on the tribunal by Article 32 of the LCIA Rules.[16] Elektrim has a right not to be oppressed or vexed by having to face the LCIA and the ICC arbitrations and Polish proceedings at once in the present circumstances. Whilst I can follow the first stage, I cannot accept the second stage of that submission as a satisfactory analysis.

59. Elektrim and Vivendi agreed to the arbitration clause in the TIA. The current LCIA arbitration was set up by agreement between the parties once disputes had arisen concerning the TIA. The LCIA arbitration has continued by the agreement of the parties until Elektrim issued the present proceedings. Neither the existence of the LCIA arbitration nor its prosecution can be characterised as being in breach of any legal or equitable right of Elektrim. It is, in fact, the opposite. The resolution of disputes concerning the TIA through an LCIA arbitration is what the parties agreed to do by their contract in the TIA.

60. I fail to see how the fact that Vivendi has started the ICC arbitration after the start of the LCIA arbitration can create a new legal or equitable right for Elektrim in respect of the LCIA arbitration that might allow the court to invoke its jurisdiction under ***section 37.*** So far as I can see, only two possible arguments might be raised. The first is that there is an implied term of the LCIA arbitration agreement that if another arbitration is started between the same parties, but not relating to the same subject – matter as the existing arbitration, then the parties have a right to call a halt to the LCIA arbitration. Such an implied term is neither reasonable nor necessary to the working of the LCIA arbitration agreement. (I appreciate, of course, that Elektrim does not accept that the Settlement Agreement is valid and binding. But Elektrim

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[16] These provide: "32.1 A party who knows that any provision of the Arbitration Agreement [including these Rules] has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non – compliance, shall be treated as having irrevocably waived its right to object. 32.2. In all matters not expressly provided for in these Rules, the LCIA Court, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every reasonable effort to ensure that an award is legally enforceable".

accepts that the ICC arbitration procedure is valid and it does not seek an injunction to restrain that arbitration).

61. The second possible argument is Elektrim has a legal right to the conduct of the LCIA arbitration by the arbitrators in a manner consistent with their duties as set out in ***section 33(1)(a)*** and ***(b)***and ***(2)*** of the 1996 Act. This provides:

> *(1) The tribunal shall –*
> *(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and*
> *(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.*
> *(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions o matters of procedure and evidence and in the exercise of all other powers conferred on it."*

62. I will assume that parties to an arbitration have a legal right that the arbitrators who have been appointed will carry out their duties in accordance with ***section 33.*** Elektrim's argument in this case would have to be that the LCIA arbitrators have failed in the exercise of their statutory duty by refusing (three times) to stay the LCIA arbitration pending resolution of the ICC arbitration. But in my view there are two reasons why, even assuming such a breach of duty, it could not permit the invocation of the court's jurisdiction to grant an injunction using ***section 37***.

63. First, it was well established under the old regime that the court did not have a general supervisory role over arbitrations at their interlocutory stage beyond that granted by the Arbitration Acts themselves.[17] Therefore there was no scope to invoke the court's jurisdiction to grant injunctions to compel arbitrators to take a particular course in the reference.[18] That rule must remain the case under the 1996 Act. The position is emphasised by the provisions of ***section 1(c)*** of the Act, which stipulates that "*in matters governed by this Part*[19] *the court should not intervene except as provided by this Part"*.

64. Secondly, the 1996 Act itself provides the remedy for a breach of the ***section 33*** duty. Either before the award is made or after it is made, the party that alleges it is aggrieved can apply to remove the arbitrator or challenge the award, under (respectively) ***section 24 (1)(d) (i)*** or ***68(2)(b).*** The first section permits an application to the court to remove the arbitrator for a refusal or failure properly to conduct the proceedings. The second section permits a challenge to the award on the basis that there has been a serious irregularity because of the tribunal's failure to comply with ***section 33.*** In either case

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17 See the ***Bremer Vulcan case [1981] AC 909 at 979 per Lord Diplock.***

18 ***Exormisis Shipping SA v Oonsoo [1975] 1 Lloyd's Rep 432, particularly at 434 per Donaldson J.***

19 That is Part 1 of the 1996 Act.

there is no need for the court to interfere with the arbitral process by granting an injunction pursuant to the powers in ***section 37.***

65. The next question is: can Elektrim demonstrate that continuation of the LCIA arbitration now that the ICC arbitration has started is oppressive or vexatious? The only basis on which it can seriously do so is by asserting that it should not have to face two arbitrations at once. However, it is clear that the two arbitrations concern different subject matters. The LCIA arbitration is dealing with disputes concerning the TIA. The ICC arbitration is dealing with disputes concerning the Settlement Agreement. Neither arbitration could deal with the subject matter of the disputes that is being dealt with by the other.[20] Both arbitrations were started pursuant to contracts by which the parties agreed to resolve disputes concerning them by arbitration.[21]

66. Therefore, quite apart from any special considerations that might arise concerning the exercise of the ***section 37*** jurisdiction in the context of the 1996 Act, Elektrim has failed to demonstrate any legal basis on which the court could invoke the jurisdiction to grant an injunction. But Elektrim's position is made even weaker, in my view, when the question of the court's power to grant an "anti – arbitration" injunction is put in the context of the 1996 Act.

H. What is the inter-relationship between the court's jurisdiction to grant injunctions, (in particular in relation to arbitral proceedings), pursuant to *section 37* of the *SCA* and the scheme of the 1996 Act?

67. Arbitrations that fall within the 1996 Act are the result of agreements between two (or possibly more) parties to resolve legal disputes through a private impartial tribunal. Such arbitrations are, by definition, consensual. As ***section 1(b)*** of the 1996 Act states, "*the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest*". I have already noted that under the pre – 1996 Act regime, it was well established that the courts did not have a general supervisory power to intervene in arbitrations before an award was made, either by injunction or some other method. That remains the position. ***Section 1(c)*** of the Act is an express statutory warning[22] to the courts not to intervene except as provided in Part 1 of the 1996 Act. That reflects the underlying principles of the 1996 Act of party autonomy and the minimum of interference in the arbitral process by the courts, at least before an award is made.

68. In my view the whole structure of Part 1 also suggests that the scope for the court to intervene by injunction before an award is made by arbitrators is very

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[20] That point is subject to one possible reading of clause 1.4 of the Sch. D3 to the Settlement Agreement, which might give the current LCIA arbitrators jurisdiction to consider disputes concerning the Settlement Agreement, including its validity. If that is right then there would be all the greater reason to continue the existing LCIA arbitration.

[21] Again I appreciate that Elektrim does not accept that the Settlement Agreement is valid and binding. But it does accept that this issue is to be resolved by the ICC arbitrators.

[22] I use the word "warning" rather than "prohibition", because ***section 1(c)*** says "*…the court **should not** intervene…*". The conditional mood implies that there might be circumstances where it should intervene other than as provided for in Part 1 of the Act.

limited. First, ***section 44(2)(e),*** [23] is the only express provision in Part 1 giving the courts the power to grant interim injunctions in aid of an arbitration, but the scope for obtaining one is limited. Mr Millett accepted that the power given to the court to grant interim injunctions in ***section 44(2)(e)*** was of no use to Elektrim in the current action.

69. Secondly, the only other express reference to the court granting an injunction is in ***section 72.*** That section permits a person who is alleged to be a party to arbitral proceedings but who has taken no part in them to question in court proceedings the validity of the arbitration agreement, the constitution of the tribunal and the terms of the reference to arbitration. The court proceedings can be for either a declaration or an injunction or other appropriate relief. Again, Mr Millett accepted that this section was no use to Elektrim in this action.

70. Thirdly, Part 1 of the Act contemplates that once matters are referred to arbitration, it is the arbitral tribunal that will generally deal with issues of their jurisdiction and the procedure in the arbitration up to an award.[24] As I have already noted, ***section 33*** lays a statutory duty upon the tribunal to adopt procedures suitable to the circumstances of a particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters that are to be determined. ***Section 34(1)*** stipulates that it is for the tribunal to decide "*..all procedural and evidential matters, subject to the rights of the parties to agree any matter"*. ***Section 34(2)(a)*** provides that procedural matters will include "*..when and where any part of the proceedings is to be held"*.

71. It is clear, therefore, that the Act contemplates that the tribunal will consider and decide such matters as whether there should be an adjournment or a stay of the arbitral proceedings. That is consistent with the general approach of the 1996 Act, which is to give as much power as possible to the parties and the arbitrators and to reduce the role of the courts to that of a supporter of the arbitration process up to an award being made.

72. Fourthly, it is to be noted that the 1996 Act did not grant power to the court to consolidate arbitration proceedings or to order concurrent hearings. ***Section 35*** of the Act permits consolidation or concurrent hearings only if the parties agree to it. This accords with the view of the DAC Report of February 1996, which preceded the Act.[25] In denying the court any power to consolidate or order concurrent hearings, it is implicit, in my view, that it would generally be contrary to the provisions of Part 1 of the Act for a court to grant an injunction to achieve the same or a similar result.

73. In the present case, the LCIA arbitrators have not only to comply with the statutory duty under ***section 33,*** but also a duty to the parties by virtue of

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[23] This gives the court the power "*for the purposes of and in relation to arbitral proceedings.."* to grant an interim injunction.

[24] See in particular ***sections 30, 31, 33, 34, 38, 40, 41 42, 43, 46 and 48.***

[25] See para 180: *"In our view it would amount to a negation of the principle of party autonomy to give the tribunal or the court power to order consolidation or concurrent proceedings. Indeed it would to our minds go far towards frustrating the agreement of the parties to have their own tribunal for their own disputes…Accordingly we would be opposed to giving the tribunal or the court this power."*

Article 14(1)(i) and (ii) of the LCIA Rules.[26] This only serves to reinforce my conclusion that in the present case the LCIA tribunal itself should decide whether or not those proceedings should continue or should await the outcome of the ICC arbitration. The tribunal has the power to do so and it is the body chosen by the parties to decide the dispute that has arisen between Vivendi and Elektrim concerning the TIA.

74. Against this background, I have concluded that even if Elektrim could establish that one of its legal or equitable rights had been infringed or was threatened by the continuation of the LCIA arbitration pending the outcome of the ICC arbitration, or even if it could establish that the continuation of the LCIA arbitration was otherwise vexatious, oppressive or unconscionable, in this case the court should not invoke the power to grant an injunction under ***section 37.*** This is for the following reasons.

75. First, to do so would be contrary to the agreement of the parties to refer the TIA disputes to the LCIA arbitrators and to do so under the provisions of the 1996 Act and the LCIA Rules of procedure. Secondly, although Mr Millett was not prepared to do so, he has to accept that the LCIA tribunal has the power to stay that arbitration pending the determination of the ICC arbitration. Thirdly, the LCIA arbitration tribunal has decided, on three occasions, not to stay the LCIA arbitration. Fourthly, the court is given no express power under the 1996 Act to review or overrule those procedural decisions in advance of an award by the LCIA arbitrators. Fifthly, to attempt to invoke ***section 37*** as a means of reviewing or overruling the tribunal's decisions would undermine the principles of the 1996 Act and would grant the court a general supervisory power which it has never had.

76. In the course of his argument, Mr Millett relied strongly on the recent decision of Gloster J in ***Intermet FZCO v Ansol Limited.***[27] In that case the defendant, Ansol, had sought an interim injunction to restrain Intermet FZCO from proceeding with an arbitration that it and another claimant had started in the Zurich Chamber of Commerce. The basis of the application was that the claimants had started two sets of concurrent proceedings against Ansol, one in the Zurich arbitration and the other by the proceedings in the Commercial Court in London, which related to the same contractual claims. Gloster J refused the injunction.

77. It appears that counsel on both sides argued that the question of whether or not an injunction should be granted to restrain an arbitration (abroad in that case) were the same as when an "anti – suit" injunction was sought.[28] The judge concluded that an injunction should not be granted because (i) in the circumstances the claimants were entitled to exercise their contractual right to resolve their disputes with Ansol in arbitration; (ii) it would not be oppressive, vexatious or severely prejudicial to Ansol to allow the arbitration to continue; and (iii) the application was made far too late.[29] It does not

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26 Sub sub paras (i) and (ii) are in identical terms to ***section 33(1)(a) and (b).***

27 ***[2007] EWHC 226 (Comm).***

28 See para 20 of the judgment.

29 See, respectively: paras 30, 23 and 25 of the judgment.

appear from the judgment that there was any argument about the relationship of the court's jurisdiction under ***section 37*** and the scheme and provisions of the 1996 Act. Insofar as Gloster J's decision might suggest that the test for whether the court should grant an "anti – arbitration" injunction is the same as for an "anti – suit" injunction, I respectfully cannot agree, for the reasons discussed above.

78. Mr Millett also referred me to the decision of HHJ Humphrey Lloyd QC, sitting as an Official Referee in ***The University of Reading v Miller Construction Ltd and David Sharp.***[30] In that case a party to multi – party litigation sought an injunction to restrain an arbitration that involved two of the parties to the litigation. The judge granted an injunction. That case is not helpful. First, it was decided before the 1996 Act came into force. Secondly, the arbitration was what was then called a "domestic" arbitration.[31] The court had previously refused to grant a discretionary stay[32] to halt the court proceedings between the two parties to the arbitration clause. It had decided that it was better for the court to deal with all disputes in its jurisdiction and the arbitration should await the outcome before it proceeded.[33] In those circumstances, where there was a danger of the two tribunals within England and Wales deciding the same issues of fact if they both continued,[34] it is not surprising that an injunction was granted. But that is not the situation in this case.

79. I should note that Mr Landau submitted that the grant of an injunction to restrain the LCIA arbitration would mean that the court was acting contrary to the UK's obligations,[35] as a Contracting State, under the New York Convention on the recognition and enforcement of foreign arbitral awards, 1958. In view of the decision I have reached apart from the New York Convention arguments of Mr Landau, I do not need to comment on them.

I. Issue Three: As a matter of discretion, should a final injunction be granted to Elektrim to restrain the LCIA arbitration pending the outcome of the ICC arbitration?

80. Having decided, on the basis of the first two issues, that no injunction should be granted, strictly speaking there is no need for me to decide the third question I have posed. As I have already said, I am not satisfied that the continuation of the LCIA arbitration is vexatious or oppressive or unconscionable. The reason for the two arbitrations carrying on at the same time is that Vivendi wishes to claim that the Settlement Agreement is valid and to do so it must start the ICC arbitration, whereas Elektrim claims it is not and the TIA subsists. So Vivendi has little choice but to continue with the LCIA arbitration which is dealing with the parties disputes under the TIA. At the same time there are disputes in the Polish courts, which are separate from

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30 ***[1996] BLR vol 75 page 91.***

31 That is one that involved parties resident/carried on business within England and Wales.

32 Under ***section 4*** of the ***Arbitration Act 1950.***

33 ***See page 102 of HHJ Lloyd's judgment.***

34 ***See pages 120 – 121 of the judgment.***

35 Mr Landau relied in particular on Articles II(3), III and V.

albeit linked to the TIA disputes. It is simply inevitable that there will be multi – party, multi – tribunal litigation or arbitration in the circumstances of the war for the PTC shares that is going on.

81. One of the main arguments on discretion concerned the alleged delay of Elektrim in applying to the court for an injunction. Mr Landau submits that the delay ran from April 2006 when the ICC arbitration was started. That was when the ICC received the Request for Arbitration which Vivendi sent to the ICC on 13 April 2006. He relies on Article 4 r(2) of the current ICC Rules,[36] which provides:

> *"The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitral proceedings".*

82. Mr Landau submits that since then there have been many steps in the LCIA arbitration, including the three applications of Elektrim for a stay of those proceedings. He submits that at no time until February 2007 did Elektrim say that it was taking steps in the LCIA arbitration without prejudice to its right to claim an injunction to restrain those proceedings. Mr Landau submits that Vivendi has suffered prejudice as a result in the form of work done and expense incurred in relation to the LCIA arbitration, which was about to have a further extensive hearing in March 2007.[37]

83. In ***Compagnie Nouvelle France Navigation SA v Compagnie Navale Afrique du Nord (The "Oranie" and the "Tunisie"),***[38] the claimant sought an interlocutory injunction to restrain an English arbitration concerning two Charterparties, when it was claimed (in French proceedings) that the charterparties constituted fictitious agreements. As the law stood under the pre – 1996 Act regime, the court had jurisdiction to grant an injunction to restrain an arbitration where it was asserted that the contract (including the arbitration agreement) was void or voidable *ab initio.*[39] But the Court of Appeal (upholding McNair J) refused to grant an injunction to restrain the English arbitration. The main grounds were, first, that in the circumstances of that case the parties should be held to their contractual bargain to arbitrate disputes; secondly, that there was delay in applying for an injunction and thirdly, it was not obvious that there would be conflict between the award and the eventual result of the French proceedings.

84. Mr Landau relies on the statement of Sellers LJ[40] that delay is a powerful factor against granting an injunction. In the present case it is 10 months since the ICC arbitration was started by Vivendi's Request. Elektrim must have taken it seriously from the start, because it applied to the LCIA

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[36] Those in force as from 1 January 1998.

[37] As noted, this hearing was adjourned by the LCIA arbitrators, after the hearing and my decision not to grant an injunction to Elektrim.

[38] ***[1966] 1 Lloyd's Rep 477.***

[39] See ***Kitts v Moore [1895] 1 QB 253;*** approved by the HL in the ***Bremer Vulcan case: see page 981 per Lord Diplock.*** Whether the law remains the same under the 1996 Act must be an open question.

[40] At ***page 487.***

arbitrators to stay the LCIA arbitration in April 2006. Since then Elektrim has taken full part in the LCIA arbitration, but has only recently reserved its position about doing so without prejudice to some application to the court. Vivendi has continued its preparations for the March 2007 hearing. It has incurred expense in doing so. At the time I made my decision not to grant an injunction, Vivendi expected that hearing to take place unless an injunction was granted.

85. In these circumstances it would be unjust, in my view, to grant Elektrim an injunction to restrain the continuation of the LCIA arbitration.

86. As a further ground for an injunction to restrain the LCIA arbitration, Elektrim has relied on the fact that Telco (of whose shares Vivendi owns 51%), has brought a claim in Poland against PTC, Elektrim and DT, claiming that it is or should be, the registered owner of 48% of the PTC shares. This action was started in December 2004 and appears to be still at an early interlocutory stage.[41] It is said that there is a danger that the LCIA arbitration and this action may produce inconsistent findings. If so, then that is a risk that must remain. That risk cannot be a reason for seeking an injunction to stop an otherwise valid arbitration proceeding.

87. It is said[42] that a hearing and determination of the issues of liability at the March hearing of the LCIA arbitration is important to Vivendi, because if it obtains an award in its favour, then it would strongly support Vivendi's actions in Poland. I have not taken that matter into account in deciding that there should be no injunction.

J. Conclusion.

88. For all the reasons given above, this action fails and will be dismissed.

Appendix 1 to Judgment.

Relevant Clauses of the draft Settlement Agreement dated 28 March 2006.

"……..

4. TERMINATION OF THE PROCEEDINGS AND WAIVER OF CLAIMS

4.1 Save as provided in clause 14 of this Agreement, [and, with respect to DT, subject to Clause 3.2, each Party (on behalf of itself and its Related Parties and its and their Representatives) hereby:

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41 Elektrim filed its reply to Telco's Statement of Claim on 19 September 2006: **Kavanagh (2) para 17.**

42 **Kavanagh (2) para 12.**

(i) agrees, not to take any new Remedy (save as herein provided) or to arise any new Claim before any court of competent jurisdiction, any arbitral tribunal, any ministry or governmental agency or regulatory authority in Poland or in any other jurisdiction whatsoever, or otherwise in respect of the subject matter of the Proceedings as listed in Schedule A; and

(ii) undertakes to take all necessary steps to comply with this Agreement, and with its respective obligations under the Implementation Agreements to which it is a party and the transactions contemplated thereby; and

(iii) agrees and undertakes that the Proceedings to which it is a party (as listed in Schedule A) and any other related proceedings or Remedies will be respectively settled, discontinued, terminated or withdrawn as set out in the relevant Implementation Agreement; and

(iv) agrees to accept the covenants and agreements set out in this Settlement Agreement in full and final settlement of any and all Claims between the Parties, including any and all Claims arising or capable of arising out of, or in any way connected with or relating to the Proceedings o any Remedy;

(v) agrees and undertakes to take all necessary steps to discontinue , terminate, withdraw the Proceedings and to consent to any court order or direction or arbitration award or order of arbitral tribunal in order to effect such termination, discontinuance or withdrawal as set forth in the respective Implementation Agreement to which it is party;

(vi) unconditionally, irrevocably and comprehensively cancels, waives, gives up, surrenders, terminates, settles and refrains from, to the extent legally permissible, any and all Claims and present and future Remedies against one or more other Party or Related Party;

…….”

SCHEDULE D3

"SCHEDULE D3
TERMINATION OF CERTAIN NON-POLISH
PROCEEDINGS

……

1. ……..

1.1 Pursuant to Article 4 of the Settlement Agreement each party to the LCIA Arbitration shall request the LCIA Arbitral Tribunal to issue a consent award confirming the mutual settlement and waiver of all claims.

1.2 Upon the execution of the Settlement Agreement and on the same day, the Parties shall jointly execute and send a letter (in the exact form attached as Schedule D4) to the arbitral tribunal (the "LCIA Arbitral Tribunal") requesting that it render a consent award (the "Consent Award") recording that the parties to the LCIA Arbitration have reached an agreement especially on the following issues:

(1) The TIA is and has always been valid and binding since the day of execution on September 3, 2001;

(2) Any and all outstanding controversies and claims that have arisen or are capable of arising among them in the LCIA Arbitration or in any current or subsequent proceedings in relation to the TIA are settled, terminated, released, waived and withdrawn with prejudice; and

(3) The parties wish to terminate with prejudice the LCIA Arbitration.

(4) Each party to the LCIA Arbitration shall bear its own respective costs associated with the LCIA Arbitration, including, but not limited to, arbitration costs, arbitrators' fees and expenses, and attorney's fees and expenses.

1.3 The parties to the LCIA Arbitration agree that they will also request in the letter that the LCIA Arbitral Tribunal confirm in its Consent Award that: (a) the Interim Measures Orders are terminated and are null and void; (b) by issuance of the Consent Award, the LCIA Arbitration proceedings terminate and the LCIA Arbitral Tribunal is discharged of its duties; and (c all of the Parties' respective claims, counterclaims, and defences asserted in the LCIA

Arbitration are unconditionally terminated, waived, and withdrawn with prejudice.

1.4 The Parties will also inform the LCIA Arbitral Tribunal that, until the issue of the Consent Award and the termination of the LCIA Arbitration, the Parties have extended the Tribunal's jurisdiction and referred to the Tribunal any dispute arising out of or in connection to the parties' Settlement Agreement dated [ ] 2006, and as far as the TIA, including regarding its existence, validity, performance or termination."

Appendix 2 to Judgment

Relief sought by Vivendi in the ICC Arbitration as set out in the Terms of Reference dated 13 January 2007.

" **2. Relief Sought**

49. The Claimants (Vivendi) seek the following relief:

(i) that the Tribunal declare that Settlement Agreement of 29 March 2006 is binding and enforceable against each of the Respondents;

(ii) that the Tribunal declare that each of the Respondents is in breach and/or anticipatory breach of its duties and obligations arising out of the Settlement Agreement of 29 Match 2006;

(iii) that the Tribunal order specific performance by the 1st to 9th Respondents of the Settlement Agreement in accordance with its terms whereby each of the Respondents must comply with all its respective obligations under ht Settlement Agreement, including, *inter alia*, the obligation to ensure that all Proceedings, as defined in the Settlement Agreement, are terminated, discontinued, or withdrawn;

(iv) that the Tribunal declare that DT/Vivendi Master Agreement of 29 March 2006 is binding and enforceable against each of the DT Respondents;

(v) that the Tribunal declare that each of the DT Respondents is in breach and/or anticipatory breach of its duties and obligations arising out of the DT/Vivendi Master Agreement of 29 March 2006;

(vi) that the Tribunal order specific performance by each of the Respondents of the DT/Vivendi Master Agreement in accordance with its terms, whereby, *inter* alia, the DT Respondents and Vivendi agreed to give effect to all transactions enabling them to have a shareholding of 50% each of PTC.

(vii) that the Tribunal in addition to specific performance order damages, including consequential damages, as shall have been proved at the terminations of the evidence proceedings, arising from the 1st to 9th Respondents' breach and until specific performance shall be undertaken;

(viii) further, in the event that the Tribunal does not order specific performance due to the impossibility of achieving the same arising from Respondents' actions, or for any other reason, the Claimants request that the Tribunal order the 1st to 9th Respondents to jointly and severally pay to the Claimants damages arising from their failure to sign and/or actual and/or anticipatory breach of the Settlement Agreement and the DT/Vivendi Master Agreement (including damages arising out of *culpa in contrahendo*), in an amount to be determined upon termination of the evidence proceedings, but no less than EUR 3 billion plus interest and further consequential damages;

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