Hiscox v Outhwaite (No 1)

HOUSE OF LORDS
LORD MACKAY OF CLASHFERN LC, LORD KEITH OF KINKEL, LORD BRANDON OF OAKBROOK, LORD ACKNER AND LORD OLIVER OF AYLMERTON
8, 9, 10, 24 JULY 1991

Arbitration – Award – Foreign award – Convention award – Place where award is made – Arbitration conducted in London – Award signed and dated in Paris and sent to parties in London – Whether award made in France – Whether award a Convention award – Arbitration Act 1975, ss 3(2), 7(1).

Arbitration – Award – Foreign award – Convention award – Convention award arising out of arbitration governed by English law – Enforcement of award in England – Application to review award – Enforcing court and curial court one and the same – Award binding for all purposes in any legal proceedings – Whether court can exercise both curial court's and enforcing court's discretion – Whether English court can set aside or suspend award and at same time permit pending supervisory process to continue – Whether court can refuse enforcement of award if it is suspended or set aside by itself as curial court – Whether English court which is both curial court and enforcing court having jurisdiction to entertain proceedings relating to award – Arbitration Act 1975, ss 3(2), 5(2)(5).

A dispute between two Lloyd's syndicates concerning liabilities under a reinsurance contract was referred, pursuant to an arbitration agreement made between the parties, to arbitration in London by Queen's Counsel with chambers in London. Both the arbitration agreement and the reinsurance contract were governed by English law. The arbitration took place in London in two stages, the first stage being concerned with the appellant's right to avoid the contract of reinsurance on the ground that the agreement had been effectively rescinded, on which the arbitrator made an award rejecting that contention, and the second stage being limited to a determination of preliminary issues as to the amount payable by the respondent, on which the arbitrator made a draft interim award and after a further hearing signed a final interim award. All the awards were dated and signed by the arbitrator at Paris and were stated in the awards to have been made and published in Paris. The parties were notified that the final interim award was ready for collection at the arbitrator's London chambers and delivery of it was taken at that address. The respondent applied to the court for leave to appeal against the award under s 1(3)(*b*) of the Arbitration Act 1979, an order directing the arbitrator to state further reasons for his award pursuant to s 1(5) of the Act, and remission of the award to the arbitrator pursuant to s 22 of the Arbitration Act 1950. The appellant contended that the court had no jurisdiction to hear the application because the award was a Convention award within the meaning of s 7(1)[a] of the Arbitration Act 1975, ie one to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 applied, since it had been made in Paris, and as such it was binding for all purposes on the parties by virtue of s 3(2)[b] of the 1975 Act and could be relied on by way of a defence in any legal proceedings in the United Kingdom. The judge rejected that contention holding that although the award was dated in Paris it was not a

a Section 7(1), so far as material, is set out at p 645 *e f*, post
b Section 3(2) is set out at p 645 *g*, post

Convention award because the central point and seat of the arbitration proceedings was London and therefore it was made in London for the purposes of the 1975 Act. The appellant appealed to the Court of Appeal, which dismissed the appeal on the grounds that although the award was a Convention award and therefore the High Court would otherwise have no jurisdiction to entertain the appellant's application, the appellant was estopped from relying on the fact that the award was a Convention award because he had not questioned the place of execution of the first award or the final interim award when it was still in draft and could have been rectified or republished in London. The appellant appealed to the House of Lords.

Held – (1) An award was 'made' for the purposes of s 7(1) of the 1975 Act when and where it was perfected, which was where it was signed in the absence of anything in the arbitration agreement or the rules under which the arbitration was conducted requiring some further formality. It followed that since the award was signed and dated in Paris it was made in Paris and was a Convention award (see p 643 *f* to *h*, p 646 *g h* and p 647 *d* to *f*, post); *Brooke v Mitchell* (1840) 6 M & W 473 considered.

(2) However, where the enforcing court and the court of the country whose law governed the award (the curial court) were one and the same and application was made to that court to set aside or suspend a Convention award that court could exercise both the curial court's supervisory power to set aside or suspend the award and, at the same time, the enforcing court's discretion to permit the pending supervisory process to continue and to refuse enforcement of the award if that process resulted in the award being suspended or set aside by itself as the curial court, since where application was made to itself, as the curial court, to set aside or suspend the award it had as the enforcing court power under s 5(2)[c] of the 1975 Act to refuse enforcement of or reliance on the award and power under s 5(5)[d] to adjourn the proceedings, notwithstanding that the only 'proceedings' consisted of the application to itself as the curial court to set aside the award in which necessarily the award was being relied upon by the party seeking to have it set aside. Accordingly, although under s 3(2) the award, being a Convention award, was binding for all purposes and could be relied on in any legal proceedings, that was subject to the award being enforceable under the Act, which was an issue to be decided by the English court as the curial court because the arbitration was governed by English law, and since the English court was both the curial court and the enforcing court the High Court remained capable of exercising its curial jurisdiction over the arbitration and of adjourning, if it thought fit, any decision on the enforceability of the award until the pending proceedings for review had been determined. On those grounds the appeal would be dismissed (see p 643 *f* to *h*, p 648 *e* to p 649 *b g* to p 650 *g*, post).

Decision of the Court of Appeal [1991] 3 All ER 124 affirmed on other grounds.

Notes

For special provisions applicable to foreign awards, see 2 *Halsbury's Laws* (4th edn) para 633, and for cases on the subject, see 3 *Digest* (Reissue) 303–305, 2040–2044.

For the Arbitration Act 1975, ss 3, 5, 7, see 2 *Halsbury's Statutes* (4th edn) 605, 606, 607.

Cases referred to in opinions

Brooke v Mitchell (1840) 6 M & W 473, 151 ER 498.

Hiscox v Outhwaite (No 2) [1991] 3 All ER 143, [1991] 1 WLR 545, CA.

c Section 5(2) is set out at p 645 *j*, post

d Section 5(5) is set out at p 646 *a b*, post

Appeal

Richard Henry Moffit Outhwaite, representing himself and all other members of Lloyd's Syndicate 661, being the respondent in an arbitration concerning liabilities under a reinsurance contract, appealed with leave of the Court of Appeal from the decision of that court (Lord Donaldson of Lymington MR (dissenting on one point), McCowan LJ and Leggatt LJ (dissenting on another point)) ([1991] 3 All ER 124, [1991] 2 WLR 1321) on 11 March 1991 dismissing the appellant's appeal from the order of Hirst J ([1991] 2 Lloyd's Rep 1) dated 19 February whereby he held that the High Court had jurisdiction and was competent to hear applications by the claimant, Robert Ralph Scrymgeour Hiscox (the respondent), representing himself and all other members of Lloyd's Syndicate 33, (i) for leave to appeal to the High Court on questions of law arising out of the interim award dated 20 November 1990 made by Mr Robert Alexander MacCrindle QC, pursuant to s 1(3)(*b*) of the Arbitration Act 1979, (ii) for an order directing the arbitrator to state further reasons, pursuant to s 1(5) of the Arbitration Act 1979 and (iii) that the interim award be remitted to the arbitrator pursuant to s 32 of the Arbitration Act 1950. The facts are set out in the opinion of Lord Oliver.

Jonathan Sumption QC and *Christopher Butcher* (instructed by *Elborne Mitchell*) for the appellant.

Anthony D Colman QC, *Jonathan Gilman* QC and *John Lockey* (instructed by *Fishburn Boxer*) for the respondent.

At the conclusion of the argument their Lordships stated that the appeal would be dismissed for reasons to be given later.

24 July 1991. The following opinions were delivered.

LORD MACKAY OF CLASHFERN LC. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Oliver of Aylmerton. I agree with it, and for the reasons which he gives I would dismiss the appeal.

LORD KEITH OF KINKEL. My Lords, I have had the advantage of considering in draft the speech to be delivered by my noble and learned friend Lord Oliver of Aylmerton. I agree with it, and for the reasons which he gives I would dismiss the appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Oliver of Aylmerton. I agree with it, and for the reasons which he gives I would dismiss the appeal.

LORD ACKNER. My Lords, for the reasons given by my noble and learned friend Lord Oliver of Aylmerton, I, too, would dismiss the appeal.

LORD OLIVER OF AYLMERTON. My Lords, the parties to this appeal are both Lloyd's underwriters who represent all the members of the two syndicates of which they are respectively members. The dispute arose with regard to the liabilities of the syndicates under a contract of reinsurance entered into in 1982. That contract, which it is common ground is governed by the law of England, contained an arbitration clause providing for arbitration in London by two arbitrators and their umpire. In fact the agreement was varied by the parties who

agreed to refer the dispute between them to Mr R A MacCrindle QC as sole arbitrator. The hearings took place in London and the arbitration was conducted in two stages, the first being concerned with the appellant's contention that the agreement had been effectively rescinded. As regards that issue an award was made on 30 June 1989 when the contention was rejected. The second stage was, by agreement, limited to a determination of preliminary issues of principle relating to the quantum of claims payable by the respondent. Following hearings in London in April and May 1990, the arbitrator made a draft interim award on 6 August 1990 in the form of a number of declarations giving the parties a period of six weeks to make representations as to the form of the award. If no representations were made the award was to become binding. In fact a further hearing took place on 6 November 1990 and on 20 November 1990 the arbitrator signed his final interim award. The award made in June 1989, the draft award in August 1990 and the final interim award signed on 20 November 1990 were all signed by Mr MacCrindle in Paris and each concluded with the words 'DATED at Paris, France' followed by the date and Mr MacCrindle's signature, witnessed by his secretary and giving an address in Paris.

Before taking up residence in France, Mr MacCrindle had been in practice in chambers in the Temple where he remained a 'door tenant' for whom the clerk to the chambers performed services from time to time. On the day on which the award was signed the respondent's solicitors were informed by the clerk by fax that the award was available to be taken up on payment of the balance of the charges due. Shortly after that the award was collected from the chambers.

On 10 December 1990 the respondent commenced three sets of proceedings in the Commercial Court, that is to say an originating summons for leave to appeal to the High Court pursuant to s 1(3)(*b*) of the Arbitration Act 1979, a further originating summons for an order directing the arbitrator to state further reasons for his award pursuant to s 1(5) of the same Act and an originating motion seeking remission of the award pursuant to s 22 of the Arbitration Act 1950. On 28 January 1991 an order was made for all three proceedings to be heard together and a hearing took place on 15 February 1991 at which counsel for the appellant raised the preliminary point that the award was a Convention award within the meaning of s 7(1) of the Arbitration Act 1975, ie one to which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 July 1958; TS 20 (1976); Cmnd 6419) applied, since it had been 'made' in Paris, with the result that the High Court could not entertain any appeal or application for remission. On 19 February 1991 Hirst J rejected the appellant's contention, holding that, since the arbitration was an English arbitration the central point of which was in London, the award was 'made' in London, although signed in Paris (see [1991] 2 Lloyd's Rep 1). Accordingly, the High Court had jurisdiction to entertain the respondent's applications.

From this decision the appellant appealed to the Court of Appeal. That court was unanimous in rejecting the contention that the award was made in a place other than that in which it was signed and held, by a majority (Lord Donaldson MR dissenting) that, since it was thus, by definition, a Convention award, the High Court would (subject to a contention as to estoppel which Hirst J had indicated that he would have decided in the respondent's favour had it been necessary for him to do so) have no jurisdiction to entertain the respondent's applications. By a majority, however (Leggatt LJ dissenting) the court held that the appellant was estopped in relation to these applications from objecting to the jurisdiction. The appeal was accordingly dismissed (see [1991] 3 All ER 124, [1991] 2 WLR 1321). The court, however, gave leave to appeal to your Lordships' House on an undertaking being given by the appellant not to object to the matter being heard by the Commercial Court pending the hearing of the appeal.

Following that decision, Hirst J on 19 March 1991 granted leave to appeal against the award on the respondent's summons for that purpose. By an order of the Court of Appeal made on 25 March 1991 it was ordered that that appeal be heard by another judge and that judgment on the appeal be in writing but be placed in a sealed envelope to be opened only in the event of this House determining that there is jurisdiction to entertain it (see *Hiscox v Outhwaite (No 2)* [1991] 3 All ER 143, [1991] 1 WLR 545). The present position, as I understand it, is that the respondent's substantive appeal has been heard de bene esse by Evans J and that publication of his judgment awaits the decision of this House.

By his written case the respondent seeks to uphold the judgment of Hirst J and to contend that, even on the footing that the award is a Convention award, the High Court has (as Lord Donaldson MR held) jurisdiction to entertain the respondent's applications. Your Lordships have accordingly heard argument on this part of the case first since, if either of the respondent's arguments is accepted, the issue of estoppel upon which the appellant appeals becomes academic.

My Lords, the Arbitration Act 1975 was passed in order to give effect to the United Kingdom's obligations under the New York Arbitration Convention of 1958. Section 2 provides that 'Sections 3 to 6 of this Act shall have effect with respect to the enforcement of Convention awards . . .' and s 3(1) provides:

> 'A Convention award shall, subject to the following provisions of this Act, be enforceable—(*a*) in England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950 . . .'

The expression 'Convention award' is defined in s 7(1) as:

> '. . . an award made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom, which is a party to the New York Convention.'

Section 3(2) is of crucial importance having regard to the arguments addressed to the House. It provides:

> 'Any Convention award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in the United Kingdom; and any reference in this Act to enforcing a Convention award shall be construed as including references to relying on such an award.'

Section 4 reproduces provisions of art IV of the convention and obliges the party seeking to enforce a Convention award to produce the award and the arbitration agreement in proper authenticated form. Section 5, which gives effect to art V of the convention, provides in sub-s (1) that enforcement of a Convention award shall not be refused except in the cases mentioned in the section. Subsection (2) goes on to enumerate a number of matters which, if proved, would authorise a refusal to enforce the award. It provides so far as material:

> 'Enforcement of a Convention award may be refused if the person against whom it is invoked proves . . . (*e*) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or (*f*) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.'

Finally, sub-s (5) provides:

> 'Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(*f*) of this section, the court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security.'

In support of their arguments for and against the proposition which found favour with Hirst J that the arbitrator's award was made in London, both counsel have made reference, as an aid to construction of the 1975 Act, to the travaux préparatoires leading up to the convention. In so far as it can properly be said that there is any ambiguity in the Act, this is, of course, perfectly permissible as indicating the difficulty with which the convention, and thus the Act, was seeking to contend. Speaking for myself, however, I have not found this reference of any assistance. It is evident that in the negotiations leading to the convention there emerged divergent views between the delegates about the appropriate criterion for determining to what awards the convention should apply and that the school of thought which favoured the simple, if arbitrary, geographical test of where the award was made ultimately won the day, but subject to a compromise addition which included also awards not considered as 'domestic' in the enforcing state. Save to the extent, however, that these discussions indicate a general realisation that the geographical test might produce anomalous results, the travaux do not really help. In particular, they go nowhere towards indicating what satisfies the geographical test and constitutes the 'making' of an award. Nor, in my view, is there any real ambiguity in the word 'made' which requires to be resolved by reference to such extraneous aids. Mr Colman QC relies heavily on the views expressed by Dr F A Mann in 'Where is an award "made"?' (1985) 1 *Arbitration International* 107 at 108 and by Steyn and Veeder in *International Handbook on Commercial Arbitration*. Both favour, in varying degrees, the conclusion that the award is 'made' at the place which is the curial seat of the arbitration. This would make very good sense if the inquiry were as to the place at which, from the point of view of legal convenience and, almost certainly, of the parties' intentions, the award ought to be deemed to be made. The difficulty that I feel, however, is that, in common with all three members of the Court of Appeal, I cannot see how this result can be achieved by any legitimate process of construction of the 1975 Act. An award, whilst it is no doubt the final culmination of a continuing process, is not in itself a continuing process. It is simply a written instrument and I can see no context for departing from what I apprehend to be the ordinary, common and natural construction of the word 'made'. A document is made when and where it is perfected. An award is perfected when it is signed, at any rate in the absence of something in the arbitration agreement or the rules under which the arbitration is conducted requiring some further formality before the award becomes effective.

The alternative submission is that an award is 'made' when the arbitrator becomes functus officio and it is urged in the instant case that Mr MacCrindle did not become functus officio until the parties were invited by the clerk of his chambers in London to take up the award. Up to that point of time, it is submitted, the arbitrator could have altered or withdrawn his award. Authority is of little assistance, but in so far as it exists it seems to me to be against the respondent's proposition. *Brooke v Mitchell* (1840) 6 M & W 473, 151 ER 498 was a case in which, under a court order which provided for an arbitration, the award of the umpire was to be 'made and published, in writing, ready to be delivered to

the parties . . .' The award was executed by the umpire in the presence of two witnesses to whom its contents were made known and was to be collected on the afternoon of the following day. One of the parties having died on the morning of that day, the question arose whether it had been 'made and published' in his lifetime. It was held that it had, Parke B remarking that 'it is only necessary that the act should be complete, so far as the arbitrator is concerned; that he should have done some act whereby he becomes functus officio and has declared his final mind' (see 6 M & W 473 at 476, 151 ER 498 at 499). Alderson B similarly observed that 'the award is made and published, when the arbitrator, by some act, has expressed his final determination on the matters referred to him' (see 6 M & W 473 at 478, 151 ER 498 at 500). The judgments in this case, which in any event depended upon the award being 'published', certainly employed the term 'functus officio' but they in no way help the respondent. Indeed they seem to me to point strongly to the conclusion contended for by the appellant that it is the signature of the award that makes it complete so far as the arbitrator is concerned (see the interlocutory observation of Parke B (6 M & W 473 at 475, 151 ER 498 at 499). I do not, for my part, consider that it can be seriously open to doubt that Mr MacCrindle had 'declared his final mind' when he signed the award in Paris. Whilst, therefore, I find it anomalous and regrettable that the fortuitous circumstance of signature in Paris should stamp what was clearly intended to be an award subject to all the procedural regulations of an English arbitration with the character of a Convention award, I find the conclusion that it did irresistible—a conclusion which underlines the wisdom of the advice in Redfern and Hunter *Law and Practice of International Commercial Arbitration* (1986) p 70 that 'it is certainly safer (if less convenient) for the arbitrators actually to meet at the place of arbitration for the purpose of checking, signing and dating their award'.

In my judgment, therefore, the Court of Appeal were right to hold that the award was a Convention award. The critical question is what is the effect of that holding. Mr Colman submits that, contrary to the conclusion reached both by McCowan and Leggatt LJJ in the Court of Appeal, this is not fatal to him but that nevertheless the English court, as both the enforcing court and the court of the seat of the arbitration, remains entitled, as it certainly would if the award had been made here, to entertain proceedings to set it aside or suspend it. The argument may be summarised as follows. It is perfectly true that s 3(1) of the 1975 Act provides that the Convention award shall be enforceable in England but it does so 'subject to the following provisions of this Act' (i e subject to ss 4 and 5). Equally it is true that s 3(2) provides that the Convention award shall be 'treated as binding for all purposes', that it may be 'relied on . . . in any legal proceedings' and that any reference in the Act to 'enforcing' the award is to be construed also as a reference to relying upon it. Thus, since 'any legal proceedings' is as wide a term as can readily be imagined and includes as much proceedings for leave to appeal against an award or for remission as any other proceedings, the mere recital of the fact that the award is a Convention award and thus binding for all purposes prima facie provides a complete bar to any such proceedings being successfully pursued. It has, however, to be borne in mind that sub-s (2) applies only to a Convention award 'which would be enforceable under this Act' and that throws one back to sub-s (1) where the enforceability is subject to ss 4 and 5; and s 5(2) contains the important provision enabling the enforcing court to refuse enforcement or reliance if it is proved that 'the award has been set aside or suspended by a competent court of the country . . . under the law of which the award was made'—which can conveniently be referred to as 'the curial country' and which is, of course, in the instant case, England, it being beyond dispute that English law is the law of arbitration.

Thus, the argument proceeds, the 1975 Act clearly contemplates that a position may arise where that which is prima facie binding and unchallengeable before the enforcing court may yet be set aside or suspended by the curial court and whilst it does not expressly deal with the improbable position which may arise where the enforcing country and the curial country are the same, there is nothing in the Act which excludes the arbitral jurisdiction of the curial court in the case where it turns out to be also the court charged with enforcing/recognising the award.

To these arguments the appellant gives three answers which to some extent overlap. First it is argued that both the convention and the Act create a dichotomy between the country of origin of the award or the curial country and the country of enforcement. As a matter of the construction of s 5(2)(*f*) 'the country ... under the law of which [the award] was made' is as much, by definition, a country other than the enforcing country as is 'the country *in* which [the award] was made'. Secondly, simply as a matter of timing sub-s (2)(*f*) cannot apply here because it applies only where the award 'has been' set aside or suspended at the time when the enforcement or reliance of the award comes into question. If this has not occurred at that point in time, there is nothing to set against the binding effect of the award prescribed by s 3(2). Thirdly—and this is to some extent another way of expressing the first point—s 5(2)(*f*) can apply by definition only if there is, in the curial country, a 'competent' authority, that is to say an authority competent to set the award aside or suspend it. But s 3(2) has already told us that the courts of the United Kingdom are not competent to do anything but enforce the award in any legal proceedings (except as provided in s 5).

As regards the first of these arguments, I entirely see the force of the contention that the Act is framed on the assumption that the enforcing country and the curial country will be different, but I cannot see why, as a pure matter of construction of the expression 'the country under the law of which [the award] was made', this should necessarily exclude the United Kingdom because it also happens to be the enforcing country.

The other two arguments would, to my mind, be much more formidable and, indeed, might well be unanswerable if the section finished at sub-s (2). But it does not. We have to take into account the provisions of sub-s (5). Now it is perfectly true that, as the appellant submits, sub-s (5) is not free-standing. It does not, of itself, provide a ground for refusing enforcement or reliance but is merely concerned with providing an ancillary power of adjournment on the enforcing court in aid of the ground of refusal contained in sub-s (2)(*f*). Nevertheless it has an important bearing on the construction of that subsection because it shows that the words 'has been' in that subsection cannot mean literally 'has been at the date when the enforcement/reliance first comes into question'. If that were the meaning, sub-s (5) could have no possible field of operation because no adjournment could serve any useful purpose in the case of an application which was merely pending. The whole purpose of that subsection is to provide a power of adjournment in the case of pending proceedings to cover the period between the making of the application and the final ascertainment of whether the event contemplated by sub-s (2)(*f*) is or is not going to occur. Thus one starts from the position that where the curial court is seized of an application the enforcing court is invested with power to suspend the enforcement of the award pending the outcome of those proceedings. Moreover sub-s (5), as it seems to me, disposes also of the question whether the curial court is a 'competent court'. On the appellant's argument no curial court in any Convention country other than the country of the award could be a competent court, except in the remotely possible case of a

country which has become party to the convention and had not fully implemented it in its domestic legislation, for in every such country the award, as a Convention award, would be absolutely binding under s 3(2) and thus incapable of being set aside or suspended. So once again sub-s (5), on this construction, would have no practical field of operation except in the case of a pending application in a non-Convention country. But it is plain that the framers of the convention and the legislature in enacting its terms contemplated in sub-s (2)(*f*) proceedings in a country other than the country of the award and I decline to believe that this important provision for preserving the arbitral control of the curial country was inserted for the sole purpose of covering the remote possibility of an award made in a Convention country pursuant to an arbitration conducted under the law of a non-Convention country.

In the course of his judgment, Lord Donaldson MR considered the question whether in fact the respondent's application for leave to appeal could be said, properly speaking, to be an application to 'set aside or suspend' the award (see [1991] 3 All ER 124 at 133, [1991] 2 WLR 1321 at 1331–1332). He observed that 'in the context of an international Convention and an Act giving effect to it, what matters is not the technical terminology used in a national court, but the nature of the relief to which application has been made' and he pointed out that in the case of the applications for leave to appeal and for remission under s 22 of the 1950 Act the applications, if successful, could lead to the setting aside of the award and that in all three cases the making of the application produces a de facto suspension of a non-Convention award. I agree and do not think that there is anything in this point. It does not, however, provide a complete answer for there is a further difficulty in the way of the respondent's argument. The only power conferred by s 5(5) is to 'adjourn the proceedings'. That, it is argued, must mean the proceedings referred to in s 3(2) in which the award is to be treated as binding and which include proceedings to set aside or suspend the award. Where, as here, the only 'proceedings' on foot are the pending proceedings for the review of the award, the adjournment of those proceedings—that is to say the very application which gives rise to the enforcing court's power of adjournment—would be self-defeating. Clearly what is intended by the subsection is an adjournment of the proceedings for the enforcement of the award and where there are no such proceedings on foot, the appellant asks forensically, what is there to adjourn?

Lord Donaldson MR after pointing out that the only difficulty lay in the fortuitous identity of the enforcing and curial court, found the answer to this by applying a purposive construction to the Act and treating the court as he expressed it, as 'two separate courts with the judges wearing two different hats . . .' (see [1991] 3 All ER 124 at 134, [1991] 2 WLR 1321 at 1332).

Without necessarily engaging in what might be regarded as a schizophrenic exercise, it does seem to me that the same result can be achieved as a matter of construction of s 5(2) and (5). Both the convention and the Act clearly contemplate that the curial court is or may be invested with and capable of exercising a supervisory power whilst leaving to the enforcing court a discretionary power (a) to permit a pending supervisory process to continue and (b) to refuse enforcement of the award if it results in the award being suspended or set aside. Subject to Mr Sumption QC's point that no court in a Convention country other than that in the award country can ever be a competent authority (which, for the reasons which I have endeavoured to explain, I cannot accept) the section presents no difficulty at all where the enforcing court and the curial court are in different countries. The only difficulty lies in the limited power conferred by s 5(5) where the same court is both the curial and the enforcing court and the only 'proceedings'

consist of the application to the curial court in which, necessarily, the award is being 'relied upon' by the other party. The plain purpose of the subsection was to enable the application to the curial court to catch up with the enforcement of the award and that purpose is achieved where there are no 'proceedings' for enforcement on foot, by the adjournment by the enforcing court of the consideration of the issue of the enforcement of or reliance on the award. Now it is true that this may be thought to give an extended meaning to the word 'proceedings' by applying it to what is, in fact, merely an issue in proceedings, but it gives a sensible meaning to the subsection and a meaning which, as it seems to me, is supported by the convention. As previously mentioned, sub-s (5) gives effect to art VI and art VI refers to 'the authority before which the award is sought to be relied upon' adjourning 'the *decision* on the enforcement of the award'.

It is argued that to apply such a purposive construction would defeat the policy of the convention and of the Act, which is to avoid the need for the enforcing court to do more than enforce or recognise the award by excluding the application of that court's own arbitral rules and procedure. Whilst clearly that is the case where the enforcing court is in a country different from that of the country of the seat of the arbitration—which would be the normal situation, since the likelihood would be that the country of the award and the country having jurisdiction over the conduct of the arbitration would be the same—I can see no clear policy reason for excluding altogether the arbitral jurisdiction of the seat of the arbitration in the improbable case of the award resulting from the arbitration being made elsewhere and thus falling to be enforced in the curial country. Clearly the framers of the convention contemplated the case of the arbitration and the resulting award occurring in different countries, and intended in art VI to provide for the possibility of the continued supervision by the courts of the curial country. Whilst it is doubtful whether they contemplated the unusual case of the curial country and the enforcing country being the same, I can see no good reason why they should have desired or sought to exclude that country's curial jurisdiction in a case where its continuance would otherwise have been appropriate. There is nothing in the convention that compulsively leads to the conclusion that the enforcing country's curial jurisdiction is to be ignored in all circumstances and indeed art I itself contemplates its implication in determining whether any given award is to be considered as a domestic or non-domestic.

In agreement with Lord Donaldson MR, therefore, I would hold that the High Court remains capable of exercising its curial jurisdiction over the arbitration and of adjourning, if it thinks fit, any decision on the enforceability of the award until the pending proceedings for review have been determined. Accordingly I would dismiss the appeal on this ground.

In the circumstances I have not found it necessary to express any view on Mr Colman's further submission that, in any event, an award in Paris was contrary to the arbitration agreement so that he was enabled to rely upon s 5(2)(*e*)—a ground not argued in the Court of Appeal but raised, by leave, before this House. It has, equally, been unnecessary to hear argument on the question of estoppel which constituted the ground upon which the majority in the Court of Appeal upheld the decision of Hirst J.

Appeal dismissed.

Mary Rose Plummer Barrister.