Balancing Act(s)

Despite recent Supreme Court consideration, the relationship between the Arbitration Act & the Senior Courts Act remains unclear, say Rian Matthews & Tom Cameron

IN BRIEF

- The Supreme Court has confirmed that, even where no arbitration is contemplated or afoot, English courts can grant anti-suit injunctions to protect an arbitration agreement (against courts outside the EU).
- The precise extent of courts' powers to grant other orders supporting arbitration remains uncertain. A tension remains between courts' broad discretion under the Senior Courts Act 1981 and their more limited powers under the Arbitration Act 1996.

The Arbitration Act 1996 (AA 1996) is the primary source of English law on arbitration. A key principle underlying the Act is the goal of increasing the autonomy of the arbitral process and limiting court intervention (s 1(c)). To support arbitration, however, AA 1996 gives the English courts significant powers to grant interim orders to preserve assets and evidence (under s 44). Yet the exercise of these powers is subject to strict limitations, so that control of the arbitral process rests with the appointed tribunal.

But there is a tension between the limitations on the courts' powers under s 44 of AA 1996 and the courts' wide and general discretion under s 37 of the Senior Courts Act 1981 (SCA 1981) to grant injunctions or appoint a receiver where it is "just and convenient to do so". In 2005, the Court of Appeal remarked that the relationship between the powers under these two acts would "at some stage require detailed consideration" (*Cetelem S.A. v Roust Holdings Limited* [2005] 1 WLR 3555, [2005] 2 All ER (Comm) 203).

On their face, the more general powers under SCA 1981 are not restricted in the same way as the powers granted under AA 1996. Can a party, therefore, overcome the limitations imposed by AA 1996 by invoking the courts' wider powers under SCA 1981? This question arose before the Supreme Court in *AES Ust-Kamenogorsk LLP v Ust-Kamenogorsk JSC* [2013] UKSC 35, [2013] All ER (D) 89 (Jun) (*AES*).

AES

A dispute arose between the owner and operator of a Kazakh hydroelectric plant. The concession to operate the plant contained an English law arbitration agreement providing for arbitration in London. The owner, disputing the validity of the arbitration agreement, obtained an order from the Kazakh courts declaring the agreement invalid. The owner later brought further Kazakh proceedings seeking information about the value of the concession assets. The operator applied to the English court for a declaration as to the arbitration agreement's validity and an anti-suit injunction to prevent the owner pursuing legal proceedings in Kazakhstan.

Anti-suit injunctions of this nature have typically been granted under s 44 of AA 1996 (although injunctions cannot be obtained to restrain proceedings in other EU member states, Switzerland, Norway and Iceland following the European Court of Justice's decision in *Allianz SpA and Others v West Tankers Inc: C-185/07*). But the operator could not rely on s 44 in this case. The courts' powers under s 44 can only be invoked where arbitral proceedings are afoot or contemplated. Here, the operator did not intend to commence arbitration.

Instead, the operator asked the High Court for a declaration and an anti-suit injunction pursuant to the court's general discretion to grant interim or final injunctions (SCA 1981, s 37(1)). The operator succeeded on this basis at first instance and, subsequently, before the Court of Appeal and the Supreme Court. All three courts agreed that the operator could rely on SCA 1981, s 37 even though relief was not available under s 44. The Supreme Court determined that AA 1996 was not, by itself, a complete arbitral code and did not purport to remove the courts' powers under SCA 1981: the courts' powers under SCA 1981 (including powers to order anti-suit injunctions) co-existed with, and complemented, those available under AA 1996.

The Supreme Court's decision in *AES* confirms that the English courts have discretion—and are willing to exercise that discretion—to grant anti-suit injunctions and uphold parties' agreements not to litigate in breach of any arbitration clause. Applying *AES*, a party seeking to enforce an arbitration agreement by way of an anti-suit injunction does not need to show, as a pre-requisite, that it intends to commence arbitral proceedings: the negative covenant not to pursue court proceedings implied by an arbitration agreement is effective and enforceable in any event.

While the Supreme Court's decision is a welcome development on its own terms, the decision also brings to the fore the tension identified by the Court of Appeal in *Cetelem*. As the House of Lords confirmed in *Lesotho Development v Impregilo SPA* [2006] 1 AC 221, [2005] 3 All ER 789 a major purpose of AA 1996 was to reduce drastically the extent of intervention by courts in the arbitral process: the Act "embodies a new balancing of the relationship between parties, advocates, arbitrators and courts which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature". The limitations imposed under s 44 of AA 1996 are, presumably, part of this careful balancing between the courts and arbitrators. If parties can invoke SCA 1981, s 37 to circumvent these

limitations, does that threaten to undermine this careful balance?

Relationship

The Supreme Court provided only limited guidance on how AA 1996 and SCA 1981 should co-exist. The Court recognised a freestanding discretion under SCA 1981 separate to any powers under AA 1996. But the Court also said that the discretion should "be exercised sensitively and…with due regard for the scheme and terms of [AA 1996] when any arbitration is on foot or proposed" (at [60]). The court stopped short of further clarification of what "sensitivity" and "due regard" actually meant.

The Court of Appeal in *AES* had, by contrast, considered this issue in some detail. Lord Justice Rix (who delivered the Court of Appeal's leading judgment) suggested that:

- AA 1996 and SCA 1981 should each influence the application of the other;
- SCA 1981 should not, in principle, be used to get round the limitations of the Arbitration Act; and
- the court's exercise of its discretion under SCA 1981 was necessarily affected by considerations deriving from AA 1996.

The Supreme Court in *AES* reached the same conclusion as the Court of Appeal and the first instance judge, ie that an anti-suit injunction should be ordered under SCA 1981, s 37. The Supreme Court did not, however, address Rix LJ's wider comments, meaning it remains unclear whether or not his comments correctly state the law where the two Acts potentially overlap or what the courts' approach should be in general. This is regrettable given the lack of clarity in this area.

Scope

On their face, s 37 and s 44 are not dissimilar in scope, and so it might be thought that, in practice, it will be rare that any differences between the two Acts will be significant. For example, the courts can make freezing orders to protect property and assets (including contractual rights) under both s 37 and s 44. It is also possible to make interim orders against third parties under both sections in certain circumstances (see, eg *BNP Paribas S.A. v OJSC Russian Machines & Otrs* [2011] EWHC 308 (Comm), [2011] All ER (D) 79 (Dec)). However, differences between the two Acts do arise in litigation and, when they do, it is currently unclear how to resolve them.

For example, in *Glidepath Holding B.V. & Otrs v John Thompson & Otrs* [2004] EWHC 2234, [2005] All ER (D) 64 (Jan) (*Glidepath*), Mr Justice Eady appears to have treated the court's powers under SCA 1981 as largely unrestricted by AA 1996, at least where no arbitral proceedings are afoot. In that case, the claimants had issued court proceedings and had obtained, under SCA 1981, s 37, together with various freezing orders, a number of disclosure orders and *Norwich Pharmacal* orders directed at obtaining evidence regarding an alleged fraud. The claimants were, however, parties to an arbitration agreement with the defendants. The claimants subsequently acceded to arbitration and the defendants then applied to set aside the disclosure and *Norwich Pharmacal* orders. Eady J accepted the court could not have made such orders under s 44 of AA 1996 had it been asked to originally, as the orders had been made to obtain, not preserve, evidence. But despite this limitation under AA 1996, Eady J found SCA 1981, s 37 gave jurisdiction to make these orders (although he set aside the disclosure order for other reasons). Eady J held that "where no arbitrator has been appointed and no arbitration proceedings have yet begun, the court must have jurisdiction to make appropriate orders in circumstances where there is evidence of fraud and an apprehension of further dissipation".

In contrast, in *Enercon GmbH & Otrs v Enercon (India) Limited* [2012] EWHC 689 (Comm), [2012] All ER (D) 47 (Apr) (*Enercon*), Mr Justice Eder appears to have treated SCA 1981 as being subject to limitations in AA 1996 to a greater extent. In the course of this case, Eder J considered the limitation, imposed by AA 1996, that the courts may only make orders in support of arbitration in cases of "urgency" (absent the tribunal's consent or both parties' agreement). Section 37 of SCA 1981 has a broader scope. To obtain an injunction under SCA 1981, a party must demonstrate either an invasion/threatened invasion of a right; or unconscionable behaviour. This threshold is arguably lower than that of "urgency" under AA 1996. Eder J considered that a party could not use SCA 1981, s 37 to "circumvent" the requirement of "urgency" in s 44 of AA 1996. While Eder J's comments were only obiter, they suggest the judge viewed the powers under SCA 1981 as being, at least to some extent, subject to limitations imposed by AA 1996.

The Supreme Court's decision in *AES* perhaps falls short of the "detailed consideration" of the relationship between the two Acts which the Court of Appeal called for in *Cetelem*. That said, the fact that the order sought in *AES* was an anti-suit injunction, rather than some other type of interim order, may have had a significant bearing on the Supreme Court's thinking.

Who has the first word on an arbitral tribunal's jurisdiction?

Section 37 of SCA 1981 allows courts to grant both "final" and "interim" orders. So, does this mean a court, when granting an anti-suit injunction under s 37, can finally determine questions of the validity of an arbitration agreement and a tribunal's jurisdiction?

English law recognises that an arbitral tribunal may rule on its own jurisdiction, including the validity of the arbitration agreement creating it (s 30 of the Arbitration Act 1996 (the 1996 Act) and the internationally recognised concept of *Kompetenz-Kompetenz*). This power derives from a presumption that the parties, by agreeing to arbitration, intended also to submit to the tribunal the preliminary question of its jurisdiction.

But should the tribunal rule first on its own jurisdiction? The tribunal's ruling will not be final, since that duty falls to the courts in which enforcement of any award is sought. Yet the laws of other arbitration centres such as France and Switzerland recognise the tribunal's right to make the first ruling on its jurisdiction (reflecting the parties' arbitration agreement).

English law is less clear. Courts recognise that it is problematic to grant declarations or final injunctions ruling on an arbitration agreement's validity: as Lord Justice Rix acknowledged in *AES*, granting a declaration "may unacceptably trespass" on the tribunal's power to determine its jurisdiction ([2012] 1 WLR 920 at 959).

Yet the Supreme Court left open the question of whether courts could grant final or declaratory relief regarding arbitral jurisdiction. Rix LJ in the Court of Appeal judgment considered this question more fully, giving a pragmatic answer. Where parties disagree about whether they have even agreed to arbitrate, he considered the English courts would have sooner or later to decide the issue of jurisdiction from first principles (ie upon enforcement). To avoid unnecessary delay and expense (the principle in s 1(a) of the 1996 Act), he found the English court was free to make a decisive ruling (959H-960C).

In relation to an agreement to arbitrate in England, is it really inevitable that this question would come before the English courts, not other national courts? That may depend, in part, on where a winning party seeks to enforce any arbitral award: the courts in any country where enforcement of an award is sought may reach their own independent views on the validity of any arbitral agreement. Further, even if the English courts will have the last word on jurisdiction, it is unclear that this means they should be free to rule first.

In any case, the Supreme Court did not explicitly endorse (or overrule) Rix LJ's reasoning. Regrettably, English law remains unclear on who has the first word.

Anti-suit injunctions

There is some debate as to whether s 44 of AA 1996 even provides a basis on which to grant anti-suit injunctions. Section 44 does not expressly address anti-suit injunctions. Instead, the court has the power to make orders for the purposes of arbitral proceedings including, under s 44(3), to make interim injunctions for the purpose of preserving "assets" in urgent situations. In *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2008] All ER (Comm) 593 (*Starlight*) (at [21]), Mr Justice Cooke found that "assets" must "include the contractual right to have disputes referred to arbitration" and that therefore the courts could grant interim anti-suit injunctions to protect this right under s 44.

The Supreme Court did not directly rule on the correctness of *Starlight*, but it strongly suggested that SCA 1981, s 37 was the appropriate statutory provision under which to seek an anti-suit injunction. Lord Mance (who delivered the Court's judgment) stated that "[w]here an injunction is sought to restrain foreign proceedings in breach of an arbitration agreement—whether on an interim or final basis and whether at a time when arbitral proceedings are or are not on foot or proposed—the source of the power to grant such injunctions is to be found not in s 44 of AA 1996, but in s 37 [of SCA 1981]" (at [48]). Furthermore, such injunctions are not "for the purpose of and in relation to arbitral proceedings" but instead "for the purposes of and in relation to the negative promise contained in an arbitration agreement not to bring foreign proceedings".

> ***"The decision has nevertheless provided clarity regarding the availability of anti-suit injunctions in support of arbitration"***

In view of these comments, it may be that the Supreme Court considered there was simply no overlap between the courts' powers to grant an anti-suit injunction under SCA 1981, s 37 and its powers under s 44 of AA 1996: the power to make anti-suit injunctions only arises under the former, not the latter. If this is correct, then the scope of the interim orders which fall within the ambit of s 44 may be narrower in comparison.

Where to from here?

Whatever the limits of the Supreme Court's decision in *AES*, it has nevertheless provided clarity regarding the availability of anti-suit injunctions in support of arbitration. The decision, as a result, enhances London's attraction as a seat for arbitration.

However, it is a shame that the Supreme Court did not take the opportunity to provide broader guidance on the relationship between SCA 1981 and AA 1996 more generally. As a result, a number of questions remain open, both in principle and in practice. As the Court of Appeal stated in *Cetelem* eight years before, "[t]he resolution of that tension must await another day". **NLJ**

Rian Matthews, senior associate & **Tom Cameron,** associate, White & Case LLP (*rmatthews@whitecase.com; tcameron@whitecase.com; www.whitecase.com*)

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