ANTI-SUIT RELIEF & FOREIGN-SEAT ARBITRATION

Overview

The recent decision in *SQD v. QYP* [2023] EWHC 2145 (Comm) brings into focus the role of the English court when asked to grant anti-suit injunctive ('ASI') relief to enforce an arbitration agreement which specifies a foreign seat.

The case concerns an arbitration agreement presumptively governed by English law which specifies Paris as the place of arbitration under the ICC Rules. Arbitration had already been commenced. On the basis of the expert evidence before the court as to the attitude of French law towards ASI relief, it was held that England was not the "*proper forum*" for granting such interim relief and (therefore) it would not, or even could not, be appropriate or convenient to do so: see paragraphs [93]-[97]. Mr Justice Bright concluded at [98]:

"*It is generally right for the courts of England and Wales to support arbitration in this jurisdiction. It is not the job of the courts of England and Wales to support arbitration in France by granting ASIs, given the fundamentally inconsistent approach in France on whether such support is appropriate or desirable. Indeed, it seems that the support of this court would be unwelcome.*"

The reasoning in the judgment is not straightforward. An expedited interlocutory appeal is imminent. Further, this decision is at odds with other first instance decisions in the Commercial Court the full details of which are yet to emerge into the public domain.

These conflicting decisions touch on the nature of the so-called curial or supervisory jurisdiction and, more specifically, the relationship of ASI relief to - or its place (if any) within or alongside - such jurisdiction. This assumes distinct jurisdictions even exist, other than as descriptive labels for the role or function or responsibility of the court which has personal jurisdiction. Although somewhat esoteric and at times semantic, this interrogation may assist a better understanding as to the availability or propriety of ASI relief in cases involving foreign-seat arbitration agreements or, indeed, foreign-seat arbitrations invoking the exclusive supervisory jurisdiction of the courts of chosen seat.

The role of international comity in a 'three forum' case such as this is different from the typical 'two forum' situation in which the vast majority of ASIs are considered. The focus here is

upon the proper role of a non-curial court by reference to the exclusive jurisdiction of the curial court in the context of substantive proceedings pending in another forum.[1]

Nature and basis of ASI relief

ASI relief can, of course, be granted where there is no arbitration agreement or arbitral process involved. Many landmark decisions of highest authority concern exclusive court jurisdiction agreements or no agreements at all concerning allocation of jurisdiction. ASI relief is general in terms of its availability, although the importance of international comity varies depending on the specific protectable interest which grounds such relief.

The sole basis for this remedial power resides in what is now section 37 of the Senior Courts Act 1981 ("1981 Act"), as confirmed by the Supreme Court in *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 1 WLR 1889 ("*AES*") in cases involving arbitration agreements. This power forms part of the mandatory *lex fori* of the civil jurisdiction in England and Wales. It encapsulates the court's inherent equitable jurisdiction to enjoin on both a negative/prohibitory basis and a positive/mandatory basis.

The test in all cases is whether it is "*just and convenient*" to order the particular injunctive relief. This test applies to ASIs as to all types of injunctions. As Lord Mance stated in *AES* at [56]:

"*Section 37 is a general power, not specifically tailored to situations where there is either an arbitration agreement or exclusive choice of court clause.*"

This echoes the statement of Lord Hobhouse in *Turner v. Grovit* [2001] UKHL 65; [2002] 1 WLR 107 at [22]-[25] to the effect that s.37 is expressed in "*simple and broad terms*" as the modern embodiment of an ancient equitable power to restrain wrongful conduct. The sole basis for such power rests upon the existence of *in personam* jurisdiction. As Lord Hobhouse reiterated at [23]:

"*When an English court makes a restraining order, it is making an order which is addressed to a party which is before it […] The order binds only that party,* in personam*, and is effective only in so far as that party is amenable to the jurisdiction of the English court…*"

[1] For convenience, the court seised of the relevant substantive dispute is referred to as the "*siesed court*", the court of seat of arbitration is referred to as the "*curial court*" and the court whose jurisdiction is engaged to grant injunctive relief is referred to as the "*supporting court*" or "*non-curial court*".

Taking a step further back, and whilst acknowledging its distinct procedural context and heritage, ASI relief is at the end of the day just equitable injunctive relief to restrain breach or compel performance of an identifiable obligation. The relief protects a right belonging to the claimant. This right is most often contractual in nature; but in non-contractual contexts it has been articulated constructively or reflectively as a negative equitable right vis. not to be subjected to unconscionable or abusive or vexatious or oppressive behaviour involving the use of a formal legal process: *Turner v. Grovit* at [24]-[28]. At an organic level, the defendant owes an obligation not to seek resolution of a dispute in an unconscionable way which may harm or prejudice the claimant.

By way of extension to this two-party model, and as an aside in the present context, a person or entity who colludes or conspires with another to facilitate the latter's breach of such legal or equitable obligation may also be enjoined. In so far as the third party's own behaviour is or must be characterised as unconscionable, that too may on strict analysis involve breach of a correlative negative equitable obligation not to harm or prejudice the claimant through unconscionable conduct involving use of a (foreign) legal process. The court may exercise *in personam* jurisdiction over such additional defendant as a necessary or proper party to the primary claim in appropriate circumstances.[2]

At all events, and however catalogued across the range of potential scenarios, an ASI protects a claimant against the prejudicial effect of another's equitable or legal wrongdoing through the latter's threatened or actual engagement of a formal legal process. More often than not this involves unlawful use of a foreign court process. It can, however, involve an arbitral process – hence the much less common instances of anti-arbitration injunctions.[3]

This fundamental position matters when looking at the role of a non-curial court in the arbitral context. On one level, ASIs are no different in nature than any other injunction. They may, however, be seen as a distinct species by reason of the nature of the impugned/enjoined behaviour which is the object of the remedy: hence the traditional calls for caution and

[2] The third party or multi-party dynamic is discussed in a separate **note** entitled "*Arbitration Agreements & Collusive Litigation*" posted on 13 March 2020.

[3] The specific statutory power to grant declaratory or injunctive relief, which may be binding upon putative arbitrators, under s.72 of the Arbitration Act 1996 ("1996 Act") is addressed below in the context of testing the distinction between curial and non-curial jurisdiction.

diffidence in the name of international comity. Courtesy, civility and respect between judges of different legal systems is a universal principle. Sensitivity to the effects of ASI relief, by causing waste of judicial or administrative resources in the first-seised court system, infuses a stricter approach to delay as a bar to ASI relief. Comity also matters where there is no contractual promise being enforced: *Turner v.* Grovit at [27]-[28]. Such factors limit the availability of ASI relief. They do not, however, alter its essential nature and purpose of protecting a claimant against the prejudicial effect of another's legal or equitable wrongdoing.

This being axiomatic, can it be said that the English court's power to grant ASI relief forms part of its curial/supervisory jurisdiction in respect of an arbitration with its seat in this jurisdiction? It is far from obvious why this should be so given that it is a general power with no intrinsic connection to arbitration.

Key distinctions: curial and non-curial functions of a court with personal jurisdiction

Whilst ASIs are habitually granted to enforce arbitration rights where England is the chosen seat of arbitration, such choice does not itself ground the availability of injunctive power. As already noted, this remedial power exists as part of the mandatory *lex fori* enshrined in s.37 of the 1981 Act. What matters is the existence of *in personam* jurisdiction in respect of the injunctive claim against the defendant. It just so happens that choice of seat supplies both jurisdiction and juridical interest on the part of the English court.

Statements which suggest otherwise should be treated with some caution. In fact, circumspection is warranted when talking of a distinct 'jurisdiction' of any kind. This word is often used as a descriptive label for a package of (mostly statutory) powers and remedies vested in a court exercising *in personam* jurisdiction. Terms such as role, function, responsibility or power are more accurate.

This semantic quicksand is illustrated in the well-known case of *Enka Insaat ve Sanayi v. OOO 'Insurance Company Chubb'* [2020] UKSC 38; [2020] 1 WLR 4117 ("*Enka*"). The Court of Appeal at [42] and [50] characterised the power to grant ASIs as "*part of*" the English court's formal curial or supervisory jurisdiction.[4] To similar but perhaps less taxonomical effect, the

[4] [2020] EWCA Civ 574; [2020] Bus LR 1668 – citing Lord Hoffmann in *West Tankers Inc. v. RAS Reiunione Adriatica di Sicurta SpA (The 'Front Comor')* [2007] UKHL 4; [2007] 1 Lloyd's Rep 391 at [21], albeit

(majority *obiter*) observations in the Supreme Court about the availability of an ASI to enforce a foreign-law-governed arbitration agreement describe the grant of such relief as a "*well recognized feature of the supervisory and supporting jurisdiction of the English courts*": see Lord Hamblen and Lord Leggatt at [174]. For his part, Lord Sales preferred a more functional approach, noting at [293] that the curial court "*has a particular responsibility to ensure that the arbitration agreement is upheld and applied in accordance with its terms*".

It is here that two important distinctions need to be marked and explored.

The first distinction is between two types of 'jurisdiction' - using that term descriptively rather than formally. On the one hand, curial supervisory jurisdiction existing exclusively in *the court of chosen seat* (for convenience, "***curial/supervisory jurisdiction***"); and, on the other hand, what may be seen as informal non-curial supportive jurisdiction that may exist in parallel and hence non-exclusively in *the same* and/or *another court or courts* (for convenience, "***non-curial/supportive jurisdiction***"). The latter may just as easily be called 'general power'.

Labels have an important role here. One unfortunate feature of recent authority, including *Enka* itself, is the tendency to compound these labels and hence elide different sources of responsibility residing in the same or different courts in any given case. For example, the majority in the Supreme Court refer to the former category as "*the supervisory and supporting jurisdiction*" (see [174]) whilst Lord Burrows refers to it as "*the curial or supervisory jurisdiction*" (see [193](vi), [261]). (Popplewell LJ attempted to establish a single and simple label for it, namely "*curial jurisdiction*" correlating with "*curial court*".) The concept of the 'supervisory jurisdiction' of a curial court is so well entrenched in the international arbitration lexicon that it is here to last: hence 'curial/supervisory jurisdiction' is a suggested label to avoid confusion. The key point is that such 'jurisdiction' is, by definition, an exclusive responsibility of the curial court. But exclusive as to what?

This leads into the second distinction, if indeed it is distinct from the first distinction. This concerns the subject and object of each type of 'jurisdiction' and hence the powers involved or conferred by or within it. The formal curial/supervisory jurisdiction concerns an arbitral process or award. It is entirely statutory and comprises what may safely be called the

describing the ASI as "*an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration*" (emphasis added).

'arbitration law' of a legal system.[5] That is the whole point of such function as conveyed by the notion of supervision – sometimes referred to as "*control*" – by the curial court. This is tacitly confirmed by the Supreme Court in *Enka* itself: see Lords Hamblen & Leggatt at [68] (third + penultimate sentences) and [174] (first sentence) using the consistent phrase "*[control] over an arbitration*"; Lord Burrows to similar effect at [193](vi) (fourth and penultimate sentences referring to "*the arbitration*"). Put bluntly, a supervisory jurisdiction requires something to supervise.[6] That means an arbitral process within the territorial jurisdiction, including any award(s) made in such place. This is what arbitral seat means.

In contrast, the non-curial/supportive jurisdiction, as a manifestation of the court's general power, relates primarily to the arbitral bargain. This power is not found in arbitration statute and may arguably not even form part of 'arbitration law' - whatever that may mean - in or of a particular legal system. Its source is the court's general power. It exists irrespective of whether any arbitral process is on foot or in prospect, as confirmed in *AES* (above) – although certain specific powers relating to (actual or contemplated) foreign-seat arbitration are conferred by statute, as addressed below by reference to s.2(3) of the 1996 Act. Such non-exclusive 'jurisdiction' is, by definition, not conferred through choice of seat.[7] It is conferred by a court's own jurisdictional rules.

This general power to enforce contractual rights and obligations has no intrinsic connection with arbitration save for the fact that arbitration agreements are a particular kind of bargain which an English court will readily enforce in furtherance of the "*strong international public policy in support of arbitration reflected in the New York Convention*" *per* Males J (as he then was) in *Nori Holding Ltd. v. PJSC 'Bank Otkritie Financial Corpn'* [2019] Bus LR 146 at [106]. This potent impetus to enforce arbitral bargains by grant of ASI relief is not the same thing as

[5] Although its exclusivity is ensured as a matter of contractual implication in English law: see *C v. D* [2007] EWCA Civ 1282; [2008] Bus LR 843. In the same way that promising to arbitrate involves promising not to litigate, a choice of arbitral seat involves a promise not to engage the courts of a non-curial jurisdiction to supervise any arbitral process or challenge/review any arbitral award.

[6] As Popplewell LJ said in *Enka* at [53]: "*… when an arbitral tribunal has been constituted or is in contemplation, this role is assigned to the court of the seat both before and after an award is made.*"

[7] Hence the specific statutory power in s.72 of the 1996 Act is not part of this general remedial jurisdiction. It is, on proper analysis, part of the exclusive curial/supervisory jurisdiction.

curial/supervisory jurisdiction, even where the two happen to coincide in a particular instance.

The court's own rules determine the existence of jurisdiction in all cases. A choice of English arbitral seat effectively guarantees jurisdiction over relevant claims against a foreign defendant via the so-called 'arbitration gateway' in CPR 62.5 without the need to demonstrate *forum conveniens* under CPR 6.37(3): see *Enka* at [179], [184]. A choice of seat is a submission to the jurisdiction of the curial court: see *West Tankers* (above) at [20]. The fact that an arbitration agreement is governed by a different system of law does not affect the capacity or propensity of an English court to uphold and enforce such bargain; cf. footnote 19 below.

It is, therefore, possible for such non-curial/supportive jurisdiction to co-exist with curial/supervisory jurisdiction either within the court of chosen seat (curial court) itself or in any other court(s) with personal jurisdiction to grant ancillary relief. Being non-exclusive and supportive of arbitral rights, as distinct from supervising an arbitral process or award, such power is pre-eminently functional. It exists where a court has *in personam* jurisdiction and can be exercised where permissible according to the general *lex fori*. So far as relevant, parties who contract for arbitration under the ICC Rules expressly contemplate such non-exclusive non-curial/supportive jurisdiction in respect of the grant of interim relief or conservatory measures in certain circumstances.[8]

In the English court, such non-curial/supportive jurisdiction may exist, for example, where there is a claim relating to an arbitration agreement governed by English law (6BPD para.3.1(6)(c)) and England is the proper place to determine such claim (CPR 6.37(3)). An ASI may be granted in such situation where it is just and convenient, as accepted by the Court of Appeal in *Enka* at [56].[9] Such power is necessarily non-exclusive. Where it happens to coincide with the (actual or future) existence of exclusive curial/supervisory jurisdiction, it nevertheless remains an expression of support as distinct from supervision.

[8] Articles 28.2 & 29.7 of the ICC Rules of Arbitration.

[9] Recording the common ground that as a matter of English law the decision of the Court of Appeal of Bermuda in *IPOC International Growth Fund Ltd. v. OAO CT-Mobile LV Finance Group* [2007] CA (Bda) 2 Civ; [2007] Bermuda LR 43 is correct in holding that a court with *in personam* jurisdiction over a defendant may grant ASI relief notwithstanding that it is not the curial court.

The fact that personal jurisdiction is established automatically in such a case via CPR 62.5(1)(c) does not alter this underlying analysis.[10] It may be that references to "*supervisory and supporting jurisdiction*" operate compositely in cases of such jurisdictional coincidence. However, the fact that choice of seat is the basis for personal jurisdiction does not mean that such feature is the basis for grant of ASI relief.

The logic of this twin distinction is recognised in *AES* albeit dealing with a case of English seat as in *West Tankers* and *Enka*. There was no arbitration on foot or in prospect in *AES*. The focus was, accordingly, on arbitration rights and obligations - more specifically the 'negative covenant' within an arbitration agreement, i.e. the promise not to litigate such dispute, as a matter of English law.

This is precisely why the power to grant an ASI to enforce the parties' bargain cannot be found in s.44 of the 1996 Act: such injunction is not granted "*for the purposes of and in relation to arbitral proceedings*" as required by s.44(1): see Lord Mance in *AES* at [43]-[48]; Bright J in *SQD* at [23], [34] (first sentence). It enforces a jurisdictional promise. Crucially, this remains the position *even if* an arbitration is on foot or becomes so. The existence of an arbitration does not alter the fundamental nature of ASI relief, i.e. to uphold and enforce a promise.

Some care needs to be taken around the concept of 'arbitration law' in this discussion. It is not a term of art or statutory definition. Furthermore, not all provisions of the 1996 Act require there to be an arbitration on foot or in prospect: section 9 is the obvious example. The mandatory stay reflects Article II(3) of the New York Convention. It is a procedural imperative which upholds and enforces an arbitration agreement. It applies irrespective of whether the seised court is the court of chosen seat or whether there is any chosen seat at all (s.2(1)(a)). It is a specific legislative manifestation of the United Kingdom's international treaty obligations as signatory of the New York Convention ("NYC") in the absence of which the English court would have an inherent power, rather than a duty, to stay proceedings brought in breach of an arbitration agreement.

[10] CPR 62.5(1)(c)(i) covers claims relating to "*an arbitration agreement*" as well as "*an arbitration (whether started or not)*" and "*an arbitral award*". The scope of this gateway does not, however, alter the proper characterisation or source of remedial power that may be exercised pursuant to such jurisdiction.

As Lord Hobhouse said in *Turner v. Grovit* at [25]:

"*An order restraining proceedings in some other forum is the obverse of an order for the stay of proceedings before the forum itself. If there are proceedings before an English court which it is unconscionable for a party to pursue, such proceedings will be stayed. The follows the same basic logic as the grant of a restraining order where the unconscionable conduct lies in the pursuit of proceedings elsewhere. The difference between the two situations does not materially alter the nature of the unconscionable conduct … but does importantly affect the grant of the remedy…*"

In the arbitral context these two remedies have been described as "*opposite and complementary sides of a coin*": see *AES* at [60]; *Nori* (above) at [105]-[106], [113].

On proper analysis, therefore, a s.9 stay or equivalent mandatory NYC-stay elsewhere forms part of the *siesed* court's own non-curial/supportive jurisdiction. It doesn't depend on seat or any abitral process – past, present or future. It is a procedural order which enforces a promise, just as ASIs do when the substantive proceedings are unlawfully brought elsewhere. It is only where it happens to coincide with being the chosen seat that this characterisation is obscured.

An ASI is, therefore, a remedy belonging within the <u>non-exclusive</u> non-curial/supportive jurisdiction, even where it is granted by the curial court which also has (or, more accurately, would have) exclusive curial/supervisory jurisdiction over any (future) arbitral process or award(s).[11] The purpose of such relief is "*to uphold and enforce the parties' contractual bargain set out in the arbitration agreement*", namely the "*promise not to litigate*": see *Enka* at [174], [177], [183]-[184]. The focus is on the arbitral bargain, whether or not governed by English law.[12]

It is inaccurate although natural to speak of ASIs as constituting a "*feature*" or "*weapon*" or "*tool*" of the English court's curial/supervisory jurisdiction. This perception obscures rather than elucidates. Put another way, "*the protection enjoyed under section 37 in respect of their negative rights under an arbitration agreement*" exists irrespective of whether contracting parties

[11] Nothing ultimately turns on whether curial/supervisory jurisdiction exists in the absence of any (intended) arbitration to be supervised. The Court of Appeal in *Enka* noted at [43] that s.12 of the 1996 Act applies before the commencement of arbitration, although the court's power to extend time for commencing arbitration is clearly supervisory as to an intended or anticipated arbitral process.

[12] In practical terms, where an arbitration agreement specifies a foreign seat and is <u>not</u> governed by English law according to the *lex fori* principles considered in *Enka*, there may be major difficulty in establishing jurisdiction over a foreign-domiciled defendant in respect of a claim for ASI relief.

"*stipulate for an arbitration with an English seat*"; cf. *AES* at [60]. Choice of seat is jurisdictional, not remedial.

Choice of seat is something of a red herring in this context. The power to grant ASI relief is not dependent upon this specific contractual feature, so long as *in personam* jurisdiction exists. A distinction can and should be drawn between supervising an arbitration, on the one hand, and supporting arbitration, on the other hand. The passage from *SQD* quoted above ("*support arbitration in France*") reveals this all-too-common elision.

ASIs in a foreign-seat context

With all this in mind, does the stipulation of foreign seat in an arbitration agreement alter the English court's approach to the exercise of its general power to grant ASI relief?

The *SQD* decision says it does; but it is not clear how.

Where no arbitration has been or is sought to be commenced, the curial court does not (yet) have exclusive supervisory jurisdiction in any practical sense: there is merely a contractual submission to that court's jurisdiction by choice of seat. There can, therefore, be no actual trespass upon such jurisdiction by a non-curial court's grant of ASI relief, subject to considerations arising from a potentially binding determination as to the validity or scope - and hence breach by one party - of the relevant arbitration agreement: see below.

Where ASI relief is available in the curial court to enforce the arbitral bargain, even if governed by English law, then it seems unlikely that an English court would exercise its non-curial/supportive jurisdiction to grant such relief, unless there was some practical necessity to obtain interim relief in the meantime: see *SQD* at [77]-[78]. It is unlikely that England would be the most appropriate forum where the curial court has such remedial power, and in any event it is unlikely to be convenient (even if otherwise just) to grant relief where it is available by equivalent remedy in the curial court with undoubted jurisdiction.

The issue only arises where such relief is not available in the curial court. This brings into focus some confusion of identity on the part of the non-curial court, as exemplified in *SQD*.

The precise interplay between s.44 and s.37 was not fully resolved in *AES* itself. Lord Mance stated at [60]:

"*The general power provided by section 37 of the 1981 Act must be exercised sensitively and, in particular, with due regard for the scheme and terms of the 1996 Act* <u>*when any arbitration is on foot or proposed*</u>." (emphasis added)

Where no arbitration is on foot or in prospect, what then?

It is difficult to see why or how the 1996 Act should exert any prescriptive or political influence over the general power in s.37 of the 1981 Act. The power to grant ASI relief is outside the 1996 Act altogether: it exists irrespective of arbitration. The fact that the powers conferred by s.44 can be used in respect of foreign seat arbitration (s.2(3)(b)) unless that choice of foreign seat "*makes it inappropriate to do so*" is, therefore, uninformative. An ASI is not granted in relation to an arbitration and does not, therefore, encroach upon the (potential) exclusive supervisory role of the curial court. The reasoning by analogy to s.2(3) in *SQD* at [37]-[76] is questionable even where a foreign-seat arbitration is on foot; even more so where it is not.

Within this questionable analogous reasoning there is a conspicuous leap of logic at [45]. Whilst the legislative rationale for what became s.2(3) of the 1996 Act may be as recorded in the supplementary DAC report as extracted in [44], paragraph 18 of that report makes it clear that the court's interim remedial powers "*should not be used where any other foreign court is already, or likely to be, seized of the matter, or* <u>*where the exercise of such powers would produce a clash with any more appropriate forum*</u>*…*" (emphasis added). Despite this, Mr Justice Bright says at [45] that remedial restraint is needed in foreign-seat contexts "*if to do so* <u>*might give rise to*</u> *a "conflict" or "clash*"…" (emphasis added).

Leaving aside what such a 'conflict' or 'clash' involves in practice - and whether one really exists in French law's attitude to (foreign) ASI relief[13] - such approach sets the bar far too low. In particular, in so far as a genuine conflict would occur between the grant of English ASI relief and the curial court or legal system (such as France), it must be right that this <u>could</u> constitute "*exceptional circumstances*" militating against the grant of such relief: *ibid.* [32], [36] (final sentence).[14] In such a situation, international comity is engaged. Atypically, given the

[13] cf. *Raphael: The Anti-Suit Injunction (2nd ed. 2019)* at 1.17 - 1.21 covering French law.

[14] The citation from *Merkin: Arbitration Law* at 8.94 in the *SQD* judgment at [32] represents a fair summary of the test for grant of ASI relief, although the traditional formulation suggests 'good reason' or 'strong reason' is enough to refuse relief as a matter of equitable remedial discretion.

'three forum' dynamic, this is not out of deference to the seised court or its legal system but the (potential) exclusive supervisory role and responsibility of the curial court.

It is axiomatic that an English court should not grant relief in the exercise of its non-curial/supportive jurisdiction which conflicts with the public policy of the (putative) curial court or legal system. This is so whether or not an arbitral process is on foot, but arguably more acute where there is one and that exclusive curial/supervisory jurisdiction has been engaged in a real sense. Such restraint accords with international judicial comity.

However, two important points need to be made in this context:

(i) First, for there to be a genuine conflict to engage or transgress comity in this way it would need to be established that the grant of English ASI relief offends or violates the public policy in the curial court or legal system. Anything short of this is insufficient to outweigh the fundamental imperatives of upholding private bargains and supporting arbitration. None of this involves glossing the language of s.37. No such gloss is permissible, whether by analogy or otherwise with any provision of the 1996 Act or other statute. As noted above, s.37 is a general power expressed in "*simple and broad terms*". A proven violation of comity means that such relief would not be "*convenient*" even if "*just*". It is a reason in principle to refuse discretionary relief.

(ii) Secondly, the comity inquiry must embrace <u>all</u> the circumstances of the case and not just focus in isolation upon the judicial or juridical attitude towards ASIs at the place of arbitral seat. The mere fact that the public policy of the curial court or legal system would be contravened by the grant of ASI relief as a matter of abstract principle is not the full horizon of the comity inquiry. The grant of such relief may further or promote an important public policy of the curial court or legal system itself. In that situation, the supporting court and curial court would share a common public policy. The former would grant a remedy where the latter could not. This is complementary, not antagonistic. It accords with international comity.

It remains to be seen what happens where both (i) and (ii) above are engaged at the same time. The latter aspect was apparently not argued in *SQD* itself. This sort of 'clash' may be theoretical, as the shared public policy as enshrined in the scheme of the NYC may mean, on

proper analysis, that there is no infringement of domestic public policy in the curial jurisdiction. There is a strong argument in favour of granting ASI relief to enforce an arbitral bargain in circumstances where the seised court itself fails or refuses to grant a mandatory stay contrary to the treaty obligations of that state.

Put another way: the court of one NYC-signatory (curial court) should understand why the court of another NYC-signatory (non-curial/supporting court) grants coercive relief to enforce an arbitral bargain, which it considers to be governed by its own system of law, in circumstances where the court of another NYC-signatory (seised court) fails or refuses to grant a mandatory stay in violation of that country's equivalent international treaty obligations. This shared value between the courts of two co-signatories of an international convention makes England a "*proper forum*" to grant such supportive relief and means that it is "*convenient*" as well as "*just*" to do so in all the circumstances.

Where geopolitical events such as international sanctions[15] lead the courts of one NYC-signatory state to disapply a litigant's right to a mandatory stay in accordance with Article II(3), and where the curial court itself has no power to enforce the arbitral bargain, there is no obvious harm or disharmony or disrespect to, still less usurpation of, the curial court by grant of such supportive relief by a non-curial court. The seised court itself can hardly complain about comity violation in such circumstances.

Further and so far as necessary, the English court has a juridical interest to protect in such circumstances.[16] Whether or not this is wholly supplied by the fact that the arbitral promise is governed by English law *as a matter of English private international law principles* is debatable: it is possible that the curial court could determine that the law governing the arbitration agreement is different, i.e. corresponding to the curial law of seat of arbitration.[17] A better view is that the English Court is concerned to uphold an arbitral promise in accordance with

[15] For example, Article 248 of the Arbitrazh (Commercial) Procedure Code introduced by legislative amendment in the Russian Federation in June 2020 which confers exclusive jurisdiction and anti-suit powers upon the arbitrazh courts notwithstanding foreign-seat arbitration agreements.

[16] So far as necessary to show, for example by analogy to s.25 of the Civil Jurisdiction and Judgments Act 1982 or applications for worldwide freezing orders in the absence of potentially executable assets within this jurisdiction; cf. *Turner v. Grovit* at [27]-[28] positing the need to protect pending proceedings in this jurisdiction where there is no contractual basis for ASI relief.

[17] As acknowledged in *SQD* at [17](ii). The fact that English law presumptively governs the arbitration agreement should, however, be a powerful factor in such cases as to *forum conveniens* under CPR 6.37(3).

the scheme of the NYC. This is the juridical interest of the English Court. It has a power, if not a duty, to uphold the "*strong international public policy in support of arbitration*" reflected in the NYC (see above). This includes discretionary grant of coercive remedies in the form of ASI relief as part of its general *lex fori* power – something which, for convenience, may be labelled its non-curial/supportive jurisdiction.

A legitimate need for caution

General warnings about the need for caution in granting ASI relief should themselves be treated cautiously nowadays, at any rate where the basis is contractual. Caution is a byword for comity so far as applicable. The role of international comity is itself a specific one in modern anti-suit jurisprudence, as noted above.

One specific note of caution is required, however. Where an English court grants ASI relief there is a risk of it prejudging, and hence finally determining as between the same parties, matters within the ultimate exclusive jurisdiction of the curial court by reference to the original jurisdictional competency (*kompetenz kompetenz*) of any arbitral tribunal – namely, the validity and scope of the arbitration agreement, the arbitrability of certain disputes or claims or remedies, and hence breach of such agreement by one party by its own prior engagement of the seised court. This concern is peculiar to the 'three forum' scenario under discussion.[18] It is not a concern any longer in the familiar 'two forum' scenario: the seised court should stay its process in accordance with Article II(3) NYC, or any other applicable procedural power; so there is no perceived harm in the English court (as court of arbitral seat) determining the parties' arbitration rights and obligations, especially when governed by English law.[19]

However, even in the atypical 'three forum' scenario this danger would not manifest where *interim* relief is granted: being satisfied as to the requisite interlocutory standard that a defendant has breached or will breach the claimant's arbitration rights does not finally or conclusively determine such substantive matters in a way that binds the defendant before a tribunal or curial court. In any event, as noted above, both the tribunal and curial court may

[18] cf. Popplewell LJ in *Enka* at [53]-[55], [64]. This is an exception to the position described by Lord Hobhouse in *Turner v. Grovit* at [26] to the effect that ASI relief concerns a defendant's conduct, not the jurisdiction of the foreign (i.e. seised) court.

[19] cf. *Enka* at [183] broaching a discretionary deferral of ASI relief to await the outcome of an imminent determination "*by the highest court in the country of the governing law in unrelated proceedings*".

conclude that the arbitration agreement is itself governed by a different system of law and hence ignore such prior findings based on English law. Arbitrability in its pure sense is determined by the public policy of the place of applicable law and/or curial law, so would be a matter for the tribunal or curial court irrespective of any suggestions or assumptions inherent in the grant of an ASI.

Where the English court is minded to grant *final* ASI relief in this scenario, a practical solution to this potential problem is for the claimant to undertake (to at least the English court) not to contend that any findings have preclusive or binding effect upon the defendant in any arbitral proceedings or future curial challenge. Such an undertaking would prevent any preclusion and hence pre-determination even where the English court grants final (mandatory) ASI relief in respect of the substantive proceedings pending before the seised court. This would ensure that strong support is given to the curial court without usurping its own (exclusive) function as ultimate arbiter of a tribunal's substantive jurisdiction.

Conclusion

Circling back to the quoted extract from *SQD* above, what is *"the job of the courts of England and Wales*" in this specific context?

Where England is not the curial court, it may nevertheless exercise its general power in support of arbitration by enjoining a party acting wrongfully in the seised court. There are no analogous statutory constraints upon the exercise of this power under s.37 of the 1981 Act. The statutory language should not be glossed or clipped. However, international comity may have an enhanced role to play in such a 'three forum' scenario depending on the attitude of the curial court or legal system to the grant of ASI relief. An English court should be astute to any proven sensibilities. Whether it is ultimately both "*just*" and "*convenient*" to grant such relief depends on all the circumstances, which can and must include the full spectrum of comity concerns both for and against non-curial remedial support. A powerful consideration in favour of such relief is the common or shared public policy of supporting international arbitration as enshrined in the NYC.

Reaching this pragmatic solution to the question posed requires some analytical introspection and semantic revisionism. The notion of a distinct 'jurisdiction' in the curial court is apt to

obscure rather than enlighten. Where an English court has such exclusive supervisory function by reason of the parties' choice of seat in this jurisdiction, the general power to grant ASI relief is at its disposal without necessarily forming a part or feature of such exclusive curial/supervisory responsibility. Properly analysed, such coercive remedy is an important tool or weapon "*in the hands of*" either a curial or non-curial court so long as it has personal jurisdiction over the relevant defendant in respect of such claim.