JUDGMENT : Mrs Justice Gloster, DBE: Commercial Court. 9th February 2007

1. These are the reasons for the ruling which I gave on 15 December 2006, whereby I refused the application of the first defendant, Ansol Limited ("Ansol"), for an interim injunction to restrain the first claimant, Intermet FZCO ("Intermet"), and the third claimant, Vneshexpertservice Consulting Company Limited ("Ves") from proceeding with or taking any further steps in the arbitration commenced by the first and third claimants before the Zurich Chamber of Commerce by way of a Notice of Arbitration dated 18 January 2006 ("the Arbitration"), pending the hearing and final determination of these proceedings in the Commercial Court. The substantive hearing of the Arbitration was due to take place in the period between 29 January 2007 and 2 February 2007.

2. The basis of Ansol's application was that it alleged that Intermet and Ves have, in effect, commenced two sets of concurrent proceedings against Ansol, one by way of arbitration, and the other by way of these court proceedings. Ansol contends that the very same contractual claims are advanced against Ansol in the Arbitration as are also being pursued in the court proceedings, that there is a significant degree of duplication and overlap between the court proceedings and the Arbitration and that, accordingly, if the Arbitration is allowed to proceed, it is inevitable that the very same factual matters and issues will have to be considered and determined in both sets of proceedings, including serious allegations of fraud and forgery. It is not disputed by the claimants that the two sets of proceedings do indeed arise out of the same factual matrix, and share the same factual background, and that there will, at least to a certain extent, be an overlap in witnesses and evidence between the two sets of proceedings. Ansol complains that the first and third claimants have conducted both sets of proceedings in this fashion so that they will get two bites at the cherry; accordingly Ansol contends that if the Arbitration is not successful, the first and third claimants will in reality seek to litigate the matter again in the Commercial Court proceedings. Apart from Ansol, neither the second claimant, Intermet LLC, nor any of the other defendants to the court proceedings, is a party to the Arbitration.

3. In the circumstances, Ansol contends that this is a case where the court should exercise its jurisdiction pursuant to CPR 25.1(1)(a), section 37(1) of the Supreme Court Act 1981, or alternatively the inherent jurisdiction to grant an injunction to restrain Intermet and Ves from proceeding with the Arbitration: see ***The "Oranie" and The "Tunisie"*** [1966] 1 Lloyd's Rep 477, 487 CA, *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 1 QB 644, 659B CA, ***University of Reading v Miller Construction Ltd*** (1995) 4 ADR LJ 56. Ansol, by Mr Brian Doctor QC and Mr Patrick Goodall of counsel, contended that it would be severely unjust and prejudicial to Ansol if the arbitration proceedings were allowed to continue against it; whereas on the other hand, no injustice, or at least no irreparable prejudice would be caused to Intermet and Ves by a stay of the Arbitration being imposed.

4. The first and third claimants oppose Ansol's application. Miss Catharine Otton-Goulder QC, on their behalf, contends the application is founded upon a mis-characterisation of the respective claimants' claims in the Arbitration and in the action and proceeds on the misconceived assumption that parties should not pursue alternative causes of action.

5. A summary of the disputes between the parties is fully set out in the respective skeleton arguments. For present purposes I summarise them as follows:

6. From 30 December 2003 to 23 December 2004, Intermet and/or Intermet LLC loaned Ansol a total of US$ 113,649,358.90. Ansol made some repayments, but then defaulted, owing (as is allegedly admitted) over US$ 50 million. In order to postpone repayment, Ansol offered to give the claimants security for the debt by transferring to the claimants, or their nominee, the sole share in a company called Gradex Limited, which allegedly owned a valuable property in Moscow. Ansol eventually transferred ownership of a UK company called Gradex Limited to the claimants' nominee, Ves, but the interest in the Moscow property was held not by the UK Gradex Limited, but by a Gibraltar company of the same name, the fourth defendant. Ansol has failed to repay the debt, and the security is said to be worthless.

7. A Mr Nazarov, the ninth defendant, was the director of Ansol and the claimants contend that he beneficially owned the share capital of Ansol, Ashton Investments Limited (the second defendant), Enothera Limited (the third defendant), Gradex Gibraltar, Prixford Limited (the fifth defendant), Gradex UK, and (through Gradex Gibraltar) the interest in the Moscow property. The claimants contend that he perpetrated a fraudulent scheme through those companies and with the assistance of the individual defendants. The substance of Ansol's defence, on the other hand, is that the situation is an unfortunate misunderstanding, in which all but the tenth defendant (a Mr Rastegaev) were misled, and that Mr Rastegaev is the true villain.

8. The claimants have a signed judgment in default against three of the defendants: the fourth (Gradex Gibraltar), the fifth (Prixford) and the tenth (Mr Rastegaev). Messrs Clyde & Co represent all the remaining defendants. The claimants contend that three of those defendants, namely the sixth, seventh and twelfth, evaded service compelling the claimants to incur the delay and expense of obtaining an order for service on them by alternative means. No sooner, however, than they had been served, than Clyde & Co came on the record for those defendants. As a result, the sixth, seventh and twelfth defendants only served their Defence to the claimants' claim on 4 December 2006, by way of an Amended Defence. That Amended Defence reflects that already served on 20 October 2006 by the remaining defendants, the essence of which is as described above.

9. The contractual agreements between the parties are complicated, and to a certain extent in dispute. There are (at least) the following written agreements between the following parties:

i) A Tolling Agreement dated 4 December 2003 between Intermet (but not Intermet LLC or Ves) and Ansol. This was expressly governed by Swiss law and contained, by clause 15, an agreement to arbitrate disputes in the following terms:

"All disputes arising out of or in connection with this Agreement, including its validity, interpretation, application, scope, enforceability, performance, breach, and termination shall be settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said rules. The Arbitration shall take place in Zurich."

ii) A Tolling Agreement dated 22 January 2004 between Intermet LLC, (but not Intermet or Ves) and Ansol, also expressly governed by Swiss law, which, likewise by clause 15 contained an agreement to arbitrate in the same terms as the previous Tolling Agreement.

iii) An Agency Agreement dated 22 January 2004 between Intermet, Intermet LLC (but not Ves) and Ansol, also expressly governed by Swiss law, which, by clause 5, contained an agreement to arbitrate disputes in the following terms:

"All the disputes arising out of or in connection with this Agreement shall be settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules. The Arbitration shall take place in Zurich."

iv) The General Agreement, dated 1 January 2005 (although not signed until 21 January 2005) between Intermet (but not Intermet LLC), Ves and Ansol. This was also expressly governed by Swiss law and, by clause 12, contained an agreement to arbitrate disputes which differed from the previous three arbitration agreements:

"All disputes arising from the present Agreement or in connection with the present Agreement or the actions covered by the Agreement shall be completely regulated by arbitration court pursuant to Swiss Chamber of Commerce Regulations of International Arbitration, as in force for the date of submission of the Arbitration Notice under these Regulations."; and

v) The Supplementary Agreement dated 12 May 2005, between Intermet (but not Intermet LLC), Ves and Ansol, which varied the General Agreement. Ansol alleges that this agreement is a forgery.

10. The two Tolling Agreements and the Agency Agreement concerned the provision to Ansol of bauxite and alumina and the payment of fees for converting bauxite and alumina into aluminium. The dispute between the claimants and the defendants does not concern those transactions, but concerns the loans which the claimants made to Ansol, and the means whereby they allege Ansol cheated them.

11. The claimants' agreement to lend Ansol money is not contained in any written agreement, although the claimants contend that its original purpose was to enable Ansol to buy bauxite and/or alumina for the purposes of Ansol's business generally. As a result, the claimants contend that the loan agreement may be characterised either as a variation of one or both of the Tolling Agreements, or one fresh, free-standing, loan agreement, or a series of free-standing loan agreements. As the schedule to the Particulars of Claim sets out, both Intermet and Intermet LLC loaned money to Ansol. Intermet loaned the money, either directly or indirectly, in accordance with the Agency Agreement, pursuant to which Intermet appointed Intermet LLC as its agent in respect of some financial matters relating to Ansol. Thus the claimants allege that Intermet LLC loaned the money as agent for Intermet, alternatively, on its own account. Accordingly, Intermet and Intermet LLC were parties to the loan agreement(s) whereby money was loaned to Ansol, which is why reference is made in the Particulars of Claim to "the Loan Agreement(s)" and also to the "LLC Loan Agreement(s)".

12. The General Agreement concerns the financial arrangements between Intermet, Ves and Ansol. It recites that as a result of the Tolling Agreement, Ansol became a debtor to Intermet, "the sum of which as of 1 January 2005 is reflected in the act of settlement dated 1 January 2005 ("Reconciliation Report"), which the claimants allege Ansol signed on 22 April 2005. It was allegedly varied by the Supplementary Agreement of 12 May 2005. The General Agreement, as allegedly varied, provided for the postponement until 27 September 2005 of the repayment of Ansol's debt in exchange for the transfer of the share in Gradex Limited, which was said to have the interest in the Moscow property. In the event that Ansol failed to repay its debt, Ves would be entitled to maintain ownership of the Gradex share.

13. The claimants contend that at the time the General Agreement was entered into, Ansol, Gradex Gibraltar, Mr Nazarov (the ninth defendant) and Mr Shushko (the eleventh defendant) knew that Gradex UK had no rights or interest in respect of the development of the Moscow site, which instead belonged to another company of the same name, i.e. Gradex Gibraltar. It is said that the claimants were deceived into believing that Gradex UK (not Gradex Gibraltar) had the rights to and interest in the Moscow site once it was developed and were induced to enter into the General Agreement on that basis. It is alleged that this deception was brought about through a scheme (the so-called "Gradex Scheme"), which was implemented by Mr Nazarov and others during the course of numerous meetings in late December 2004 and the first half of 2005.

14. Ansol and the other eight defendants represented by Clyde & Co strongly deny the allegations against them. Many of the legal and factual matters alleged by the claimants are in serious dispute. Not only are there disputes about many of the central allegations relied on by the claimants, but there are major disputes about the authenticity of various documents, with both sides making allegations of forgery.

15. The defendants represented by Clyde & Co have also commenced Part 20 proceedings against the tenth defendant (Mr Rastegaev), as well as his corporate vehicle, Prixford Limited (the fifth defendant). In brief, it is said that at the time the negotiations took place in connection with the General Agreement, Gradex UK was the company with the rights in the development, but that about six months later Mr Rastegaev, who was a partner of Mr Nazarov in the development and was responsible for its management and administration, in breach of his agreement with Mr Nazarov, procured from the Moscow City Government a change in the permission given in regard to the development so as to reflect the fact of Gradex Gibraltar being ultimately entitled to be registered as owner on the development's completion.

16. Pursuant to the arbitration clause in the General Agreement, on 18 January 2006 Intermet and Ves began arbitration proceedings against Ansol in which Ves claims damages of US$ 70 million, plus interest and costs, for breach of the contractual obligations set out in the General Agreement, as allegedly varied by the Supplementary Agreement of 12 May 2005. Alternatively, Intermet claims repayment of the outstanding debt of US$ 50,960,599.08 plus interest and costs, in accordance with the General Agreement, as allegedly varied by the Supplementary Agreement.

17. It is this arbitration which Ansol now seeks to prevent Intermet and Ves from continuing. On 27 September 2006, Ansol issued an application to the tribunal to stay the arbitration proceedings. This was refused by the tribunal on 16 October 2006. On 27 October 2006, Ansol served its Defence in the Arbitration, and witness statements were ordered to be served by 15 January 2007.

18. In the High Court action, commenced on 5 June 2006, the claimants seek the following relief:

    i) Tortious damages from eight of the defendants, on the basis of conspiracy and/or deceit and/or inducement of breach of contract;

    ii) the return by Ansol of the US$ 50 million, pursuant to the Loan Agreement(s) and/or the LLC Loan Agreement(s);

    iii) from Ansol, Mr Nazarov and Mr Shushko, compensation for breach of trust;

    iv) from the remaining nine defendants, compensation for dishonest assistance in a breach of trust; and

    v) from Ansol, rectification of the General Agreement and a decree of specific performance for the transfer of the shares in Gradex Gibraltar to Intermet LLC.

19. In the High Court action, the claimants seek no payment pursuant to, or damages for breach of, the General Agreement (whether or not varied by the Supplementary Agreement of 12 May 2005). Neither do they make a claim in contract in the action, other than the claim for repayment of the loans made pursuant to the loan agreement.

20. The principles governing the grant of an anti-suit injunction in circumstances such as the present were not in dispute between counsel. In addition to the cases referred to in paragraph 3 above, reference was also made to ***Donahue v Armco Inc & Others*** [2002] 1 All ER 749 **and *Capital Trust Investments Ltd v Radio Design TJ AB and Others*** [2002] 2 All ER 159. Those principles can be summarised as follows:

    i) the jurisdiction is to be exercised when the ends of justice require it;

    ii) where the court decides to grant an injunction, its order is directed, not against the foreign court or tribunal, but against the party proceeding or threatening to proceed in the foreign court or tribunal;

    iii) however, since such an order indirectly affects a foreign court or tribunal, the jurisdiction is one which has to be exercised with caution;

    iv) the court will only restrain a party pursuing proceedings in a foreign court if such pursuit would be vexatious or oppressive, or in breach of an exclusive jurisdiction or arbitration clause; in circumstances where there is an exclusive jurisdiction or arbitration clause, effect will be given in most circumstances to the clause, unless the applicant can show that the pursuit is vexatious or oppressive;

    v) in general, although the court's discretion is not limited to fixed categories, it will usually only consider granting the relief sought where either *"one party to an action has behaved or threatens to behave in a manner which is unconscionable"* or *"one party to an action can show that the other has either invaded, or threatens to invade, a legal or equitable right of the former, for the enforcement of which the latter is amenable to the jurisdiction of the courts"*: see Dicey, Morris & Collins, *The Conflict of Laws* 14th Edition 2006 at 12R--001 at page 461 and 12-067 to 12-078 at pages 500-509; ***Société National IND Aerospatiale v Lee Kui Jak*** [1987] AC 871; and *Airbus Industrie v Patel* [1999] 1 AC 119.

21. As Miss Otton-Goulder submitted, the above principles assume the sanctity of the arbitration agreement in that, where parties have agreed to submit their differences to arbitration, and the arbitration agreement is valid, the court will, save in exceptional circumstances, do its utmost to hold the parties to their obligations under an arbitration agreement.

22. In summary, Ansol advanced the following reasons in support of its application for an injunction restraining Intermet and Ves from continuing the Arbitration:

i) it would be just and reasonable to grant the application, whereas allowing the Arbitration to continue would be oppressive, vexatious and severely prejudicial to Ansol;

ii) it is convenient that one tribunal should determine all the issues arising out of the allegations by all the parties; that cannot be achieved in the Arbitration because none of the other defendants are party thereto, but can and should be achieved in the action;

iii) if the Arbitration were allowed to proceed, it is inevitable that the same factual matters and issues will have to be considered and determined in both sets of proceedings, with witnesses being in the unsatisfactory and inequitable position of having to give evidence twice;

iv) the commencement of the action, as well as the Arbitration, is merely a device for harassment and prejudice; even if Intermet and Ves succeed in the Arbitration, it may well be that they will proceed with the court proceedings;

v) if the two sets of proceedings are allowed to continue, unfeasible or unreasonable demands will be made on witnesses; there is a risk of inconsistent findings between the Arbitration and the action; and there will be a substantial increase in costs, with a significant duplication of work between the two sets of proceedings.

23. In my judgment, and largely for the reasons put forward by Miss Otton-Goulder on behalf of the claimants, I do not consider that the ends of justice require an injunction to be imposed restraining the Arbitration in the circumstances of this case. In my judgment, it would not be oppressive, vexatious or severely prejudicial to the defendants for the Arbitration to continue.

24. It is clear from the authorities that delay in seeking an injunction to restrain foreign proceedings is a ground for refusing relief, especially where the foreign proceedings are well-advanced; see ***Aggeliki Charis Compania Maritima SA v Pagnan SA, The Angelic Grace*** [1995] 2 Lloyd's Rep 87 at 96 per Millett LJ.

25. In my judgment, the application for the injunction is far too late. By the time the claimants issued the court proceedings on 5 June 2006, Ansol had had more than sufficient time to familiarise itself with the issues in the Arbitration. On 7 April 2006, it had lodged a substantial answer to the Notice of Arbitration challenging the tribunal's jurisdiction. It should immediately after the issue of the court proceedings have applied either to the arbitrators and then to the court, if the arbitrators had refused, for an injunction. Instead of which, Ansol proceeded with the Arbitration and went along with the fixing of the hearing date for (originally) 18 December 2006, a date which was fixed on 6 July 2006. It was only in early September 2006, when Ansol served a Statement of Defence Limited to jurisdictional issues, that they raised the issue of a stay of the Arbitration for the first time. Even then Ansol did not contend that the matter the subject of the Arbitration should properly be litigated in the High Court action. The argument then was that Intermet and Ves had waived their right to have the claims which they had brought in the Arbitration determined in Zurich; that there was a duplication of proceedings and a risk of inconsistent findings, and that accordingly, the Arbitration should be stayed pending resolution of the English action.

26. It was only after Ansol's jurisdictional challenge failed on 11 September 2006 that it applied to the tribunal on 27 September 2006 to stay the arbitration proceedings. Even when the tribunal rejected that motion on 16 October, it was not until 13 November 2006 that Ansol issued its application to this court for a stay of the arbitration proceedings. The delay is particularly lamentable in the context of the timetable for the Arbitration, as, throughout the period, the parties were preparing for the hearing which was due to begin on 18 December 2006 and was subsequently moved to the end of January 2007. I also consider that it is appropriate for me to have regard to the decision of the arbitrators in refusing the application for this stay.

27. Secondly, I do not consider that the claimants, in seeking to have the tribunal determine the issues which have been raised in the arbitration proceedings, have behaved, or have threatened to behave, in a manner which is oppressive or unconscionable. As Miss Otton-Goulder submitted, the Arbitration claimants have never sought any finding in the Arbitration that Ansol or any of the witnesses in the Arbitration, or indeed any other party to the action, was a party to any fraudulent conspiracy or made any fraudulent misrepresentations at any time. Although there are tangential references in the arbitration Statement of Claim to fraudulent schemes, I am satisfied that, on a true analysis of the claims made in the arbitration proceedings, the claims brought in the Arbitration are not dependent on findings of fraud. The contractual claims do not involve any allegations of fraudulent misrepresentation, fraudulent conspiracy, fraudulent inducement of breach of contract or forgery, and it will not be necessary for the arbitrators to make any findings to such effect. In effect, the claims made in the Arbitration are contractual claims. What is relevant is whether the General Agreement has been breached, and whether the security that was promised to be supplied has indeed been provided.

28. In the Arbitration the claimants rely on certain of the written agreements as well as documents establishing the amount of the debt. Their claims basically depend on their showing that the General Agreement is a settlement and novation or in the alternative merely a settlement, and does not require any cross-examination of Ansol's witnesses in order to establish fraud.

29. Moreover, under the terms of the order which I made on 15 December 2006, specific undertakings were given by Intermet and Ves: (a) not to pursue any claims nor to seek relief alleging, or based upon, any alleged fraud, or associated claims; (b) not to amend or seek to amend the claims made by them in the Arbitration to claim or seek relief alleging or based upon any alleged fraudulent conspiracy, deceit etc; and (c) to restrict their evidence in

the Arbitration to the issues and the matters identified in Miss Otton-Goulder's skeleton argument dated 12 December 2006 headed "Outline argument on behalf of the claimants relating to allegations of fraud in the Arbitration".

30. In those circumstances, I see no reason why Intermet and Ves should be prevented from exercising their undoubted contractual rights to pursue their contractual claims in the Arbitration against Ansol. Whilst it would be convenient that one tribunal should determine all the issues between all the parties, that cannot, in reality, be achieved. I consider it would be unjust to deprive Intermet and Ves of their right to arbitrate the issues subject to the arbitration agreement contained in the General Agreement as allegedly varied. If I were to grant any such injunction, they would be deprived of the benefits of the Arbitration, and the opportunity of an award against Ansol which could be achieved far more quickly than in the Commercial Court proceedings. It is clear that the grant of an injunction would severely prejudice Intermet and Ves as it would deprive them of the opportunity of speedy enforcement of any award that they might obtain. Moreover, Intermet and Ves have already incurred enormous costs in the Arbitration which, in reality, would be wasted if the injunction were to be granted. I refer to the fact that, at the time when I gave my ruling in December 2006, shortly before the full hearing of the Arbitration it had already been fixed for some months. Any injunction would deprive the first and third claimants of the relative ease whereby they might enforce the arbitration award, as opposed to the judgment of the English court which the evidence showed was not so easily enforceable.

31. As Miss Otton-Goulder submitted, the Commercial Court proceedings will determine the fraud issues whereas the Arbitration will determine the less complex contractual issues. Moreover, I see no risk of there being inconsistent findings, since, no doubt, insofar as there are any adverse findings against the claimants, issue estoppel will arise to prevent them from re-arguing or re-litigating such issues in the Commercial Court proceedings.

32. Accordingly, and in the light of the undertakings given by the claimants, I am satisfied that it would have been wholly inappropriate to have granted any injunction in this matter, and that the continuation of the arbitration proceedings could not in any way be characterised as oppressive or unconscionable. Accordingly, I dismissed Ansol's application.

Miss Catharine Otton-Goulder QC (instructed by Steptoe & Johnson) for the Claimants
Brian Doctor Esq, QC & Patrick Goodall Esq (instructed by Clyde & Co) for the Defendants