CA on appeal from Commercial Court (Mr Justice David Steel) before Pill LJ; Waller LJ; Sir Martin Nourse. 14th November 2002.

Lord Justice Waller :

Introduction

1. This is an appeal from a judgment of Mr Justice David Steel given on 6thFebruary 2002. He continued an injunction granted by him without notice on 11th December 2001, restraining the Appellant State (The Islamic Republic of Pakistan referred to hereafter by the initials GOP) from continuing with proceedings commenced by them on 31st October 2001 in the Court of the Senior Judge, Islamabad. He also ruled against the GOP's application to stay the English proceedings. The judge gave limited permission to appeal on *"the State Immunity Issue",* but this court on 24th April 2002 gave permission to appeal on all aspects. The essential issues which arise on the appeal relate to (1) whether under a guarantee given in favour of Sabah Shipyard (Pakistan) Ltd (Sabah), the GOP, in waiving sovereign immunity consented to this court having jurisdiction to grant the injunction which the judge granted; (2) the proper construction of the jurisdiction clause of the same guarantee (clause 1.9.1) under which: ". . . . *Each Party consents to the jurisdiction of the Courts of England for any action filed by the other Party under this Agreement to resolve any dispute between the Parties and may be enforced in England except with respect to the Protected Assets, as defined in the Implementation Agreement of the Guarantor."* and (3) whether the circumstances are such that if the court has jurisdiction to grant an injunction it should do so, in particular in the context of the GOP having obtained an injunction with the effect of restraining Sabah commencing proceedings in England, (although there is a dispute as to whether the same was actually in force when David Steel J granted the injunction).

The facts

2. Sabah is a limited company incorporated in Pakistan. It was incorporated by its Malaysian parent for the sole purpose of entering into certain agreements with the GOP and a state owned corporation, the second defendant, the Karachi Electrics Supply Corporation Limited (KESC). Those agreements related to the design, construction, operation and maintenance of a barge-mounted electric generation facility at Karachi. Various agreements were signed in 1996 including the Implementation Agreement (the IA) between Sabah and the GOP, and the Power Purchase Agreement (the PPA) between Sabah and KESC. In accordance with the terms of the IA, Article 22, GOP also entered into a guarantee dated 5th May 1996, in favour of Sabah. Clause 1 of the guarantee provided as follows:-

> "1.1 Guarantee
>
> In consideration of the Company having entered into the Power Purchase Agreement with KESC and the Fuel Supply Agreement with the Fuel Supplier, the Guarantor hereby irrevocably and unconditionally guarantees and promises to pay the Company any and every sum of money KESC and the Fuel Supplier are obligated to pay to the Company under or pursuant to the Power Purchase Agreement and the Fuel Supply Agreement that KESC or the Fuel Supplier has failed to pay when due in accordance with the terms of those agreements, which obligation of the GOP shall include monetary damages arising out of any failure by KESC or the Fuel Supplier to perform its obligations under the Power Purchase Agreement or the Fuel Supply Agreement, respectively, to the extent that any failure to perform such obligations gives rise to monetary damages."

3. Disputes arose in relation to the reasons why the project was delayed. KESC drew down on certain letters of credit provided by Sabah pursuant to the PPA on the basis that the delay was due to Sabah being in breach of contract. Sabah asserted that the delay was due to force majeure, that KESC should have granted an extension of time and thus that KESC had acted wrongfully and in breach of contract. On 7th December 1998 Sabah commenced arbitrations against the GOP under the IA, and against KESC under the PPA. The arbitration under the PPA took place in Singapore, and the arbitrator, Sir David Tompkins QC, made an award in Sabah's favour in the sum of US$6.84m together with interest and costs.

4. Sabah demanded payment from KESC by letter dated 27th June 2001. KESC responded by fax of 7th July 2001 denying liability. By letter dated 7th September 2001, Sabah made a demand under the guarantee on the GOP. The GOP responded by letter dated 11th September 2001 asserting (1) that the GOP was not bound by the findings in the arbitration as between KESC and Sabah; (2) that Sabah had in any event not established the liability of KESC, who were challenging the award [KESC have challenged the award in the Sindh High Court in Karachi]; (3) that because the IA had terminated, the PPA had ceased to exist, and (a) the demand was premature because the legality of the basis on which the PPA had been terminated was still subject to arbitration, and (b) was not maintainable for failure of consideration; (4) no demand could be made until the award was made a rule of court; (5) the demand had not been made in accordance with the guarantee.

5. On 31st October 2001 the GOP issued proceedings in the Court of the Senior Civil Judge, Islamabad, describing the proceedings as "*Suit for a declaration & permanent injunction*". The pleading asserted the points set out in the letter of 11th September but also asserted that the award had been obtained by fraud, and claimed a declaration to that effect in addition to declarations that the demand was based on an award not binding on the GOP, that the guarantee was invalid due to failure of consideration, and that Sabah should be *"permanently restrained by injunction from making any demand under the guarantee."*

6. Also on 31st October 2001, the GOP applied ex parte for an injunction pending trial of the action restraining Sabah from making any demand whatsoever under the guarantee. It is common ground that the form of words had the effect, and was intended to have the effect, of preventing Sabah commencing proceedings in England

despite clause 1.9 1 of the guarantee. On the documents that this court has, there is no indication that clause 1.9.1 was drawn to the attention of the Islamabad court. The application simply asserted the strength of the GOP's case. The guarantee was appended as a document, but it seems most unlikely that clause 1.9.1 was drawn to the attention of the court in any detail because there is no mention of the clause in the record of argument and decision (pages 197/8), and whether or not that clause is exclusive, it seems to provide a complete answer to any assertion that Sabah should be subjected to an injunction which has the effect of preventing them commencing proceedings in England.

7. Mr Gruder QC, who appeared for the GOP before David Steel J, told the judge on instructions that the judge in Islamabad "*was specifically told about these matters*" (see judgment page 24 line 29). It is difficult to accept that the judge in Islamabad fully appreciated the effect of clause 1.9.1, because if he had, I cannot think he would have granted an interim injunction ex parte in the terms he did i.e. *"until the next date of hearing defendant is hereby restrained to demand/recover any amount from the plaintiff on the basis of guarantee*."

8. The history of the proceedings thereafter was that on 5th November representatives of the GOP appeared again before the judge. The documents for one reason or another had not been served on Sabah, and an order was made for re-service "*for 15th November*". On 15th November counsel for both sides appeared and counsel for Sabah asked for time to file a written statement and counter affidavit, and the case was adjourned until 13th December 2001. There is a dispute as to whether the injunction granted ex parte continued after that date. Those acting for the GOP say that their representative checked with the judge that the injunction continued and assert that the judge said "*that continues*." They assert further that as a matter of Pakistan law the injunction would continue automatically. Those representing Sabah say that the injunction does not continue automatically and that, although Mr Naqvee representing the GOP made an oral request for the injunction to continue, since the judge did not respond to that request they believed the injunction was not continuing.

9. David Steel J did not feel it necessary to resolve either the issue as to whether under Pakistan law the injunction automatically continued, or as to what precisely transpired before the judge in Islamabad on 15th November. He accepted that Mr Talibuddin "*was firmly of the view that the order needed to be renewed at the hearing of 5th November, and that it had not been by reference to the express terms of the order*". He also accepted that he "did not appreciate that Mr Naqvee thought otherwise, given his request for a extension on 15th November". He accepted he was unaware of any different view "because it was not expressed or because it was not heard."

10. In any event Sabah made their application to the English court on 11th December 2001. They set out in the supporting affidavit what they suggested had happened in the courts in Pakistan asserting that the GOP had obtained an ex parte injunction "*until the next hearing date*"; that that injunction had expired on 15th November 2001, and had not been renewed. They applied without notice because of a fear that if they gave notice to the GOP, the GOP would attempt to obtain a further injunction. An injunction was granted by David Steel J, and directions given for a return date when the matter could be argued with the GOP represented.

11. The court in Islamabad was due to hear the application inter partes in the proceedings in that court on 13th December 2001, but on being informed of the injunction granted by the English court, postponed that hearing until after the date of the on notice hearing in England. I note in passing, as did the judge, that the record of what occurred on 13th December in the Islamabad court does not read as if the view was being taken that the proceedings and application for an injunction in England were in contumacious breach of an injunction issued in the Pakistan courts.

12. On the on notice hearing in England, David Steel J held that the GOP had by the guarantee waived sovereign immunity including consenting to the granting of an injunction; and that this was a case where an injunction restraining proceedings should be granted. It was not argued before him that clause 1.9.1 was an exclusive jurisdiction clause in the sense that the GOP had been in breach of contract in commencing proceedings in Pakistan, but it was suggested that clause 1.9.1 was more than a bare agreement to accord jurisdiction to England on a non-exclusive basis *"because it not only affords machinery for service of process in England, see 1.9.2, but also contains a waiver of any objection to English jurisdiction on forum non-conveniens grounds, 1.9.3"* (see judgment page 19). The view of David Steel J was thus that *"whilst the burden would be on [Sabah] to establish that the proceedings commenced in Pakistan are vexatious or oppressive, ... it is a burden lightened by the fact that the parties have identified a neutral forum in which they are content that their dispute should be determined, that forum being the same as the governing law of the contract and a forum which is deemed convenient and appropriate."*

13. David Steel J held that the proceedings in Pakistan were vexatious and oppressive. He examined the reasons why the proceedings had been commenced in Pakistan at all, and his conclusion ultimately he put in the following terms: *"The claimants, I conclude, have fully made good their case that the proceedings in Pakistan are oppressive and vexatious. The defendants have no legitimate interest in invoking Pakistan jurisdiction. It is, as I see it, a transparent device to seek to avoid liability under the guarantee by reference to defences which have little merit and that, in any event, are governed by English law. Furthermore they are being advanced in an inconvenient jurisdiction, and certainly not a neutral one, all in the context of an agreement in clause 1.9.3 not to object to English jurisdiction on the grounds of inconvenience."*

14. In reaching the above conclusion he found that the reason given for invoking the jurisdiction of the Pakistan court, i.e. that it was a convenient forum, was not a legitimate reason having regard to the terms of the guarantee. He in any event found that it was *"impossible to discern any genuine aspects of convenience justifying the invocation of*

Pakistani jurisdiction, even if it was open to the [GOP] to pray in aid aspects of convenience," reaching this conclusion by reference to his view (1) that the issues raised by the GOP were issues of law and construction which were unlikely to need witnesses; (2) that the issues of construction were at first blush only just arguable; (3) that the allegation that the award had been obtained by fraud had effectively been withdrawn and replaced by a complaint of procedural unfairness; (4) that the complaint was in any event difficult to argue, but even if there was merit in it, it would be for a Singapore court to adjudicate upon, Singapore having jurisdiction over the arbitration; (5) that the GOP's assertion that the claimants could not rely on the award, but would need to establish the case they had established in the arbitration with KESC was misconceived. He distinguished ***ex parte Kitchin*** (1881) 17 Ch. Div.668 on the basis that there was no special agreement in that case whereas there was in the instant case.

15. David Steel J, as I have said, did not feel it necessary to decide whether the injunction was actually in force in Pakistan, and indeed he added *"that even if Mr Talibuddin should have appreciated it was arguable that the injunction remained in force, it would have been of limited significance to the application to this court. First, because the need to go ex parte would have been fully justified given the argument that no injunction was in force but that it could be readily reinstated. Second, the whole thrust of the application was that the invocation of Pakistan jurisdiction to obtain an injunction was vexatious and oppressive, and thus the arguable existence of the outcome of such an oppressive and vexatious proceedings would have been of limited materiality to the exercise of discretion"*(see judgment page 42).

16. As already indicated David Steel J gave only limited permission to appeal confined to the state immunity point, but this court granted full permission to appeal on 24 April 2002, Clarke LJ delivering the judgment with which Pill and Chadwick LJJ agreed. One basis for granting permission was the relevance of the existence of the injunction in Pakistan to the exercise of the court's discretion here.

17. Further material has been placed before us in relation to the proceedings in Pakistan. That court has suo motu ordered the lawyers for Sabah and Sabah to show cause as to why they should not be committed for contempt. It is however still contended by Sabah and those representing Sabah that the injunction was not in place when proceedings were commenced in England. The matter has not been finally resolved. Neither side at the hearing before us was anxious for this court to become embroiled in that issue, and unless it was necessary for the decision on the appeal it must be right to leave that question to the courts in Pakistan. For reasons which will become clear, I can say now that in my view it is not necessary for the decision on this appeal to resolve that question. It is right to emphasise that I did not understand Mr Young QC to press any argument that those representing Sabah appreciated that there was an injunction in place in Pakistan when they commenced proceedings in England. No attempt was made to argue that the finding of the judge, that there was genuine belief as to the position (as set out in the affidavits supporting the application for relief in this country) was wrong.

Sovereign Immunity

18. Clause 2.6 of the guarantee provides as follows:

"2.6 <u>Sovereign Immunity</u>

The Guarantor hereby irrevocably and unconditionally agrees that the execution, delivery, and performance by it of this Guarantee constitute private and commercial acts.

The Guarantor hereby irrevocably and unconditionally agrees that: (i) should any proceedings be brought against the Guarantor or its assets, other than its military aircraft, naval vessels and other defense related assets or assets protected by the diplomatic and consular privileges under the 1978 Immunity Act of the United Kingdom or the 1976 Sovereign Immunities Act of the United States or any analogous legislation (the "Protected Assets") in any jurisdiction in connection with this Guarantee or any of the transactions contemplated by this Guarantee, no claim of immunity from such proceedings will be claimed by or on behalf of the Guarantor on behalf of itself or any of its assets (other than the Protected Assets); (ii) it waives any right of immunity which it or any of its assets (other than the Protected Assets) now has or may in the future have in any jurisdiction in connection with any such proceedings; and (iii) consents generally in respect of the enforcement of any judgment against it in any such proceedings in any jurisdiction to the giving of any relief or the issue of any process in connection with such proceedings (including without limitation, the making, enforcement or execution against or in respect of any of its assets whatsoever (other than the Protected Assets) regardless of its use or intended use). "

19. The relevant Sections of the State Immunity Act provide as follows:-

"<u>Section 13 of the State Immunity Act 1978</u>

13. The GOP is a State. The relevant provisions of the State Immunity Act 1978 provide:

". . . Immunity from jurisdiction

1. *(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act. . . . .*

Exceptions from immunity

2. *(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.*

(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission . . .

> ***3.*** *(1) A State is not immune as respects proceedings relating to - - (a) a commercial transaction entered into by the State . . . . .*
>
> ***13.****(1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.*
>
> *(2) Subject to subsections (3) and (4) below - -*
>
> *(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and*
>
> *(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.*
>
> *Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection. . . . . .*
>
> ***14.****(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom, and references to a State include references to - -*
>
> *(a) the sovereign or other head of that State in his public capacity;*
>
> *(b) the government of that State; and*
>
> *(c) any department of that government."*

20. The argument of Mr Saloman QC in summary was (1) clause 2.6 as a whole appeared to be intended to be a comprehensive waiver placing the GOP in the same position as any private individual **save** in relation to *"protected assets";* (2) support for that view was supplied by the fact that it would be odd for a State to waive immunity from suit in a particular jurisdiction, but preserve for itself the right in effect to resist enforcement of that very right; (3) clause 2.6 was constructed so as to deal first with commencement of proceedings by 2.6(i); second, with the proceedings themselves by 2.6(ii); and third, with the enforcement of any judgment by 2.6(iii). The language of 2.6(ii) was very wide and by waiving "*any right of immunity*" "*in connection with any proceedings,*" the GOP was consenting to the granting of any relief against it (save in relation to its protected assets) in connection with the proceedings e.g. an interim injunction for mareva relief or for an anti suit injunction. In the alternative (4) if (as the GOP argued) because the word "*consents*" appeared in clause 2.6(iii), and not in 2.6(ii), it was only to 2.6(iii) to which the court could look so far as "*procedural privileges*" were concerned, that clause should be construed so as to amount to a consent to relief including injunctive relief even prior to final judgment.

21. The argument of Mr Young for the GOP was that the language of 2.6 followed the language of section 13 of the State Immunity Act. That clause accordingly, he submitted, used the word waive when it was concerned with waiver of Sovereign Immunity, and *"consent*" when it was concerned with privileges retained by a State. It was only in clause 2.6(iii) that the word "*consent*" appeared. Thus it was, he suggested, from clause 2.6(iii) and that clause alone that any consent to the granting of an anti suit injunction had to be spelt out. But he submitted that clause 2.6(iii) was governed by the words at the commencement of the clause "*enforcement of any judgment*". So until final judgment, he submitted, there was no room for spelling out any consent to relief by way of injunction. Thus his submission was that there was no consent to the granting of any injunction during the currency of any proceedings. He accepted that once judgment had been granted the word "*relief*" included injunction, i.e. a mareva injunction to aid enforcement of a judgment.

22. Mr Young's submission has certain rather odd consequences. It would seem that whereas he would accept that the court could grant a mareva injunction to aid enforcement of a final judgment, it could not grant a mareva during the currency of the proceedings. It would also seem that although he would accept that a final injunction might be granted to aid enforcement of a final judgment, an interim injunction to hold the status quo pending decision could not be granted. It further has the consequence that, as Mr Saloman submitted, although the GOP has waived immunity in relation to suit brought in England, and however vexatiously the GOP may behave in commencing proceedings elsewhere, the GOP cannot be compelled to comply with its obligation.

23. My starting point accordingly is that it would be very strange if clause 2.6 as a whole were not to be construed so as to include a consent by the GOP to have an interim injunction granted against it. Mr Young's submissions do not involve looking at clause 2.6 as a whole at all. He concentrates on clause 2.6(iii) suggesting that because of the use of the word "*consents*", that must be the only provision which relates to consent (the word used in section 13(3)), but then seeks to confine the clause to matters after final judgment, because of the words "*generally in respect of the enforcement of any judgment*" at the beginning of the clause. However, such a construction makes no commercial sense, and assumes that a draftsman had the State Immunity Act in front of him and was seeking to achieve a very odd result - consent to relief including an injunction to assist the enforcement of final judgment, but no consent to maintaining the status quo pending judgment.

24. Mr Young's submission also gives very little meaning to clause 2.6(ii).

25. The judge preferred the primary submission of Sabah which relied on clause 2.6(ii) as providing the relevant consent. I think the judge was right in the construction he chose. Furthermore, it seems to me that support for the approach adopted is obtained from the decision quoted by the judge, of Saville J (as he then was) in ***A Company v Republic of X*** [1990] 2 Lloyds Rep 521. The clauses under consideration were different, but Saville J rejected

an argument that in some way a restrictive operation should be adopted to clauses dealing with waiver of immunity since one of the parties is a State; where the case concerns an ordinary commercial transaction, there is no good reason why the clause in question should not be construed in accordance with the ordinary principles of construction for commercial contracts *"giving the words used, if capable of bearing them, a construction which accords with commercial common sense."*

26. He furthermore suggested that the argument run in that case as in this that drew a distinction between immunities and privileges was a *"highly legalistic argument that cannot be accepted."* He pointed out that privileges can be described as immunities and indeed had been not only by Mr Wood in his work entitled ***"The Law and Practice of International Finance",*** but indeed by Lord Diplock in the House of Lords in ***Alcom v The Republic of Columbia*** [1984] 1 AC 580 at 600G.

27. I would thus uphold the judge on the State Immunity aspect for the reasons he gave in reliance on clause 2.6(ii).

Exclusive or non-exclusive

28. I shall set out Clause 1.9 in its entirety.

"1.9 Submission to Jurisdiction; Service of Process

1.9.1 Submission to Jurisdiction

Each party hereby consents to the jurisdiction of the Courts of England for any action filed by the other Party under this Agreement to resolve any dispute between the Parties and maybe [sic] enforced in England except with respect to the Protected Assets, as defined in the Implementation Agreement of the Guarantor.

1.9.2 Appointment of Agent for Service of Process

With respect to any proceedings referred to in Section 1.9.1;

(a) The Guarantor appoints, the Commercial Officer, or in his absence, another diplomatic agent of its Diplomatic Mission at such Contracting Party, and, in all cases, the Commercial Counsellor of the Islamic Republic of Pakistan in London (or, in his absence, a responsible officer in the High Commission), whose address is presently 35/36 Lowndes Square, London SW1 9JN, England, to receive for and on its behalf service of process in any such proceeding;

(b) The Company appoints Clyde & Co., whose address is presently 21 Eastcheap, London EC3M 1JP, England, to receive for and on its behalf service of process in such jurisdiction in any such enforcement proceeding;

(c) Each Party shall maintain in London a duly appointed agent for the receipt of service of process and shall notify the other Party of the name and address of such agent and any change in such agent and/or the address of such agent;

(d) Each Party agrees that the failure by any such agent for the receipt of service of process to give it notice of any process that has been served on such agent shall not impair the validity of such service or of any judgment based thereon.

1.9.3 Waiver of Defence of Inconvenient Forum

Each Party waives any objection that it may now or hereafter have to the venue of any action or proceeding brought as consented to in this Section 1.9, and specifically waives any objection that any such action or proceeding was brought in any inconvenient forum and agrees not to plead or claim the same. Each Party agrees that service of process in any such action or proceeding may be effected in the manner set forth in this Section 1.9 or in any other manner permitted by applicable law."

29. Clause 2.6 set out above is also relevant in that it appears to contemplate the bringing of proceedings in *"any jurisdiction"* at least as against the GOP.

30. The first question is whether clause 1.9.1 is an exclusive jurisdiction clause so as to make it a breach of contract for either party to bring proceedings in any other court but that of England. Mr Saloman, it would seem, did not press the argument before the judge that the clause was exclusive in that sense. He sought before us however to suggest that it was exclusive in that sense and relied on ***Austrian Lloyd Steamship Company v Gresham Life Assurance Society Ltd*** [1903] 1 KB 249. That case was concerned with a clause in the following terms: *"For all disputes which may arise out of the contract of insurance, all the parties interested expressly agree to submit to the jurisdiction of the Courts of Budapest having jurisdiction in such matters."*

31. Romer LJ in his judgment in the Court of Appeal said: *"This is a simple point; and, though I can understand that different persons might take different views of it, I must say that to my mind the meaning of condition 24 is that contended for by the defendants. The question is this: Does the condition merely mean that, if one of the parties to the contract is sued by the other in the Court of Budapest, he will not take any objection to its jurisdiction; or, does it mean that the parties mutually agree that, if any dispute arises under the contract, it shall be determined by the Court in Budapest? Having regard to the nature of the contract and its language, I am of opinion that the latter construction is the correct one. It is not as if the insurance company only had agreed that they would submit to the jurisdiction of the Court at Budapest: both parties mutually agree to submit to that jurisdiction in respect of any dispute which may arise under the contract. If there had been an agreement by the parties in similar terms to submit to the decision of a particular individual, I think there could have been no doubt that it would have amounted to an agreement to submit any dispute under the contract to the arbitration of that person. In this case, instead of nominating a particular individual as arbitrator, the parties agree to submit any dispute arising under the contract to the Courts at Budapest. I think the appeal should be allowed."*

32. We were also referred in this context by both counsel to ***BAe v Dee Howard*** [1993] 1 Lloyd's Law Reports 368; and ***Continental Bank v Aeakos*** [1994] 1 W.L.R.588.

33. In ***BAe*** I cited a passage from the transcript of a judgment of Hobhouse J (as he then was) in ***Cannon Screen Entertainment Ltd v Handmade Films (Distributors) Ltd*** (July 11 1989 QBD unreported). The clause with which he was dealing was in the following terms: *"This agreement shall be construed and interpreted pursuant to laws of England and the parties hereby consent and submit to the jurisdiction of the Courts of England in connection with any dispute arising hereunder. The parties further agree that process in any such action may be served upon either of them by registered or certified mail at the address of first above given or such other address as the party being served may from time to time have specified to the other party by previous written notice."*

34. His view was that that clause was not exclusive and his reasons involved consideration of the *Austrian Lloyd* case, and were in the following terms: *"In my judgment the wording of these clauses is clear. The clause in the model and conforming agreements starts by specifically referring to the fact that the agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. It therefore expressly contemplates the relevance of other entities than those actually named in the agreement. It then uses words which are words of submission not reference: **"The parties hereby submit to the jurisdiction."** In the output agreement the equivalent phrase is **"the parties hereby consent and submit to the jurisdiction."** "The addition of the word **"consent"** reinforces the same conclusion. The phrase in the **Austrian Lloyd** case was **"agree to submit"** but in that case it was construed in a transitive sense as an agreement to submit disputes to a particular court in the same way as one can agree to submit disputes to the decision of the arbitrator. The clauses which I have to construe do not lend themselves to a transitive construction; the sense is that the parties submit themselves to the jurisdiction of the court not that the parties submit disputes. In the Austrian Lloyd case it was open to the court to construe the words as if they read **"agree to submit all such disputes."** I do not consider that it would be appropriate to make such an inferential insertion in these clauses. Words are an accurate tool and relatively small differences in wording will produce different contractual effects. In these clauses the parties have used neither the word exclusive nor a sentence construction which is transitive. They have used words which are apt to demonstrate an intention to agree to submit to the jurisdiction of the English Courts and not there should be a contractual obligation not to have any recourse to any other court. This is the natural meaning of the words used. It is consistent with the surrounding circumstances and the general matrix of the contracts and in accord with the general context in which these clauses appear in the contracts."*

35. In my view clause 1.9.1 does not lend itself to a transitive construction, and when taken with clause 2.6, it seems to me that it is not an exclusive clause in the sense of making it a breach of contract for either party to commence proceedings in a jurisdiction other than England.

36. However, it is not without interest that in the *Cannon Screen* case Hobhouse J did in fact grant an injunction to restrain the proceedings in California. In ***BAe*** I quoted Hobhouse J as saying: *"There is on any view an agreement between Cannon UK and the Defendants to submit to the jurisdiction of the English courts. Therefore it cannot be said that as regards the matters to which that cause relates it is an arrogation of jurisdiction by the English courts to decide where those matters should be tried. Those parties have agreed to submit to English jurisdiction; **they cannot object to its accepting that jurisdiction**. (My underlining)."*

37. In the instant case, on any view, the GOP agreed to submit to the jurisdiction of the English court. Furthermore, it appointed agents for the purpose of service in England, and it agreed to waive any objection that any action brought in England was being brought in an inconvenient forum. It seems to me that it cannot have been the intention of the parties that if proceedings were commenced in England, parallel proceedings could be pursued elsewhere unless there was some exceptional reason for doing so. It certainly cannot have been contemplated that convenience could count as a reason for pursuing proceedings in a country other than England. In particular, where England has been chosen as a neutral jurisdiction by an entity, Sabah a Pakistan company with Malaysian shareholders, and the State of Pakistan, it cannot have been contemplated that parallel proceedings would be pursued in the courts of Pakistan simply on the basis that that forum is a convenient forum.

38. It was thus in my view clearly a breach of contract to seek to prevent Sabah commencing proceedings in the agreed jurisdiction. Furthermore, if Sabah had already commenced proceedings in England before commencement of the proceedings in Pakistan, it would in the context of this particular clause clearly have been vexatious for those proceedings in Pakistan to have been commenced if the only basis for bringing the same was on the ground of forum conveniens. It also seems to me that if proceedings were commenced in Pakistan simply to attempt to frustrate the jurisdiction clause, such conduct would be contrary to the spirit of the jurisdiction clause and vexatious.

Is this a case for an injunction?

39. The proper approach of the English court has been considered recently in two cases in the House of Lords, *Donohue v Armco Inc and others* [2002] 1 Lloyd's Rep 425, and ***Turner v Grovit and others*** [2002] 1 WLR 107, and, following those decisions, in the Court of Appeal in ***Glencore International AG v Exeter Shipping and others*** 18th April 2002. In ***Turner v Grovit*** Lord Hobhouse said this at 118:

> *"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. This 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 being relied upon by the applicant but*

does importantly affect the grant of the remedy. As Lord Goff put it in Airbus ***Industrie GIE v Patel*** *[1999] 1 AC 119, 133,* ***"[the power to stay] depends on its voluntary adoption by the state in question and [the power to make a restraining order] is inhibited by respect for comity".*** *Under English law, a person has no right not to be sued in a particular forum, domestic or foreign, unless there is some specific factor which gives him that right. A contractual arbitration or exclusive jurisdiction clause will provide such a ground for seeking to invoke the right to enforce the clause. The applicant does not have to show that the contractual forum is more appropriate than any other: the parties' contractual agreement does that for him. Similarly, where as in the present case there has been clearly unconscionable conduct on the part of the party sought to be restrained, this conduct is a sufficiently strong element to support the affected party's application for an order to restrain such conduct. This, as well, is not based upon the complaint that the action has been brought in an inappropriate forum – the doctrine of forum non conveniens. But, where the conduct relates to the prosecution of proceedings abroad, the question whether or not the foreign forum was an appropriate forum in which to sue is bound to have an evidential importance in the evaluation of the conduct complained of and to affect importantly the decision whether or not to grant the remedy of a restraining order. By contrast, there are cases where the only unconscionable conduct alleged is the fact that the party sought to be restrained has commenced proceedings in an inappropriate forum. This is a weak complaint and is easily overridden by other factors or considerations: see for example* ***Castanho v Brown & Root (UK) Ltd*** *[1981] AC 557,* ***Spiliada Maritime Corpn v Cansulex Ltd*** *[1987] AC 460 and* ***Société Nationale Industrielle Aérospatiale v Lee Kui Jak*** *[1987] AC 871. Most of the criticism of the use of* ***"anti-suit"*** *injunctions (i.e. restraining orders) relates to their use in this field. These criticisms are recognised and for reasons of comity an English court will be reluctant to take uponm itself the decision whether the foreign forum is an appropriate one (****Airbus Industrie GIE v Patel*** *[1999] AC 119) and it will not do so where the foreign country is a Brussels Convention country (p 132).*

26. The making of a restraining order does not depend upon denying, or pre-empting, the jurisdiction of the foreign court. One of the errors made by the deputy judge in the present case was to treat the case as if it were about the jurisdiction of the Madrid court. Jurisdiction is a different concept. For the foreign court, its jurisdiction and whether to exercise that jurisdiction falls to be decided by the foreign court itself in accordance with its own laws (including Conventions to which the foreign country may be a party). The jurisdiction which the foreign court chooses to assume may thus include an extraterritorial (or exorbitant) jurisdiction which is not internationally recognised. International recognition of the jurisdiction assumed by the foreign court only becomes critical at the stage of the enforcement of the judgments and decisions of the foreign court by the courts of another country. Restraining orders come into then picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction. English law makes these distinctions. Indeed, the typical situation in which a restraining order is made is one where the foreign court has or is willing to assume jurisdiction; if this were not so, no restraining order would be necessary and none should be granted."

40. In the above passage Lord Hobhouse, in analysing the way in which someone may establish a right not to be sued in foreign proceedings, draws a distinction between the situation where there is an exclusive jurisdiction clause (which without more provides the right) and the situation in which the person has to rely on unconscionable conduct. He does not, because it was not relevant, explore the situation in which although a clause is not exclusive it provides the background against which the conduct of a party may be examined. The terms of such clauses will vary. In this instance the clause expressly deals with the forum conveniens aspect and provides for methods of service so as to enable England to be the most likely forum for resolution of disputes. England is the agreed jurisdiction to which neither party can object, and furthermore it cannot be said "that as regards the matters to which that clause relates it is an arrogation of jurisdiction by the English courts to decide where those matters should be tried."

41. Mr Young stressed various factors. First he stressed that the existence of a non-exclusive jurisdiction clause was not sufficient as a ground for granting an injunction. It was necessary for there to be oppression or vexation. I would accept that point but the terms of the non-exclusive clause will be relevant, and may, as the judge put it, lighten the burden in establishing oppressive conduct. Second he stressed the fact that although injunctions are in personam foreign courts do consider such injunctions as an interference with proceedings in that country. Again he is right, and it is for that reason that an English court is cautious before granting such an injunction. Third he stressed that it was possible that there was an injunction in place granted by the Pakistan court when Sabah commenced proceedings and moved for injunctive relief in England, and this court would not wish to be seen to be aiding a contempt of an order made by a foreign and friendly court. If there was an injunction in place that would clearly be a relevant matter and the English court would clearly prefer not to be thought to be aiding a contemnor. But where the obtaining of the injunction was itself a breach of contract, and was seeking to prevent a party exercising its contractual right to bring proceedings in the English court, the English court must at least allow the proceedings to be commenced in its courts. It does not necessarily follow that the English court should grant an injunction to prevent proceedings in the foreign court, but again the existence of the foreign injunction should not prevent it doing so, if the very obtaining of that injunction can be seen to have abused the rights of the litigant with the contractual right to come to England. This of course in no way interferes with the right of the foreign court to proceed in any way it sees fit to punish any contemnor.

42. Mr Saloman stressed the following factors. First, to take steps as part of the proceedings in Pakistan to try and prevent proceedings in England was the clearest breach of contract. If the court had been made aware of the

effect of the relevant clause no injunction would have been granted, but the moving for an injunction and the claim for relief in the proceedings demonstrated the aim of the GOP was to have one set of proceedings but in Pakistan. Second, the proceedings can be seen as vexatious. There was simply no need to seek a negative declaration; if the GOP's point on not being liable under the guarantee is a good point it will be a good point in England as well as Pakistan. The only basis for suggesting that the proceedings should be allowed to be brought and continued in Pakistan, was on the basis that Pakistan provided a convenient forum. In the context of clause 1.9.3, that could not provide a legitimate basis for Pakistan being the sole court in which proceedings could be brought, and could not indeed provide a basis on which parallel proceedings should be allowed to continue in Pakistan once English proceedings had been commenced. Third, an injunction against the making of a demand under the guarantee or claiming under it was completely unnecessary. A demand had already been made. Sabah did not have any security against which it could enforce its claim.

43. As already indicated, it seems to me that if proceedings had been commenced in England before the GOP commenced their proceedings in Pakistan, then the commencement of such proceedings in Pakistan would be vexatious and oppressive unless the GOP could show some exceptional reason why parallel proceedings were justified. The GOP could not show any exceptional reasons. They rely simply on matters of convenience all of which would have been in the contemplation of the parties when they agreed the clause that they did. To have sought an injunction to seek to prevent English proceedings being the parallel proceedings in those circumstances would have demonstrated even more clearly that the GOP's conduct was oppressive and vexatious. Does the fact that the GOP commenced their proceedings first change the position? In my view it does not. The proceedings were commenced, it is plain, as a pre-emptive strike, and in the hope of preventing Sabah starting proceedings in the country to which both parties had agreed. The only basis for suggesting that the proceedings should be allowed to continue is that Pakistan is a convenient forum. It simply cannot have been contemplated that if proceedings were commenced in the forum each had agreed as convenient, parallel proceedings would still take place in Pakistan.

44. Mr Young at one stage suggested that the only matter about which Sabah had any right to complain was the seeking of the injunction. I do not accept that point. Parallel proceedings in England and Pakistan simply on the basis that both were convenient was contrary to the spirit of the jurisdiction clause agreed. The seeking of the injunction to prevent proceedings in England tried to deal with that obvious point. But the seeking of the injunction was impermissible, and once it disappears, it is clear also that parallel proceedings should not be entitled to continue.

45. Mr Young would suggest that even if the above is right, this court should still leave the question of a stay of the Pakistan proceedings to the Pakistan court. He submits that comity requires that to be done. There are various answers to that suggestion in this case. First it is not absolutely clear that a stay would be granted; it seems that it would be resisted by the GOP and that points might be taken that Sabah, by requesting time to deal with the interim injunction, had taken a step in the action and were not entitled to a stay. Mr Young assured us that Pakistan had a forum conveniens jurisdiction which could override the above, but it is not clear to me that accords with what Mr Gruder told the judge at first instance (see page 6 paragraph 7). In any event since it seems that a stay would be resisted, and since this court is the court chosen by the parties as having jurisdiction, and a court which has concluded that the conduct of the GOP is vexatious and contrary to the spirit of the jurisdiction clause agreed, this court would be failing in its duty if it did not give effect to that view by granting an injunction. I stress that the injunction is in personam and against the GOP. It is being granted by the court to which both parties have agreed to give effect to the bargain they made. It is not intended in any way to be an interference with the jurisdiction of the courts in Pakistan, and above all it is not implying any criticism of those courts.

46. I should add that Mr Saloman sought to demonstrate that the action in Pakistan had very little prospect of success. The merits of an action taken abroad could be a relevant factor in considering whether the action is oppressive, and the judge expressed adverse views in this case. But it seems to me that in this case whatever the merits of the points being taken, the proceedings in Pakistan are vexatious. Since there was not extensive argument by either side on this aspect before us, and since on the view I take the action will be proceeding in England, and an application for summary judgment is being made, I think it better not to express any view.

47. For the reasons I have endeavoured to give, I think the judge was right to grant an injunction in this case and right to refuse the GOP's application to stay the English proceedings. I would dismiss the appeal.

Sir Martin Nourse:

48. I agree.

Lord Justice Pill:

49. I also agree. As to sovereign immunity, I too approach Clause 2.6 of the guarantee on the basis that what appears to be a comprehensive submission by the Government of Pakistan (save as to protected assets) was not intended to be capable of being nullified by the government commencing proceedings in another jurisdiction. Mr Young QC, for the government, relies on the provision in section 13(2) of the State Immunity Act 1978 that the *"written consent of the state"* is required before relief can be given against the state by way of injunction and only in that part of Clause 2.6 dealing with the enforcement of judgments does the word consent appear. He places great reliance on the apparently careful drafting of Clause 2.6(iii). It was intended to provide for the consent required by section 13(2) only at the stage of proceedings after judgment, it is submitted.

50. Reading the clause as a whole, I cannot accept that to have been the intention of the parties. Clause 2.6(ii) should be given a broad construction so as to include the consent required by section 13(2), the word *"waives",* in the commercial context, being capable of conferring a consent. Clause 2.6(iii) was intended to make clear the extent of Sabah's post-judgment remedies, save as to protected assets, and does not limit the effect of Clause 2.6(ii). In my judgment, express consent to post-judgment injunctive relief does not in context have the effect of excluding consent to interim relief.

51. Mr Young's submission that Clause 2.6(iii) was plainly and carefully drafted, and so drafted to achieve a particular purpose is weakened by the use for the second time of the expression *"such proceedings"* in Clause 2.6(iii). The expression "*such proceedings"* appears in each of the sub-paragraphs of Clause 2.6. It can be expected to have, in each case, the same meaning and it is the broad meaning particularised at the beginning of the Clause. Had the draftsman had in mind the specific purpose for which Mr Young contends, I would have expected the words "*in connection with proceedings in respect of the enforcement of any judgment"* to be present rather than the broader expression "*in connection with such proceedings".*

52. For those, and the reasons given by Waller LJ, I would uphold the judge on the state immunity issue.

53. As to the grant of an injunction and the refusal to stay the English proceedings, I agree with the reasoning and conclusions of Waller LJ. Whatever label is attached to it, the intention and effect of Clause 1.9 is that, if proceedings were commenced in England, parallel proceedings could not, in the absence of exceptional reasons, be pursued elsewhere. Moreover, that intention is not defeated by the Government of Pakistan having commenced proceedings in Pakistan first. Once the English proceedings were commenced, Clause 1.9 operated to confer a jurisdiction on the English courts which requires the Court, in present circumstances, to act by way of injunction to give effect to the agreement of the parties. I too stress that the Court's order is not intended in any way to be an interference with the jurisdiction of the courts of Pakistan and does not imply any criticism of the courts of Pakistan.

54. I agree that the appeal should be dismissed.

Timothy Young QC (instructed by Messrs Amhurst Brown Colombotti) for the Defendant/Appellant
Timothy Saloman QC and Mr Simon Picken (instructed by Messrs DLA,) for the Claimant/Respondent