LLOYD'S LAW REPORTS

R 8/29

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COURT OF APPEAL

Feb. 25, 1991

HISCOX
v.
OUTHWAITE

Before Lord DONALDSON of LYMINGTON, M.R., Lord Justice McCOWAN and Lord Justice LEGGATT

Arbitration — Award — Convention award — Dispute under reinsurance contract — Final award signed in France — Plaintiffs initiated proceedings against award — Whether a Convention award — Whether proceedings could be entertained by High Court — Whether defendant estopped from asserting award not subject to Arbitration Acts 1950 and 1979 — Arbitration Act 1950, s. 22, Arbitration Act 1979, s. 1, Arbitration Act 1975, ss. 3, 5.

A dispute arose under a reinsurance contract between the plaintiff and defendant representative Lloyd's underwriters and was referred to the sole arbitrament of Mr. R. A. MacCrindle, Q.C. The arbitration agreement provided that arbitration was to take place in London and both the agreement and the reinsurance contract were governed by English law.

The arbitration took place in stages and in due course Mr. MacCrindle signed a final interim award. This was dated Nov. 20, 1990 and concluded in the same way as the previous awards save that the address was "12 Rue d'Astorg, 75008 Paris, France".

On Dec. 10, 1990 the plaintiffs initiated the following proceedings: (1) an originating summons for leave to appeal to the High Court under s. 1(3)(b) of the Arbitration Act, 1979; (2) an originating summons for an order directing Mr. MacCrindle to state further reasons for his award pursuant to s. 1(5) of the Arbitration Act, 1979 and (3) an originating motion seeking remission of the award pursuant to s. 22 of the Arbitration Act, 1950.

The defendant contended that as this was a Convention award, under the terms of the Arbitration Act, 1975 the High Court was disabled from adjudicating upon those proceedings.

The issues for decision were (1) where was an arbitration award "made" for the purposes of s. 7(1) of the Arbitration Act, 1975 which defined a Convention award as meaning—

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

(2) to what extent if at all did the Arbitration Acts 1950 and 1979 apply to a Convention award where the procedural law of the arbitration was English? and (3) whether the defendant was estopped from asserting award not subject to the Arbitration Acts, 1950 and 1979.

——*Held*, by Q.B. (Com. Ct.) (HIRST, J.), that (1) this was not a Convention award because although dated in Paris it was "made" in London for the purposes of the 1975 Act;

(2) even if this was a Convention award the High Court had the necessary jurisdiction to adjudicate on the proceedings initiated by the plaintiff;

(3) if it had been necessary to decide, the defendant was estopped from asserting that the award was not subject to the Arbitration Acts, 1950 and 1979.

The defendant appealed.

——*Held*, by C.A. (Lord DONALDSON, M.R., McCOWAN and LEGGATT, L.JJ.), that (A) an award was not "made" at the seat or central point of the arbitration; where the Court was concerned with a statute avowedly designed to give effect to an international convention, in the event of ambiguity it was permissible to have regard to the travaux preparatoires; from these it was plain that a great deal of thought and debate was devoted to this issue and a conscious and deliberate decision was reached in favour of defining a "Convention award" in terms of where the award was made as opposed to anywhere else, including where the arbitration took place; where an award states that it was dated or signed in a particular place that was the place where it was made; the award was signed in Paris and was therefore a Convention award (*see* p. 12, col. 2; p. 14, col. 1; p. 17, col. 2; p. 18, col. 1; p. 19, col. 2; p. 20, col. 1);

——— *Brooke v. Mitchell*, (1840) 6 M. & W. 473, considered.

(B) as to whether the Convention award was amenable to remedies in the 1950 and 1979 Acts (per Lord DONALDSON, M.R.; McCOWAN, L.J. dissenting) that (1) the submission by the defendant that the Courts could only adjourn the 1950/1979 proceedings would be rejected; the answer lay in treating the Court which was both the competent authority and an enforcing Court as two separate Courts; the Convention then worked as it was intended to; although this might give the 1975 Act a purposive construction this was permissible and indeed necessary when construing a statute giving effect to an international Convention intended to be applied consistently in different jurisdictions (*see* p. 15, col. 2; p. 16, col. 1);

(2) (per LEGGATT, L.J.) the 1975 Act could not be construed so as to preserve a locus for the English Courts when acting in its supervisory capacity; the Act did not envisage that the award would be subject to the supervisory jurisdiction of the English Courts; an adjournment of enforcement proceedings would be of no avail because no application to the English Court for the setting aside of a Convention award would be successful in face of s. 3(2); for the purposive argument to succeed the words "any legal proceedings" in s. 3(2) had to be construed as meaning "any proceedings for the enforcement of a Convention award"; the Convention award could be relied on outside the realm of enforcement to meet all proceedings including proceedings to set aside and suspend the award (*see* p. 21, col. 2);

(C) as to the estoppel issue (LEGGATT, L.J. dissenting), that the exchange of letters between the solicitors on Aug. 3 and 6 in relation to the draft award showed quite clearly that both parties assumed the fact that an award dated at Paris was no obstacle to the exercise by the English Courts of their supervisory jurisdiction under the Arbitration Acts, 1950 and 1979; that assumption was never questioned and on its basis the plaintiff incurred costs in preparing for the hearing of his applications under the 1950 and 1979 Acts before he learned that his right to make this was being challenged; it would be unconscionable now to allow the defendant to renege from the common assumption which extended not only to the facts that application under the 1950 and 1979 Acts could be made within a specified time but by necessary implication that in respect of an award which stated on its face that it was dated at Paris such applications could and would be heard and determined on their merits; the appeal would be dismissed (*see* p. 16, col. 2; p. 17, cols. 1 and 2; p. 19, col. 1).

The following cases were referred to in the judgments:

Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd., (C.A.) [1982] 1 Q.B. 84;

Brooke v. Mitchell, (1840) 6 M. & W. 473;

Hamel-Smith v. Pycroft Jetsave Ltd., Feb. 5, 1987 (Unreported).

Vistafjord, The (C.A.) [1988] 2 Lloyd's Rep. 343;

Wilkinson v. Barking Corporation, (C.A.) [1948] 1 Q.B. 721.

This was an appeal by the defendant Mr. Richard Henry Moffit Outhwaite, a representative Lloyd's underwriter and all other members of Syndicate 661 at Lloyd's who were party to the contract of reinsurance from the judgment of Mr. Justice Hirst given in favour of the plaintiff Mr. Robert Ralph Scrymgeour Hiscox a representative Lloyd's underwriter suing on his behalf and on behalf of the members of Syndicate 33 at Lloyd's, and holding in effect that the arbitration award made in the dispute between the plaintiff and defendant was not a Convention award; that the Court had the necessary jurisdiction to adjudicate on the plaintiff's application and that the defendant was estopped from asserting that the award was not subject to the Arbitration Acts 1950 and 1979.

Mr. Justice HIRST delivered the following judgment on Feb. 19, 1991:

Introduction

There were before the Court last Friday Feb. 15, 1991, three applications by the applicants in relation to a final interim arbitration award dated Nov. 20, 1990 made by Mr. Robert Alexander MacCrindle, Q.C. as sole arbitrator viz: (a) A summons for leave to appeal under s. 1(3)(b) of the Arbitration Act, 1979. (b) An originating summons for an order directing the arbitrator to state further reasons pursuant to s. 1(5) of the Arbitration Act, 1979. (c) A notice of originating motion seeking the remission of the award to the arbitrator under s. 22 of the Arbitration Act, 1950.

Both parties are Lloyd's underwriters, Mr. Hiscox suing on his own behalf and on behalf of the members of Syndicate 33 at Lloyd's, and Mr. Outhwaite being sued on his own behalf and on behalf of all other members of Syndicate 661 at Lloyd's who are parties to the contract of reinsurance which is the subject of the proceedings.

The arbitration was heard in England, and conducted under English procedural rules. However the award was signed by Mr. MacCrindle in Paris, and as a result Mr. Rokison on behalf of the respondents has raised a preliminary issue, namely that the Court cannot entertain these applications, on the footing that this is a Convention award to which the Arbitration Act, 1975 applies, and that the 1975 Act on its proper construction precludes the granting by the Court of any of the three orders sought by the applicants.

The crux of his submission is stated clearly and succinctly in Mr. Rokison's skeleton argument, and I cannot do better than quote it:

The Court cannot Entertain these Applications

1. The Award to which the Applications relate is an Award made in Paris, France. It specifically states (see Applicant's Bundle A pp. 22, 25):

> NOW I, the said ROBERT ALEXANDER MACCRINDLE . . . .do hereby make and publish this my INTERIM AWARD (p. 22).
>
> . . . .
>
> DATED at Paris, France, this 20th day of November, 1990.
>
> (Signature)
>
> ROBERT ALEXANDER MACCRINDLE
>
> 12, Rue d'Astorg,
> 75008, Paris, France. (p. 25)

2. The Award is therefore a "Convention Award" within the meaning of the Arbitration Act 1975. Section 7(1) of that Act provides:

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

France is a party to the New York Convention. (See for example, Mustill and Boyd on Commercial Arbitration (Second Ed.) at p. 707).

3. Accordingly, the Award is enforceable in accordance with Section 3(1) of the Act, and by Section 3(2)

> Any Convention Award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made . . .

It is accordingly binding as between the Applicant and the Respondent. No question can be raised as to its correctness under the Arbitration Act 1979, and clearly it cannot be remitted to the Arbitrator pursuant to Section 22 of the Arbitration Act 1950 with a view to its being reconsidered. Such a jurisdiction would be inconsistent with the Court's obligation to enforce the Award.

4. Furthermore, it is implicit in both the Arbitration Act 1950 and the Arbitration Act 1979 that those Acts (insofar as they apply to Awards) only apply to Awards made within the jurisdiction. (See Cmnd. Paper 1515 — copy will be supplied.)

5. Only if the above contention is rejected does the Court have to consider the applications.

Mr. Colman on behalf of the applicants puts forward three answers to Mr. Rokison's submission viz: (1) That this is not a Convention award since the award was not made in France. (2) If it is a Convention award, on the proper construction of the 1975 Act the Court is entitled to grant the orders sought. (3) In any event the respondents are estopped from taking the point at issue.

Although the application was in Chambers, I am giving this judgment in open Court at the request of both parties. Since the history of the arbitration and its aftermath is relevant both to the first and third of Mr. Colman's points, it is convenient, before dealing with the issues in more detail, to summarise the relevant facts.

The arbitration

The dispute arises under an Aggregate Excess of Loss Reinsurance Agreement dated Mar. 30, 1982, which contained as art. 11 the following arbitration clause:

> If any dispute shall arise between the Reassured and the Reinsurers with reference to the interpretation of this Agreement or the rights with respect to any transaction involved, the dispute shall be referred to two Arbitrators, one to be chosen by each party and such Arbitrators shall first choose an Umpire. If they are unable to agree upon an Umpire, they shall appeal to the Chairman of the Committee of Lloyd's for the time being to nominate him and in the event of the said Arbitrators not agreeing, the decision of the said Umpire shall be final and binding upon all parties. The Arbitrators and Umpire shall interpret this Agreement as an honourable engagement and they shall make their award with a view to effecting the general purpose of this Agreement in a reasonable manner, rather than in accordance with the literal interpretation of the language.
>
> Said Arbitration shall take place in London and the Arbitrators and Umpire shall be executive officials of Insurance or Reinsurance Companies or Lloyd's Underwriters. The cost of Arbitration shall be borne by the parties hereto as the Arbitrators and/or Umpire may direct.

This was varied by an agreement dated Oct. 24, 1989 contained in a letter signed by the solicitors for both parties addressed to Mr. MacCrindle as follows:

> This letter is to confirm that the parties have now agreed, subject to your acceptance, to appoint you as sole Arbitrator to determine all disputes and differences arising between them in relation to the quantification of the liability of the reinsurers (Syndicate 661) under the aggregate excess of loss reinsurance agreement number 82050036, the validity of which has already been determined by your recent Award.
>
> It is further agreed between the parties that the hearing in this matter should commence on 25th April 1990, estimated duration 10 days, assuming that date to be convenient to yourself. Your appointment is deemed to be upon the terms of Article 11 of the reinsurance agreement, amended so as to provide for you to act as sole Arbitrator.
>
> It is anticipated that there will need to be an interlocutory hearing for directions, and we would ask you please to confirm which of the two days in November (13th or 14th) which have been indicated by your Clerk would be convenient for such an appointment. The directions to be sought by each party will be notified in due course.

It is plain from the last sentence of the second paragraph that, save for the substitution of a single arbitrator for the previous regime, art. 11, including London as the venue for the arbitration still stood.

There was an agreed order for directions dated Nov. 13 1989, containing several directions completely in line with ordinary English arbitration practice (ie., points of claim, points of defence, discovery, exchange of statements of witnesses of fact, and limitations on the number of expert witnesses); it was also provided that Commercial Court guidelines should apply generally, subject to any specific directions.

The hearings took place in London in April and May, 1990, and after final speeches in July it was agreed that Mr. MacCrindle should produce a set of reasons together with draft declarations on the issues of principle, with the parties having the opportunity if so desired to make representations in relation to the form of the declarations to be embodied in the award. The draft interim award signed in Paris on Aug. 6, 1990, and made on the above basis, was headed (as had been all the pleadings, and as was the final interim award) with the words:

> In the matter of the Arbitration Acts 1950 to 1979, and In the matter of an Arbitration.

Three days beforehand, the applicants' solicitors addressed to the respondents' solicitors the following letter:

> We take the view, and we would be obliged if you would confirm that you agree, that if either party is contemplating making an application for leave to appeal to the Court on any aspect of the Award, time does not run until at the earliest six weeks from 6th August 1990.

On Aug. 6 the respondents' solicitors, having meantime received a copy of the draft interim award, replied as follow:

> It is our understanding of Point 8 of the Arbitrator's Award that if either party within six weeks of 6th August 1990 notifies the Arbitrator in writing that it desires to make representations as to the form of the Arbitrator's Award, then this Award dated 6th August 1990 shall be treated as a draft only and the final form will be determined following the further hearing and that the time for appeal will commence running from the date of this final form. If however, neither party notifies the Arbitrator in writing within six weeks of 6th August 1990 that it desires to make representations, then the Award dated 6th August 1990 will be treated as the Arbitrator's Interim Award and that the time for appeal will commence running at six weeks from 6th August 1990, as you have stated in the second paragraph of your letter of 3rd August 1990.
>
> Would you please confirm that you are in agreement with our understanding of Point 8 of Mr. MacCrindle's Award.

On Nov. 6 there was a further hearing before Mr. MacCrindle to discuss the form in which the declarations should appear in the final interim award. As already noted, this was signed by Mr. MacCrindle in Paris on Nov. 20, bearing the same heading as the draft interim award.

On the same day the applicants' solicitors received from the clerk at 4 Essex Court, Temple, where Mr. MacCrindle is a door tenant, a fax to inform them that the award could now be taken up from those Chambers on payment of the balance of charges due. Shortly after receiving this letter, the applicants' solicitors collected the award from the Chambers against a cheque for the amount stated in the letter.

The present applications were issued and served on Dec. 10, 1990.

On Jan. 28, 1991 the applicants applied to me for an order that all three applications should be heard together; this was not opposed by the respondents, subject to the proviso that the Court should not read any of the documents pertaining to the third application until the first two had been disposed of; this procedure was approved by the Court.

On Feb. 8, the applicants' solicitors forwarded provisional paginated bundles to the respondents; also on the same day they furnished a further affidavit, and there was controversy as to whether that affidavit was admissible. On Feb. 12, the respondents' solicitors forwarded three affidavits to the applicants' solicitors, under cover of a letter which for the first time foreshadowed (though without any detail or explanation) the preliminary point now under consideration.

The Arbitration Act, 1975

This Act, which was of course passed to give effect to the New York Convention, provides so far as relevant as follows:

> 3 Effect of Convention awards (1) A Convention award shall, subject to the following provisions of this Act, be enforceable —
>
> (a) in England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950 . . .
>
> (2) Any Convention award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in the United Kingdom; and any reference in this Act to enforcing a Convention award shall be construed as including references to relying on such an award . . .
>
> 5. Refusal of enforcement (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section . . .
>
> (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
>
> 7 Interpretation (1) In this Act —
>
> "arbitration agreement" means an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of settlement by arbitration;
>
> "Convention award" means an award made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom, which is a party to the New York Convention.

Where was the award made?

Mr. Rokison relies on the actual words used by Mr. MacCrindle above his signature, and submits that they in themselves self-evidently demonstrate beyond doubt that it was made in Paris.

The only sensible construction of the interpretation clause in the 1975 Act was that an award was made where it was signed, and there was no warrant in the wording of the Act to support any looser test.

Mr. Rokison relied in support of his argument on the 5th Report of the Private International Law Committee dated October, 1961 (CMD 1515) in which the Convention was considered. This was a most distinguished committee with Mr. Justice Cross as chairman and Mr. Justice Wilberforce and Mr. Justice Megaw among its members (each as he then was). Paragraph 1 of the Convention is as follows:

> 1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

The Committee's commentary on this article stated inter alia as follows:

> The second sentence of this paragraph introduces a new factor. A number of Continental countries distinguish between "foreign" and "domestic" awards. Country A will not regard an award made in Country B as "foreign", if the parties are nationals of Country A: Country X will not regard an award made in Country Y as "foreign" if it is made in accordance with the procedural rules of Country X. Similarly Country X will not regard an award made *in its own territory* as "domestic" if it is made in accordance with the procedural rules of Country Y. The effect of the second sentence in this paragraph seems to be that Country X in the last example is bound to enforce "foreign" awards made in its own territory. This obligation appears to be imposed only on coun-

tries which draw the distinction illustrated above between "foreign" and "domestic" awards. How does the obligation affect the United Kingdom? The fundamental distinction drawn in the Arbitration Act, 1950, is between awards made in the United Kingdom and those made outside; this is not expressed but seems to be clearly implied since the methods by which the courts can intervene seem to be applicable in the main only to an award made within the jurisdiction. Awards made out of the jurisdiction fall into two main classes: — those which satisfy the requirements of section 35(1), and those which do not. The former again fall into two sub-classes: those which are made on arbitration agreements governed by the law of England, those made in pursuance of arbitration agreements governed by some other law (see Section 40). The net effect is that Part II of the Act applies, so far as enforcement in England is concerned, only to awards made outside the United Kingdom and on arbitration agreements governed by some law other than English law. (Where enforcement is sought in Scotland or Northern Ireland, the law must be some law other than the law of Scotland or Northern Ireland). This looks very like one of the Continental distinctions mentioned above between "foreign" and "domestic" awards. If an award is made in Hamburg on an arbitration agreement governed by English law, we treat it as not falling within the scope of the Convention of 1927. If we enforce it, we do so as part of our domestic law, not as the result of an international obligation. It seems that the effect of the first sentence in this paragraph (particularly when read in the light of the second sentence) is that if we accede to the Convention of 1958, we should bind ourselves to enforce such an award *as a matter of international obligation*. This may not be a matter of great practical importance. The next question seems to be whether, by virtue of the second sentence in this paragraph the Convention could apply to an award made in the United Kingdom under the foreign law in the sense that a court in the United Kingdom would be able to enforce it as a "foreign" award. The answer is not altogether clear since section 40 of the Act seems to suggest that we do distinguish between foreign awards made abroad according to the law governing the arbitration agreement. Here again, it may not be of great practical importance whether an award is enforced as a "foreign" or "domestic" award.

The history of this provision is as follows: —

> The Federal Republic of Germany said that the Convention should not apply to awards regarded as domestic by the *lex fori* (the law of the enforcing country).

At the Conference, eight countries (Austria, Belgium, the Federal Republic of Germany, France, Italy, Netherlands, Sweden and Switzerland) proposed an amendment defining the awards to which the Convention of 1958 applied as "arbitral awards other than those considered as domestic in the country in which they are relied upon". The discussion which followed showed a difference of opinion between those countries (including the United Kingdom) who favoured the simplicity of defining a "foreign award" on a territorial basis and those who considered that the place where the award was given should not be the decisive factor in determining whether it was "domestic" or "foreign". Those who favoured the territorial conception also objected to being bound by an international obligation to enforce awards made in their own territories; those who objected to the territorial conception objected to being required to enforce awards which, although made abroad, were regarded as domestic under their own legal systems and might be made in circumstances which indicated an intention to evade the law of the enforcing country. A working party which was appointed to consider the matter produced a text which was substantially the same as the present paragraph 1. The text was produced as an attempt to *reconcile* the two conflicting points of view. It is not on the face of it a reconciliation; instead of restricting the scope of the New York Draft it seems to extend it. It seems reasonably clear, however, that no State may exclude awards made in the territory of other Contracting States on the ground that they are regarded as "domestic" under its own law. It must rely upon the public policy exception in Article V(2)(b) of the Convention of 1958 in cases where the foreign arbitration has been entered on to avoid some domestic law, i.e., where there has been *fraus legis*. If a foreign State refused to enforce an award made in the United Kingdom on the ground that it was regarded as "domestic" under the law of that State, the United Kingdom would seem to be free by virtue of Article XIV of the Convention of 1958 to refuse enforcement to corresponding awards made in the territory of that State.

Mr. Rokison submitted that this analysis was in line with his argument.

Mr. Colman submitted that this argument was false, and that an award is made at the place where the arbitration is held, or has its situs or seat or centre of gravity, which in the present case was manifestly London.

Mr. Colman relied in particular on an article by Dr. F.A. Mann, who was also a member of the Private International Law Committee, in the quarterly journal Arbitration International in April, 1985.

This article stated as follows:

> Where is an Award "made"?
>
> Part II of the English Arbitration Act 1950 deals with the enforcement of certain foreign awards. According to Section 35, Part II applies to any award "made" in certain defined territories and conditions. The Arbitration Act 1975 renders Convention awards enforceable in the United Kingdom and by Section 7 defines them as awards "made . . . in the territory of a state other than the United Kingdom, which is a party to the New York Convention." This definition corresponds to article 1(1) sentence 1 of the New York Convention. Article V(1)(a) and (e) of the Convention also refers to awards "made" in a certain country, while article V(1)(d) refers to "the law of the country where the arbitration took place". Finally by Article 1 of the Geneva Convention of 1927 an arbitral award "made" in accordance with an agreement covered by the Protocol of 1923 shall be recognised as binding and enforceable.
>
> This terminology is by no means confined to the law of the United Kingdom or to international Conventions. The recent version of article 1472 of the French Code of Civil Procedure speaks of a "sentence rendue"; and in Article 1504 there is a reference to a "sentence rendue en France".
>
> There is very little learning on the question where an award is made. As far as can be seen only Dr. A. J. van den Berg, *The New Convention of 1958 (1981)* pp. 294, 295, has dealt with the point at some length. He takes the view that the award is made at the place indicated in it, irrespective of where it is in fact signed or published or where the arbitration was held. Schlosser, *Das Recht der internationalen privaten Schiedgerichtsbarkeit* (1975) Nos. 67 and 138 is less clear. He speaks of the seat at the "centre of gravity" which according to him is not so much the place where the procedure took place, as the place where the award was rendered, though this "plays the most important, yet not solely decisive role".
>
> It is submitted that an award is "made" at the place at which the arbitration is held, ie. at the arbitral seat. It is by no means necessarily identical with the place or places where hearings are being held or where the parties or the arbitrators reside. It is rather the place fixed in the contract or the submission or the minutes of the hearing or is found to be the central point of the arbitral proceedings. It is the place which in the case of institutional arbitration will always be certain, which otherwise will only in the rarest of cases be open to doubt, and which in no reported case seems ever to have been questionable, for, as experience shows, where there could be any doubt, the arbitrators will almost invariably determine the place by agreement with the parties or if necessary by their own ruling recorded in the minutes.
>
> This is the place which is independent of the place of meetings of the arbitrators, hearings with the parties, or of the actual signature or publication of the award. If a place other than the seat is held to be decisive, unacceptable consequences could ensue. An arbitration which in every possible sense is an English one could suddenly become foreign, merely because the arbitrator has gone to Paris and signed and, perhaps, dispatched the award there. If there are three arbitrators who hold an arbitration in London, but meet in Paris to consider their award, and sign it at their respective residences, *viz*, New York, Geneva and Tokio, the award should be treated as "made" in London, even if each arbitrator has indicated the place where he has signed it. The award, it is submitted, is no more than a part, the final and vital part of a procedure which must have a territorial, central point or seat. It would be very odd if, possibly without the knowledge of the parties or even unwittingly, the arbitrators had the power to sever that part from the preceding procedure and thus give a totally different character to the whole.
>
> In so far as the Conventions or the statutes incorporating them into English law are concerned, we know that Article 31 of the Vienna Convention governs their interpretation. *Fothergill v. Monarch Airlines* [1981] A.C. 251 at p. 282 per Lord Diplock and at p. 290 per Lord Scarman. Accordingly they should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The decis-

ive words, it is believed, are "in their context", for they indicate the intention to recognise and enforce that which is the final step in proceedings the seat of which is not fortuitous or unknown, but is readily ascertainable. If this is the correct interpretation of the text of the Conventions or the statutes derived from them, then it does not seem unlikely that it also applies to other statutory texts concerned with the locality of the award.

Admittedly the view suggested here attributes a somewhat strained meaning to the word "made". But for the reasons given the natural meaning of the word leads to such strange consequences that a less literal interpretation would seem to be justified.

Alternatively Mr. Colman submits that the award was made where it was published, namely in London when it was handed to the applicants' solicitors by the clerk at No.4 Essex Court. In my judgment, in construing the vital words in the 1975 Act, it is crucial to bear in mind that an award is not an isolated event, but rather the culminating stage in a process of arbitration which has passed through a number of earlier phases, from which in my judgment it cannot properly be divorced.

If Mr. Rokison's argument is correct, an arbitration which from its inception through to its penultimate stage has been rooted entirely in one country will be capriciously transferred to another territory simply and solely as a result of the fortuitous circumstances of the place of signature of the award.

Such a result would be highly unreasonable, and would also cause great uncertainty, since the parties would not know the territory of the award until they knew where it had been signed. It would also raise potentially insoluble problems, for example, if in the present case Mr. MacCrindle had been one of three arbitrators, with the other two signing in London.

I do not derive assistance from the Private International Law Committee report, since I do not think that the authors were directing their minds to the point presently at issue. Dr. Mann's article, on the other hand, seems to me directly in point, and most cogent and persuasive.

It is elementary that, where there are two possible constructions of a Statute, one of which leads to absurd results, the Court should lean towards the other. If in the 1975 Act the word "made" had been replaced by the word "signed", then I should have been constrained to uphold Mr. Rokison's argument however anomalous the consequences. But, in my judgment, in order to decide where an award is made, one must look at the arbitration as a whole, and not just at the place of signature, and the proper criterion is the central point of the arbitration proceedings.

The present arbitration bears all the hallmarks of an English arbitration apart from the place of signature of the award, which supplies the only, and very slender, connection with France.

It follows that in my judgment the central point of the present arbitration proceedings was in London, and therefore London is the place where the award was made.

As a result, the Court is plainly competent to hear all the applications.

The other two points taken by Mr. Colman are therefore academic, but, since they were fully argued, it is right that I should deal with them as briefly as I can.

Are Convention awards amenable to the remedies in the 1950 and 1979 Acts?

This point of course only arises if I am wrong on the first point.

Mr. Colman submits that there is nothing in the 1975 Act to exclude such remedies, and that furthermore sub-s. 5(2)(f), and in particular the reference to the award having been—

> . . . set aside or suspended by a competent authority of the country . . . under the law of which it was made . . .

supports the contention that the remedies do apply, in particular the right to apply for leave to appeal under the 1979 Act since that is confined to issues of law. Thus, in Mr. Colman's submission, if the English Courts set aside an English law award on appeal, it could not thereafter be treated as binding under the 1975 Act.

Mr. Rokison submits that such a construction does violence to the express terms of s. 3(2) that a Convention award shall be "treated as binding for all purposes"; and he draws attention to the past tense in which sub-s. 5(2)(f) is couched, and submits that in any event it would only apply if the award had already been set aside, which this one has not. This is a point of pure law, and since it is unnecessary for me to express a concluded view, I prefer not to do so. I say no more, therefore, than that I am strongly inclined to accept Mr. Colman's argument, since it seems to me to be implicit in sub-s. 5(2)(f) that Convention awards should be capable of review, confined of course to issues of law only, in the Courts of the country under whose laws it was made, which in the present case is plainly English law.

Estoppel

Mr. Colman submits this is a classic case of estoppel by convention, seeing that:

(i) The applicants proceeded throughout on the basis that it was common ground that the award was subject to the English Arbitration Acts.

(ii) The respondents must have been well aware at all times the applicants were proceeding on the basis that this was an English law arbitration, and fostered that belief.

(iii) The applicants acted in reliance on, and their conduct was influenced by, the assumption that it was common ground that this was an English arbitration with an English law award to follow.

(iv) It would be unconscionable to permit the respondents to assert now that the award was not subject to the Arbitration Acts, 1950 and 1979.

In support of this argument he relies on the course of events which I summarized in an earlier section of this judgment, and points out that, as a result of the common assumption, the applicants incurred considerable expense both in preparing the present applications, assembling the documents and affidavits etcetera, and also in the hearing before me three weeks ago.

The applicants' solicitor Mr. Mark Klimt, states the position in his affidavit sworn on Feb. 15, 1991 as follows:

> If following receipt of Mr. MacCrindle's initial draft Award on 6th August 1990 — also signed in Paris — it had in any way been suggested by the Respondent that it might not be subject to the 1950 Act or 1979 Act supervising jurisdiction of the English Courts, my firm would have advised the Claimant to request Mr. MacCrindle to re-issue his Award signed in London. Certainly if this had not been done and the Respondent had then or at any later time indicated that a jurisdiction point was to be taken the Applicant would have been advised to have that issue resolved by the court as a preliminary issue before incurring further expense in further preparing the applications now about to be heard.

Mr. Rokison accepts that the arbitration proceedings were in England, and that there was a common assumption that English procedural rules applied, but says that it did not follow that this would not lead to a Convention award, as to which there was no common assumption; indeed, he submitted that, if the parties had considered the matter (which they probably did not) they would have expected the award to be signed in France, since both knew that Mr. MacCrindle resides in France.

By participating in the preparation of the appeal as Mr. Rokison accepted the respondents had done, they had not in any way laid the foundation for an estoppel, he submitted, since the 1975 Act did not preclude the Court from hearing the application, but only from granting the relief sought. In support of this argument he relied on the Court of Appeal decision in *Wilkinson v. Barking Corporation*, [1948] 1 Q.B. 721, and in particular on the judgment of Lord Justice Asquith at pp. 724 to 725 as follows:

> . . . It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others. As the House of Lords ruled in *Pasmore v. Oswaldtwistle U.D.C.* (per Lord Halsbury):
>
> > The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.
>
> Before this court the principle laid down in this passage was not seriously challenged. What was said for the plaintiff was that even though s. 35 of the Act of 1937 deprives the ordinary law courts of jurisdiction in the case of claims or questions covered by the section, yet the defendants, by entering an unconditional appearance to the writ, had submitted to the jurisdiction of those courts and could not be heard to challenge it. One corollary of this argument, if it were sound, would be that the House of Lords decided *Pasmore v. Oswaldtwistle* wrongly, since there is no suggestion that an unconditional appearance was not entered in that case, or that any steps were taken to set aside the writ, yet the House had no hesitation in saying to the plaintiff-appellants, "you have no remedy in the courts of law: your only remedy is to make a complaint to the Local Government Board". The real answer to the plaintiff's contention under this head can be put in several ways: No act of the parties can create in the courts a jurisdiction which Parliament has said shall vest, not in the courts, but exclusively in some other body. Nor

again can a party submit to, os as to make effective, a jurisdiction which does not exist: which is perhaps another way of saying the same thing. The argument we are here rejecting seems to be based on a confusion between two distinct kinds of jurisdiction: The Supreme Court may, by statute, lack jurisdiction to deal with a particular matter — in this case matters including superannuation claims under s. 8 — but it has jurisdiction to decide whether or not it has jurisdiction to deal with such matters. By entering an unconditional appearance, a litigant submits to the second of these jurisdictions (which exists), but not to the first (which does not). We are not here concerned with irregularity in the service or issue of the writ which raises other considerations which are here quite out of place. I think the argument for the plaintiff under this head quite impossible to sustain, and leading counsel for the plaintiff when fairly confronted with the difficulties in his way, did not press it.

Mr. Colman submitted, rightly in my judgment, that *Wilkinson's* case is not in point, since in the present case no question of jurisdiction arises, but rather whether the respondents are entitled to put forward a blanket defence based on the 1975 Act.

So far as the interpretation of the documents is concerned, I reject Mr. Rokison's submissions, and am satisfied that Mr. Colman's analysis is in all respects correct.

Therefore, had it been necessary for me to do so, I should have upheld the applicants' case on estoppel.

[*Discussion as to costs*]

Mr. Jonathan Sumption, Q.C. and Mr. Christopher Butcher (instructed by Messrs. Elborne Mitchell) for the defendant; Mr. Anthony Colman, Q.C., Mr. Jonathan Gilman, Q.C. and Mr. John Lockey (instructed by Messrs. Fishburn Boxer) for the plaintiff.

The further facts are stated in the judgment of Lord Donaldson, M.R.

Judgment was reserved.

Monday Mar. 11, 1991

JUDGMENT

Lord DONALDSON OF LYMINGTON, M.R.:

The issues

This appeal from a decision of Mr. Justice Hirst raises two interesting and novel points of arbitration law:— (1) Where is an arbitratio[n] award "made" for the purposes of s. 7(1) of th[e] Arbitration Act, 1975 which defines a "Conven[tion] award" as meaning

> . . . an award made in pursuance of an arbi[tration] tration agreement in the territory of a Stat[e] other than the United Kingdom, which is party to the New York Convention?

(2) To what extent, if at all, do the Arbitratio[n] Acts 1950 and 1979 apply to a Conventio[n] award where the procedural law of the arbi[tration] tration is English?

There is an additional issue, which is of les[s] general importance, namely whether Mr. Out[h]waite is estopped by his conduct from raisin[g] either point.

The facts

The dispute which was referred to arbitratio[n] concerned liabilities under a reinsurance con[tract], both parties being members of Lloyd's. The original agreement to refer contemplate[d] the appointment of two arbitrators and a[n] umpire, but this was varied by the agreement o[f] the parties to an agreement to refer to th[e] arbitrament of Mr. R. A. MacCrindle, Q.C., [as] sole arbitrator. The original arbitration agre[e]ment provided that the "Arbitration shall ta[ke] place in London" and this was unaffected b[y] the variation. Both this agreement and th[e] reinsurance contract were governed by Englis[h] law.

The arbitration was conducted by stages. Th[e] first stage concerned a contention on the part o[f] Mr. Outhwaite that he was—

> . . . entitled to avoid the contract of re[-] insurance *ab initio* by reason of no[n-] disclosure or alternatively of misrepresen[-] tation and that by a letter dated 2nd Sep[-] tember 1987 he had validly avoided o[r] rescinded it.

By an award date June 30, 1989 Mr. Ma[c]Crindle rejected this contention. The awa[rd] concluded:—

> DATED at Paris, France, this 30th day of Jun[e] 1989.

Witness to the signature of Robert Alexander MacCrindle [Signed] Secretary	[signed] ROBERT ALEXANDER MacCRINDLE 21 Avenue George V 75008, Paris, France.

The second stage, by agreement between th[e] parties, was limited to a determination—

> . . . by way of preliminary issue of su[ch] issues of principle relating to the quantum [of] the claims payable by the Respondent might be pleaded by the parties.

Hearings took place in April and May, 1990 and in August, 1990 Mr. MacCrindle made an award in the form of a declaration. The award was in draft because all concerned contemplated that in so complicated a matter the declarations might require clarification. Accordingly the award provided as follows:—

> 8. If within 6 weeks of the date hereof I shall have been notified in writing by either party that it desires to make representations to me as to the form which my Interim Award herein shall take, having regard to my Reasons, the foregoing shall be treated as a draft only and the final form will be determined following a further hearing for that purpose or as may be otherwise agreed by the parties. Unless I shall have been so notified within such 6 weeks the foregoing shall stand as my Interim Award.

The award concluded in the same form as that on liability, save that it was dated Aug. 6, 1990. In fact it appears to have reached the parties on Aug. 2, 1990.

On Aug. 3, 1990 Messrs. Fishburn Boxer, solicitors acting on behalf of Mr. Hiscox, wrote to Messrs. Elborne Mitchell, solicitors acting on behalf of Mr. Outhwaite, as follows:—

> We take the view, and we would be obliged if you would confirm that you agree, that if either party is contemplating making an application for leave to appeal to the Court on any aspect of the Award, time does not run until at the earliest six weeks from 6th August 1990.

On Aug. 6, 1990 Messrs. Elborne Mitchell replied:—

> It is our understanding of Point 8 of the Arbitrator's Award that if either party within six weeks of 6th August 1990 notifies the Arbitrator in writing that it desires to make representations as to the form of the Arbitrator's Award, then this Award dated 6th August 1990 shall be treated as a draft only and the final form will be determined following the further hearing and that the time for appeal will commence running from the date of this final form. If, however, neither party notifies the Arbitrator in writing within six weeks of 6th August 1990 that it desires to make representations, then the Award dated 6th August 1990 will be treated as the Arbitrator's Interim Award and that the time for appeal will commence running at six weeks from 6th August 1990, as you have stated in the second paragraph of your letter of 3rd August 1990.

In the event one or other or both parties notified Mr. MacCrindle that they required a further hearing and the award of Aug. 6 took effect as a draft only. That further hearing took place on Nov. 6, 1990. Thereafter Mr. MacCrindle signed a final interim award. This was dated Nov. 20, 1990 and concluded in the same way as the previous awards save that the address was "12 Rue d'Astorg, 75008 Paris, France".

When Mr. MacCrindle was in practice at the English Bar, he was in Chambers at 4 Essex Court, Temple, London and he remains a "door tenant" of those Chambers and, as such, has the services of their clerk. On Nov. 20, 1990 Mr. Hiscox's solicitors were informed by the clerk by fax that the award could be taken up at those Chambers on payment of the balance of the charges due and shortly thereafter they collected the award.

On Dec. 10, 1990 Mr. Hiscox initiated the following proceedings: (1) an originating summons for leave to appeal to the High Court under s. 1(3)(b) of the Arbitration Act 1979. (2) An originating summons for an order directing Mr. MacCrindle to state further reasons for his award, pursuant to s. 1(5) of the Arbitration Act, 1979. (3) An originating motion seeking remission of the award pursuant to s. 22 of the Arbitration Act, 1950.

We are not concerned with the merits of those proceedings, which at present stand adjourned. Our concern is with Mr. Justice Hirst's decision on a preliminary objection taken by Mr. Outhwaite that this was a Convention award and under the terms of the Arbitration Act, 1975, the High Court was disabled from adjudicating upon those proceedings. In summary, Mr. Justice Hirst held that this was not a Convention award because, although dated in Paris, it was "made" in London for the purposes of the 1975 Act. He also said that he was inclined to accept Mr. Hiscox's contention that even if it was a Convention award he had the necessary jurisdiction to adjudicate upon those proceedings which he had initiated. Finally he held that, had it been necessary to do so, he would have accepted Mr. Hiscox's contention that Mr. Outhwaite was estopped from asserting that this award was not subject to the Arbitration Acts, 1950 and 1979.

Was this a Convention award?

The Arbitration Act, 1975 is, as its long title proclaims,

> . . . an Act to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The definition of a "Convention award" is contained in s. 7(1) of the Act and is in the following terms:—

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

France and some 50 other countries including the United Kingdom are parties to the Convention.

Whether or not this was a Convention award depends solely upon whether it was "made" in France. Mr. Justice Hirst was greatly impressed by an article by Dr. F. A. Mann, who needs no introduction, in the quarterly journal "Arbitration International" in April, 1985. Doctor Mann expressed the view that:—

> . . . An award is "made" at the place at which the arbitration is held, i.e. at the arbitral seat. It is by no means necessarily identical with the place or places where hearings are being held or where the parties or the arbitrators reside. It is rather the place fixed in the contract or the submission or the minutes of the hearing or is found to be the central point of the arbitral proceedings. It is the place which in the case of institutional arbitration will always be certain, which otherwise will only in the rarest of cases be open to doubt, and which in no reported case seems ever to have been questionable, for, as experience shows, where there could be any doubt, the arbitrators will almost invariably determine the place by agreement with the parties or if necessary by their own ruling recorded in the minutes.
>
> This is the place which is independent of the place of meetings of the arbitrators, hearings with the parties, or of the actual signature or publication of the award. If a place other than the seat is held to be decisive, unacceptable consequences could ensue. An arbitration which in every possible sense is an English one could suddenly become foreign, merely because the arbitrator has gone to Paris and signed and, perhaps, dispatched the award there. If there are three arbitrators who hold an arbitration in London, but meet in Paris to consider their award, and sign it at their respective residences, viz., New York, Geneva and Tokio, the award should be treated as "made" in London, even if each arbitrator has indicated the place where he has signed it. The award, it is submitted, is no more than a part, the final and vital part of a procedure which must have a territorial central point or seat. It would be very odd if, possibly without the knowledge of the parties or even unwittingly, the arbitrators had the power to sever that part from the preceding procedure and thus give a totally different character to the whole.

It will be seen that Dr. Mann foresaw precisely the problem which has arisen here. Mr. Justice Hirst accepted this view and held that this award was "made" in London, that being:

> . . . the central point of the present arbitration proceedings.

I accept the problems which may arise if there is more than one arbitrator but, as Mr. Jonathan Sumption, Q.C., who has appeared for Mr. Outhwaite in this Court, pointed out, the award cannot be "made" unless and until the last arbitrator has assented to the award by signing it. This is the earliest time when the award can be said to be "made" and may determine where it is "made". Accordingly I do not think that it could be argued in such a case that the award could be "made" in three different countries. I also accept that if the place of signature, or of the last signature, on the award is the crucial test, an award may become, or fail to become, a Convention award almost by caprice and contrary to the expectations and, it may be, the wishes of the parties.

However, with regret, I am unable to accept Dr. Mann's and Mr. Justice Hirst's view that an award is "made" at the seat or central point of the arbitration. Where the Court is concerned with a statute avowedly designed to give effect to an international convention, in the event of ambiguity it is permissible to have regard to the travaux preparatoires in order to ascertain the mischief at which the Convention was directed. Those travaux, which we have seen, make it clear that the mischief was a tendency for countries to categorise awards as "foreign" or "domestic" for enforcement purposes by reference not to where the arbitration was held or the award was made, but by reference to such considerations as the nationality of the parties involved or the law governing the arbitral procedure.

Eight States wished to continue with this system, but it is reasonably clear that this view did not prevail and that the intention was to make the application of the Convention depend upon a universally applicable objective criterion, namely where the award was "made" regardless of what was the procedural law which governed the arbitration.

This conclusion leaves open the possibility that it is not the act of signing the award which constitutes making it, although it may do so, but the delivery of the award to the parties or a notification to them that it was ready for delivery. In the instant case the award was signed in Paris, but the parties were notified that it was ready for collection from 4 Essex Court in the Temple in London and delivery of it was taken from that address.

In *Brooke v. Mitchell*, (1840) 6 M. & W. 473 the plaintiff began an action in trespass. At that time such a cause of action terminated with the death of the aggrieved party. The plaintiff's claim was referred to arbitration on terms that in the event of the arbitrators disagreeing, as they did, the umpire—

> . . . should make and publish his umpirage in writing, ready to be delivered to the parties, or such of them as should require the same, on or before the 13th day of July [1839].

On July 11, 1839 the umpire made and executed his award, in the presence of and attested by two witnesses—

> . . . to whom it was fully made known and declared at the time of its execution.

At 10 a.m. on July 12 the plaintiff died, but this fact was unknown to the umpire and the attornies of the parties when during the afternoon of that day they received a letter from the umpire inviting them to attend at his office at 5 30 p.m. This they did and "he read over to them and declared his award".

It will be seen that on these facts there were three possible moments when it could be said that the award was "made and published", namely upon the signature before witnesses "to whom it was fully made known", upon the sending of the letter to the attornies saying that the umpire was about to make his award and when the umpire met the attornies and "read over to them and declared his award".

The case is of considerable interest and relevance, but is not decisive for two reasons. The first is that it was a decision of the Court of Exchequer and so is not binding upon this Court. The second is that the Convention and the Act giving effect to it do not fall to be construed in the light of the English law of arbitration, in so far as it may have its own peculiarities. Nevertheless the ratio decidendi seems to me to be sound and applicable. It was put this way:—

> [By Parke B. at p. 476:] I am of opinion that this award was sufficiently published, for the purpose of making it valid, in the lifetime of the plaintiff. For that purpose it is only necessary that the act should be complete, so far as the arbitrator is concerned; that he should have done some act whereby he became functus officio and has declared his final mind.
>
> [By Alderson B. at p. 478:] I apprehend that the meaning of publication, in the rule which regulates the time for an application to set aside an award, is not the publication of the award itself, but, by analogy to the statute, publication to the parties, i.e. when they have notice of its contents and are therefore in a situation to move to set it aside. But on the terms of this submission, the award is made and published, when the arbitrator, by some act, has expressed his final determination on the matters referred to him.
>
> [By Gurney B. at p. 478:] After the execution of the award, and its having been read over to the witnesses, there was as complete a publication of it as could be; the umpire could not afterwards revoke or alter it; and it was then ready to be delivered.

It may be said that the Court was there concerned with the double condition of "made and published", whereas we are only concerned with "made". Nevertheless I would accept that what we have to look for is the first point of time at which the arbitrator's award could not be revoked or altered (Gurney B.), the arbitrator has expressed his final determination (Alderson B.) and is functus officio (Parke B.). On the facts of that case the ceremony which involved the execution of the award in the presence of two witnesses "to whom it was fully made known and declared" served the double purpose of showing that the umpire regarded himself as functus officio and publishing the award. We only have to determine when Mr. MacCrindle could reasonably be regarded as having become functus officio, as being no longer able to revoke or vary his award and as having expressed his final determination.

I regard it as so unlikely that Mr. MacCrindle fully made known his award and declared it to his secretary — she would have been bored to tears — that I should require evidence that this took place. Clearly what she was doing was witnessing his signature. Thereafter the award was in the custody of Mr. MacCrindle, or the Post Office or his clerk until it was delivered to one of the parties. I accept that he could not have revoked or varied his award once his clerk had notified the parties that it was ready for collection, but quite clearly he could have done so at any earlier time.

One of the mysteries of this case is why Mr. MacCrindle ever included a statement in the award that it was dated in Paris. He had only to sign it and the problem would never have arisen. But he did. So I have to balance the fact that since he did not in fact revoke or vary the award once he had signed and dated it in Paris against the fact that he only became functus officio when he put it out of his power to do so by issuing a notification in London informing the parties that the award was ready for collection.

With very considerable doubts I have concluded that where an award states that it is dated or signed in a particular place, that is the place where it has been made. If no such statement is included, it should be taken to be made in the place where it is made available to the parties or from which it is sent to the parties. In no circumstances should it be necessary, and it cannot have been contemplated by the Convention, that there should be a factual inquiry by the enforcing Court as to where an award was signed if this does not appear on the face of the award.

I therefore conclude that this was a Convention award.

It is an interesting, but irrelevant, thought that for an arbitrator to "make" an award in Paris when the terms of reference require that the arbitration, which must include the award, "shall take place in London" may very well constitute technical misconduct which would justify setting it aside under s. 23 of the Arbitration Act, 1950 or a procedural mishap justifying remission under s. 22. In saying this I do not mean to suggest that the place where Mr. MacCrindle was when he appended his signature to the award has any significance. He may in fact have been on an aeroplane in mid-Atlantic. I mentioned in argument that I signified my concurrence as Master of the Rolls to the Solicitors' Indemnity Rules, 1984 by signing a copy in Anchorage, Alaska, but advisedly refrained from recording this fact lest it raise jurisdictional problems. It was the fact that Mr. MacCrindle declared in the award itself that it was dated in Paris which is significant and which alone could turn it into a Convention award as contrasted with an English domestic award. This transformation was something to which the parties never agreed and probably never contemplated.

I say that this thought is irrelevant for two reasons. First because if the English Court is still free to exercise its supervisory jurisdiction, which falls to be considered hereafter, there is no need to set the award aside in order that a new domestic award may be made and if the English Court is not free to exercise that jurisdiction, it cannot set it aside anyway. Second because it has not been contended on behalf of Mr. Hiscox that the word should not be "enforced", giving that word the extended meaning contemplated by s. 3(2) of the 1975 Act, because "the arbitral procedure was not in accordance with the agreement of the parties" (see s. 5(2)(e)).

Can the applications under the Arbitration Act 1950 be entertained?

Mr. Sumption says "No" and his argument goes like this: — (1) Under s. 3(1) of the 1975 Act, a Convention award —

> . . . shall, subject to the following provisions of this Act, be enforceable.

(2) Under s. 3(2):

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

(3) Under s. 5(1)

> Enforcement of a Convention award shall not be refused except in the cases mentioned in this section . . .

and since enforcement includes "reliance", subject to the exceptions contained in s. 5, a Convention award is a defence to any claim to relief, other than enforcement, in legal proceedings under the Arbitration Acts 1950 and 1979. (4) Under s. 5(2)(f) it is a ground for refusing to enforce a Convention award —

> . . . that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, *or under the law of which*, it was made (my emphasis).

The award became binding at the latest as soon as it was notified to the parties and before Mr. Hiscox initiated his proceedings. It has not been set aside or suspended by any competent authority either in this country (under whose law the arbitration was conducted and the award made) or in France if, by the laws of France, the French Courts are a competent authority in respect of an award made in France. (5) Under s. 5(5) —

> . . . where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f) of this section, the court before which enforcement of the award is sought [or in which the award is relied upon (see s. 3(2))] may, if it thinks fit, adjourn the proceedings . . .

(6) The only options open to Mr. Justice Hirst were to adjourn the 1950 Act proceedings indefinitely, since the position would never change, or dismiss the proceedings.

As is so often the case with Mr. Sumption's superbly crafted arguments, its simplicity and apparently irresistible logic amount to forensic prestidigitation. My admiration for the performance is unqualified, but I resolutely refuse to be beguiled by it.

Where enforcement is sought in one Convention country and an application is made to the "competent authority" in another Convention country to set the award aside or to suspend it, there is an obvious risk that the enforcing Court may overtake the competent authority in their respective dealings with the award. Hence s. 5(5) of the Act (and Art. VI of the Convention) which empowers the enforcing Court to stay its hand in order to enable the competent authority to discharge its duties in relation to the award.

If in this case enforcement had been sought in Germany, there would have been no problem so far as the German Court was concerned. It would have been faced with an award in respect of which applications had been to the English Courts, as the competent authority, to set aside or suspend the award. It would then have had to consider adjourning the enforcement proceedings under the equivalent in German law of s. 5(5). In saying this I appreciate that none of the three applications made by Mr. Hiscox mention setting aside or suspension. If the Convention had been tailored to meet the particular terminology of any one country, and in particular of this country, it may be that different terminology would have been used in s. 5(2)(f) and art. V 1(e). But in the context of an international Convention and an Act giving effect to it, what matters is not the technical terminology used in a national Court, but the nature of the relief for which application has been made.

In the case of an application for leave to appeal, what is being sought is an appeal leading to a variation, setting aside or remission of the award (see s. 1(2) of the 1979 Act). A variation involves a partial setting aside. A remission involves a total setting aside, because the award remitted has no validity unless and until it is confirmed by the arbitrator at a later date and so becomes to that extent a different award. In most cases he will make a new award in different terms.

In the case of an application for further reasons, the basis is that there are required for the purposes of an appeal (see s. 1(5)(b) of the 1979 Act) and will not be entertained in any other circumstances. It is ancillary to an appeal and similar considerations apply.

In the case of remission under s. 22, as in the case of remission on an appeal, the award is set aside.

In all three cases the making of the application itself produces a de facto suspension of a non-Convention award, because the Court will not allow an award to be enforced under s. 26 or by action on the award whilst such applications are pending. Under other systems of law, it may well be necessary to couple an application to the competent authority for the exercise of its jurisdiction to make a final order suspending or setting the award aside with an application to suspend the award meanwhile, but that is not necessary in this jurisdiction.

On the argument as it was advanced by Mr. Sumption in this appeal, a problem only arises where, as in this case, the competent authority is also the enforcing Court. But if Mr. Sumption's submissions are correct, no competent authority in *any* Convention country could ever set aside or suspend a Convention award, even if the award was being enforced in the normal sense of the word in another Convention country, e.g. Germany. As soon as an application was made for this purpose to the competent authority in another Convention country, e.g. France or the United Kingdom, that application would be met with the answer that the Court was also an enforcing Court in the sense that it was required to allow the award to be relied upon in any proceedings including those proceedings (see s. 3(2) giving effect to art. III of the Convention or the local equivalent of that sub-section) and accordingly could only adjourn the application. This makes nonsense of the role of the competent authority as contemplated by the Convention and leaves the award and arbitration entirely unsupervised.

The answer lies in treating a Court which is, or is sought to be treated as, both the competent authority and an enforcing Court as two separate Courts with the Judges wearing two different hats, or wigs. The Convention then works as it was intended to do. I accept that this may be stigmatised as giving the 1975 Act a "purposive" construction, but this is permissible and indeed necessary when construing a statute giving effect to an international Convention intended to be applied consistently in different jurisdictions. Put in another way, I do not accept that the authors of the Convention or Parliament could or did intend to achieve the result which flows from Mr. Sumption's submission and I do not think that the wording of the Act compels us to achieve it.

Estoppel

In *Amalgamated Investment and Property Company v. Texas Commerce International Bank Ltd.*, [1982] 1 Lloyd's Rep. 27 at p. 32, col. 1; [1982] 1 Q.B. 84 at p. 122, Lord Denning, M.R. summarised the modern law on estoppel by Convention as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

In the same case Lord Justice Eveleigh at p. 126 and Lord Justice Brandon at p. 37, col. 2; p. 130 approved the following passage from Spencer Bower and Turner on Estoppel by Representation, 3rd ed., p. 157, par. 157: —

> This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth from the statement of facts so assumed.

In *The Vistafjord*, [1988] 2 Lloyd's Rep. 343 Lord Justice Bingham, with the agreement of Lord Justice Taylor, approved a passage in a judgment of Mr. Justice Peter Gibson in *Hamel-Smith v. Pycroft Jetsave Ltd.* (unreported) from which he quoted at length (p. 351–2). In so doing he was approving criticisms of this passage. For present purposes all that need be said is that his judgment is authority for the proposition that estoppel by convention is not confined to an agreed assumption as to fact, but may be as to law (p. 351, col. 2); that the Court will give effect to the agreed assumption only if it would be unconscionable not to do so and that, once a common assumption is revealed to be erroneous, the estoppel will not apply to future dealings.

In this case the exchange of letters to the draft award shows quite clearly that both parties assumed that the fact that an award was "Dated at Paris" was no obstacle to the exercise by the English Courts of their supervisory jurisdiction under the Arbitration Acts, 1950 and 1979. Furthermore, as Mr. Klimt of Messrs. Fishburn Boxer pointed out in an affidavit sworn on Feb. 15 1991, and as is indeed obvious:

> If following receipt of Mr. McCrindle's initial draft award on 6th August 1990 — also signed in Paris — it had in any way been suggested by the Respondent that it might not be subject to the 1950 Act or 1979 Act supervising jurisdiction of the English Courts, my firm would have advised the Claimant to request Mr. MacCrindle to re-issue his award signed in London. Certainly if this had not been done and the Respondent had then or at any later time indicated that a jurisdiction point was to be taken the Applicant would have been advised to have that issue resolved by the court as a preliminary issue before incurring further expense in further preparing the applications now about to be heard.

The assumption was never questioned at the time when the present award was still only in draft form and an amendment could easily have been made. Indeed it was not questioned until after a date had been fixed for the hearing of Mr. Hiscox's applications. This was not due to any lack of candour on the part of Mr. Outhwaite or his advisers, but arose simply from the

fact that the argument which is now advanced on his behalf would be most unlikely to occur to anyone familiar with the law of arbitration, (such as the learned authors of Mustill & Boyd on Arbitration — see 2nd ed. p. 89–91 [The learned authors are, if I may say so, no slouches when it comes to uncovering new aspects of the law of arbitration. It was their discovery of an undetected loophole in s. 10 of the 1950 Act (Power of Court in certain cases to appoint an arbitrator or umpire) and the attention which they drew to it in the first edition which created a situation in which the Act had to be amended as a matter of urgency (see s. 58 of the Administration of Justice Act, 1985).] — who do not seem to have thought of it either that the only cause for surprise is that it has been thought of at all. On the basis of this common assumption Mr. Hiscox incurred costs in preparing for the hearing of his applications under the 1950 and 1979 Acts before he learnt that his right to make this was being challenged.

Mr. Sumption's answer to this reliance upon an estoppel is in two parts. It begins with the proposition that the parties cannot confer on the Court by estoppel a jurisdiction which the Court does not have by statute and whose exercise would be contrary to the mandatory provisions of the 1975 Act (see *Wilkinson v. Barking Corporation*, [1948] 1 Q.B. 721 per Lord Justice Asquith at p. 725 and Halsbury's Laws of England 4th ed., vol. 10 (1975) p. 326, par. 718, vol. 16 (1976) p. 1008, par. 1501, note 3). So be it, but the Court has the jurisdiction under the 1950 and 1979 Acts and the only question is whether the provisions of the 1975 Act prevent it exercising that jurisdiction. If, contrary to my view, it does so, this is only because the award, like the award on liability and the draft award, was made in Paris and is a Convention award having that consequence. It was quite clearly the assumption of the parties that either this was not in fact or law a Convention award or that, if it was, there was no impediment under the 1975 Act or otherwise to the exercise of the Court's jurisdiction under the 1950 and 1979 Acts.

Mr. Sumption's second answer was that if, as Mr. Justice Hirst had held, no question of jurisdiction was involved but what was being put forward was a blanket defence to the claims under the 1950 and 1979 Acts, the common assumption that the applications could be made within a particular time scale was not inconsistent with their being such a defence and that no party is under any legal or equitable obligation to give advance notice of any defence which they intend to advance.

While it is quite true that in general there is no obligation to disclose defences, this is not the case where there has been a common assumption that the defence is not available and one or other or both parties have acted on that assumption. In my judgment it would be unconscionable now to allow Mr. Outhwaite to renege from the common assumption which extended not only to the fact that applications under the 1950 and 1979 Acts could be made within a specified time, but by necessary implication that in respect of an award which stated on its face that it was "Dated at Paris" such applications could and would be heard and determined on their merits. In relation to any future awards the position will, of course, be different.

I would dismiss the appeal.

Lord Justice McCOWAN: The Arbitration Act, 1975 is:

> An Act to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

By s. 7(1) of the Act a "Convention award" is defined as:

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

In the present case Mr. Justice Hirst held that the award was not made in Paris, where the arbitrator signed it, but in England, which was, he said, "the central point of the arbitration proceedings". To hold otherwise, he said, would lead "to absurd results".

The Act being designed to give effect to the Convention, and there being ambiguity as to where an award is "made", our attention has properly been drawn to the travaux preparatoires. From these it is plain that a great deal of thought and debate was devoted to this issue and a conscious and deliberate decision was reached, after weighing the arguments for and against, in favour of defining a "Convention award" in terms of where the award was made as opposed to anywhere else, including where the arbitration took place. They recognised that that might work capriciously, but they felt that this disadvantage was outweighed by the advantages of simplicity and consistency.

That view having been reached by the Convention, and the 1975 Act being an Act to give effect to the Convention, it is not for our Courts to overturn it on the ground that it produces "absurd results". It is to be noted, moreover, that the draftsman of the Act (no doubt to give effect to the Convention) made a clear distinction between where the arbitration took place" (s. 5(2)(e)) and "in which . . . it [the award] was made" (s. 5(2)(f)). He was, therefore, capable of saying "where the arbitration took place" when he chose, but in fact chose not to in s. 5(2)(f).

A further argument is, however, advanced by Mr. Colman for the respondent that the award was made, not in Paris where the arbitrator signed it, but in London where the award was published to the parties. Till that moment, submits Mr. Colman, he could have changed his mind and hence was not functus officio.

I am unable to accept this argument. In *Brooke v. Mitchell* (1840) 6 M. & W. 473, Parke B. said at p. 476:

> . . . it is only necessary that the act should be complete, so far as the arbitrator is concerned; that he should have done some act whereby he became *functus officio* and has declared his final mind.

I see nothing to suggest in the present case that the arbitrator had not declared his final mind from the moment he put his conclusions in a formal document and signed it in front of a witness. Publication to the parties was not necessary to the validity of the award. Indeed, as Mr. Sumption pointed out, the place where the parties were notified of the award could be even more capricious than where the award was signed: suppose for example, the arbitrator sent notice to one party in the United States and to another in Italy, where would the award be made?

Accordingly, I am of the view that this was a "Convention award" within the terms of s. 7(1) of the Act. The effect of this is set out in s. 3, as follows:

> (1) A Convention award shall, subject to the following provisions of this Act, be enforceable —
>
> (a) in England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950;
>
> (2) Any Convention award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in the United Kingdom; and any reference in this Act to enforcing a Convention award shall be construed as including references to relying on such an award.

Section 5 deals with "refusal of enforcement" as follows:

> (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
>
> (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves . . .
>
> (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made . . .
>
> (5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f) of this section, the court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security.

The proceedings before Mr. Justice Hirst were brought by the respondent and consisted of: (a) A summons for leave to appeal under s. 1(3)(b) of the Arbitration Act 1979. (b) An originating summons for an order directing the arbitrator to state further reasons pursuant to s. 1(5) of the Arbitration Act 1979. (c) A notice of originating motion seeking the remission of the award to the arbitrator under s. 22 of the Arbitration Act 1950.

The appellants argue that the Courts of this country cannot entertain these applications. It is the appellants, therefore, who are relying on the Convention award by way of a defence, and the respondents who are obliged to rely on s. 5(2)(f) in order to defeat that reliance. There are three ways under that sub-section in which they might do that. They might show: (1) that the award has not yet become binding on the parties; or (2) that the award has been set aside by a competent authority of the country in which, or under the law of which, it was made; or (3) that the award has been suspended by such a competent authority.

By s. 3(2) of the Act, however, the award has to be —

> . . . treated as binding for all purposes on the persons as between whom it was made . . .

and as a matter of fact the award has not been set aside or suspended. In consequence, in my judgment, the respondents are unable to bring themselves within s. 5(2)(f).

Mr. Colman next argues, however, that the appellants can rely on s. 5(5), which reads:

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

Mr. Colman submits that Mr. Justice Hirst would be entitled under this sub-section to adjourn the appellant's defence, which Mr. Colman terms "the proceedings", while allowing the respondents' proceedings to continue. I cannot, I am afraid, accept this as a possible interpretation of the sub-section. What is meant by "the proceedings" is, in my judgment, those which were brought by the respondents. But in any event the proceedings can only be adjourned where an application has been made for the setting aside or suspension of the award, and in this case no such application has been made. I agree with Mr. Sumption's submission that sub-s. (5) is subsidiary to sub-s. (2)(f), and that its purpose is to "enable the competent authority to catch up."

For all these reasons I conclude that the plain words of the 1975 Act lead to the conclusion that the appellant's arguments on this aspect of the case must succeed. The results may be unsatisfactory and regrettable, but short of further legislation there is nothing, in my judgment, which the Courts can do about it.

On the issue of estoppel by convention, however, I find myself in complete agreement with the Master of the Rolls and cannot usefully add anything to what he has said. On this ground, therefore, I would dismiss the appeal.

Lord Justice LEGGATT:

The nature of the award

Section 7(1) of the Arbitration Act, 1975 ("the Act") defines "Convention award" as meaning for purposes of the Act

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

Mr. Colman submits that the award was not made in Paris: it was made in London where — (i) all the hearings took place and where the parties were domiciled; (ii) it was published to the parties; (iii) the seat or centre of gravity of the arbitration was located.

Mr. Justice Hirst accepted this submission saying —

> In my judgment, in construing the vital words of the 1975 Act, it is crucial to bear in mind that an award is not an isolated event, but rather the culminating stage in a process of arbitration which has passed through a number of earlier phases, from which in my judgment it cannot properly be divorced.

He considered that it would be "highly unreasonable" if an award could be "capriciously transferred" "simply and solely as a result of the fortuitous circumstance of the place of signature of the award." He adopted as "cogent and persuasive" the article by Dr. Mann, which the Master of the Rolls has cited, and held that —

> . . . in order to decide where an award is made, one must look at the arbitration as a whole, and not just at the place of signature, and the proper criterion is the central point of the arbitration proceedings.

The Judge accordingly rejected as "absurd" the result that the award was made in France.

In an article in Pace Law Review, vol. 6 (1985), p. 45, Dr. van den Berg has asserted that:

> The place of arbitration in the legal sense (also called "seat of arbitration") means that the arbitration law of the country where the arbitration takes place governs the arbitration [— and that it is that place —] which must be mentioned in the arbitral award as the place where the award is made.

No support is quoted for this theory, and the very fact that an arbitrator so experienced as Mr. MacCrindle elected to state that the award was made where he signed or executed it shows that Dr. van den Berg's theory is, to say the least, not universally applied. To me the term "made" simply does not mean "created at the arbitral seat": it means "effected", or "executed". The term "signed" may have been eschewed because, although an award may have to be signed by each of three arbitrators, it is not complete until the last of them affixes his signature.

In *Brooke v. Mitchell*, (1840) 6 M. & W. 473 the Court held that:

> . . . an award is "made and published", when the arbitrator, by some act has expressed his final determination on the matters referred to him [Alderson B.];

and that —

> . . . the instrument was complete as an award, and the umpire could make no alter-

ation in it, after the execution of it; he was then *functus officio* having declared his final mind [Parke B].

That happened here when the arbitrator signed in Paris the award, of which copies were afterwards made available to the parties.

I do not understand what the Judge had in mind when he said:

> . . . the award is not an isolated event, but rather the culminating stage in a process of arbitration . . . from which . . . it cannot properly be divorced.

An award is not "an event": it is only a "culminating stage" in the sense that it could not be produced without reference to and through the medium of evidence previously tendered. Of course it cannot be divorced from the arbitration because it represents the conclusion of it. But it is with the making, not the evolution, of the award that the Act is concerned, and that has nothing to do with where the arbitration takes place. In s. 5(2) of the Act the two contrasting formulae are used:

> . . . the law of the country where the award was made [par. (b)] [and] the law of the country where the arbitration took place [par. (e)].

It is obvious that the one may be different from the other.

From the moment of execution of an award it has all the legal attributes of an award; and it has them irrespective of the knowledge of the parties. The "travaux preparatoires" support the construction for which Mr. Sumption contends — that although the test is mechanical, it was adopted as being precise, and not susceptible to any real difference of approach between the Courts of different countries. The test of where the award was made was chosen as affording what the U.K. delegate called "an objective and easily applicable criterion." I accept Mr. Sumption's submission that the disadvantages of an occasional capricious solution are outweighed by the advantages of simplicity and consistency.

In this case the award was executed in France. The arbitrator began by saying, "Now I . . . do hereby make and publish this my interim award". In my judgment that correctly describes what happened. It therefore is a Convention award.

The effect of the award

Article III of the Convention provides (so far as material):

> Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles . . .

Translated into the Act, the formula used in s. 3(2) is exactly the same as in s. 36(2) of the Arbitration Act, 1950 in relation to a foreign award:

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

It is the phrase "any legal proceedings" that enables Mr. Sumption to argue that the award can be relied on by way of defence to applications made by Mr. Outhwaite in respect of the award. But for this, the dichotomy would have been clear between enforcement proceedings and other legal proceedings. Sections 3 to 6 of the Act are expressed by s. 2 to have effect with respect to the enforcement of Convention awards. It would, I suppose, be possible to argue (though Mr. Colman did not do so) that s. 3(2) should therefore be confined in its application to the enforcement of Convention awards; but that is difficult to reconcile with the phrases "for all purposes" and "in any legal proceedings". It is plain that ss. 4 to 6 have no purpose except to control enforcement proceedings. Section 5(2)(f) envisages that before enforcement is attempted the Courts of the country in which, or under the law of which, the award was made may suspend it or set it aside. Section 5(5) gives power to the enforcing Court to adjourn pending proceedings for the setting aside or suspension of the award. These latter subsections contemplate that in the present case the Courts of France and England respectively will or may have power to set aside or suspend; that that power may have been exercised before enforcement proceedings are brought here; and that if they are brought here they may be adjourned.

Mr. Sumption argues that by force of the words "has been" in s. 5(2)(f) the English court's task is confined to granting or withholding enforcement, once the award has been classified as a Convention award. Section 5(2) is concerned with the legal status of the award as issued or the agreement or procedure which led to it: none of the paragraphs in the sub-section is concerned with re-opening the award on its merits. According to Mr. Sumption's argument, since s. 5 does not confer any jurisdiction, as soon as it has been ascertained that the award has become binding (as it clearly has), and has not been set aside or suspended (as it clearly has not), the Court has no power to adjourn enforcement proceedings. Section 5(5) does not apply to a case where an English Court is both the enforcing Court and the Court to which an application is made to adjourn the award or set it aside. The sub-section is merely ancillary to s. 5(2)(f), which assumes that when the matter is first before an English Court there has already been an order suspending it or setting it aside.

Mr. Sumption remarks that if the English Court could apply its own curial law, it would be exercising the right to do what was proposed by the eight-power amendment to the Convention, and rejected. That would have applied the Convention to the enforcement of awards "other than those considered as domestic in the country in which they are relied on."

Mr. Sumption's construction precludes the curial Court from intervening if it is itself the enforcing Court. He argues that it is appropriate that, whether its rights are limited or not, the curial Court should not be able to exercise any superivsory jurisdiction in relation to a Convention award. In such a case, the Act is designed to limit the objections to enforcement to those specified in the Act itself. Because the award was not made here, it is the decisions of a foreign Court that the enforcing Court is empowered to consider. This produces the result, according to Mr. Sumption, that the English Court can only exercise jurisdiction in relation to an award of a country outside the Convention. It is, however, not necessarily under the law of a foreign country that the award was made.

The Master of the Rolls has described how he would reconcile the enforcing and supervisory jurisdictions of the English Court. It would be a sensible solution. But unfortunately he gives no indication of how this result could be achieved by way of interpretation of the Act.

The result of the rival arguments is either that the English Court cannot do anything to a Convention award except enforce it or that the English Court retains all its powers to interfere with such an award before considering enforcement. The latter result is achieved by adopting what is termed a purposive approach. It involves treating "any legal proceedings" in s. 3(2) as meaning "any enforcement proceedings".

Having anxiously considered this dilemma I do not feel able to construe the Act so as to preserve a locus for the English Court when acting in its supervisory capacity. By definition a Convention award means an arbitration award made abroad. The Act does not envisage that the award will be subject to the supervisory jurisdiction of the English Court. It follows that s. 5(2)(f) is worded as one would expect it to be, not contemplating that the English Court will be the "competent authority". It only could be the competent authority if the award, though made abroad, was made under English law. In practice an adjournment under s. 5(5) of enforcement proceedings would be of no avail, because no application to the English Court for the setting aside or suspension of a Convention award could be successful in face of s. 3(2), if that sub-section means what it says. For the purposive argument to succeed, in s. 3(2) "any legal proceedings" would have to be construed as meaning either "any legal proceedings other than proceedings to set aside or suspend" or "any proceedings for the enforcement of a Convention award". As to the former, no such limitation is warranted by the language used. As to the latter, the provision about reliance is needed not merely in the context of enforcement but for the protection, for example, of a defendant who is sued here on a cause of action already determined in his favour by means of a Convention award.

Because the language of s. 3(2) is wide and unconfined, I see no escape from the conclusion that it can be relied on outside the realm of enforcement to meet all proceedings, including proceedings to set aside or suspend the award.

Estoppel

Mr. Colman argued that Mr. Outhwaite is estopped from contending that Mr. Hiscox cannot pursue his applications because the award is a Convention award. Mr. Justice Hirst held that Mr. Colman was in all respects correct in submitting that this was a classic case of estoppel by Convention. It was common ground throughout that the award was subject to the English Arbitration Acts; Mr. Outhwaite knew that Mr. Hiscox thought that it was; and Mr. Hiscox relied on this common assumption, with the result that it would be unconscionable to allow Mr. Outhwaite to claim that the Acts do not apply. That nobody had thought of the point now relied on by Mr. Outhwaite until shortly before the hearing before Mr. Justice Hirst is obvious from the affidavit of Mr. Hiscox's solicitor, Mr. Klimt, and is accepted by Mr. Sumption.

The relevant law is conveniently summarised in the passages cited by the Master of the Rolls from *Amalgamated Investment Property Co. Ltd. v. Texas Commercial International Bank Ltd.*, [1982] 1 Lloyd's Rep. 27; [1982] Q.B. 84. In that case at p. 31, col. 2; p. 121C Lord Denning also said —

> If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it — on the faith of which each of them — to the knowledge of the other — Acts and conducts their mutual affairs — they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether there particular interpretation is correct or not — or whether they were mistaken or not — or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretations on their contract, and cannot be allowed to go back on it.

And at p. 32, col. 1; p. 121F he added —

> They are bound by the "conventional basis" on which they conducted their affairs. The reason is because it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract — when it would be inequitable to do so, having regard to dealings which have taken place between the parties.

Mr. Sumption submits that there was no representation by Mr. Outhwaite on which Mr. Hiscox can be said to have acted. True it is that both parties assumed that English law applied as the curial law, but that told nothing about what law would apply if the award were not signed in this country. The plea that the award was a Convention award may be regarded as matter of defence: if so, Mr. Outhwaite never undertook not to take advantage of it. Alternatively, if it be regarded as going to jurisdiction, the parties cannot have achieved the result that the award is not a Convention award merely by assuming that it would not be executed in Paris.

There can have been no question of the parties assuming that the award was not a Convention award, because the fact that it is, or might be said to be, had not crossed their minds. By the same token it cannot sensibly be suggested that it was common ground that because the arbitration was a domestic arbitration the Court's supervisory jurisdiction would be unimpaired. Mr. Outhwaite and his advisers never encouraged Mr. Hiscox or his advisers to pursue a remedy in the English Courts or to believe that if he did so no jurisdictional objection would be taken. Still less did they represent that the fact that the award was expressed to be "Dated at Paris" would have, or would not have, any particular effect on the Court's jurisdiction to entertain Mr. Hiscox's applications. Neither party took any view, or formed any apprehension, about the effect on the award of its having been made in Paris. There was therefore no basis for the establishment of a convention between them about the consequences of the fact that it was so made. By analogy, I cannot see how the fact that parties fail to realize that a defendant can in the circumstances avail himself of a limitation defence, will preclude the defendant from doing so in due time. In short, there was here no common assumption about the effect of the award having been made in France: there was a mutual failure to appreciate that that fact was material and why it was. I therefore do not consider that Mr. Hiscox can by raising an estoppel prevent the award from having effect as a Convention award.

I would allow the appeal.

[*Order: Appeal dismissed with costs. Certificate for three Counsel refused. Leave to appeal to the House of Lords granted on the undertaking of the Appellant not to object to the matter being heard by the Commercial Court pending the appeal to the House of Lords.*]

COURT OF APPEAL

Mar. 11 and 13, 1991

KURT A. BECHER G.m.b.H. & Co. K.G.
v.
ROPLAK ENTERPRISES S.A.
ROPLAK ENTERPRISES S.A.
v.
TRADAX OCEAN TRANSPORTATION S.A.

(THE "WORLD NAVIGATOR")

Before Lord Justice PARKER,
Lord Justice STAUGHTON and
Sir David CROOM-JOHNSON

Sale of goods (f.o.b.) — Loading obligation — Demurrage — Cargo of maize to be shipped f.o.b. Rosario — Vessel delayed due to congestion and documents not being in order — Whether sellers in breach of obligation to load — Whether buyers entitled to demurrage.

The sellers (Tradax) sold to the buyers (Roplak) 30,000 tonnes of maize f.o.b. Rosario in three instalments. The third instalment of 10,000 tonnes was due for shipment in June. Roplak sold that 10,000 tonnes together with 2000 tonnes from another source to the buyers (Becher). The maize was sold on the terms of two standard sets of conditions, GAFTA 64 and the Argentine Centro conditions.

The Argentine Centro conditions provided inter alia:

> Loading Rate: Once vessel is berthed alongside berth suitable to sellers . . . sellers guarantee provided vessel is able to receive, a minimum average loading rate of 500 tonnes per weather working day . . . but sellers shall not be responsible for any time lost due to . . . any other cause of Force Majeure . . .
>
> Pre-advice: Buyers to give sellers at least fifteen days notice of readiness of vessel to load . . .

GAFTA 64 provided inter alia:

> 7. Delivery. Buyers shall tender vessel in readiness to load between ——— both dates inclusive. Sellers shall be entitled to receive at least ——— consecutive days notice of probable readiness of vessel . . . Vessel to load in accordance with the custom of the port of loading . . .

By telex of May 24, 1985, the buyers nominated the vessel *World Navigator* to load the June shipment of 12,000 tonnes. The vessel arrived at Zona Comun on June 13, 1985, and tendered notice of readiness. Because of congestion at Rosario roads the vessel was instructed to remain at Zona Comun.

Owing to the fact that the shipper's documentation was not in order, *World Navigator* lost her place in the loading schedule and was overtaken by other vessels. She eventually arrived at Rosario on July 11, 1985, and was moored at unit 6 on July 18, loaded a total of 24,000 tonnes and completed loading on July 22, 1985.

The buyers claimed from the sellers damages for wrongfully detaining the vessel *World Navigator* at the port prior to commencing loading. The buyers contended that the sellers had the obligation to deliver the goods by loading them when the vessel was ready to receive them. The delay in loading the 12,000 tonnes was on the sellers and they were liable for the additional demurrage incurred.

The disputes were referred to arbitration. The Board of Appeal of GAFTA rejected the buyers' claim stating that the load rate was 500 tonnes per weather working day as per Centro terms. Laytime commenced earlier on June 26, 1985, and the vessel completed loading 24,000 tonnes on July 22, 1985. The vessel used less than 18 days (allowing for time not counting) of laytime while under the contract 24 days were allowed.

The buyers appealed.

———*Held*, by Q.B. (Com. Ct.) (PHILLIPS, J.), that (1) the loading rate in the Centro form did, on its true construction set out a comprehensive statement of the sellers' obligations in relation to loading; the obvious object of a clause dealing with loading rates was to define the rights and obligations of the parties in relation to loading in a manner that produced certainty; where a loading rate was specified it was implicit that the rate in question was a minimum rate; and the clause was concerned with a comprehensive definition of the sellers' loading obligation and not merely a guarantee that the performance required by some alternative obligation would not fall below the specified rate; cl. 7 of GAFTA 64 primarily contemplated those aspects of customary procedure which affected the speed of loading such as work at weekends; the Centro form loading rate clause constituted an alternative stipulation governing such matters and it displaced the GAFTA provision;

(2) the evidence demonstrated that *World Navigator* could not berth without the co-operation of the sellers in providing appropriate loading documentation and it was common ground that it was necessary to imply into the f.o.b. contract a term requiring the sellers to provide that co-operation; there was an implied obligation on the sellers to act with reasonable despatch and in accordance with ordinary practice in doing those acts which were necessary to enable the buyers to present their vessel for loading at the berth; if availability of goods sold was necessary to enable the buyers' vessel to berth there was an absolute obligation on the sellers to have the goods available when the vessel arrived provided 15 days' notice had been given; it might be that this obligation could be extended to cover the procurement of documentation if this was something solely within the control of the sellers;

(3) if the sellers were in breach of the duty that they were under, the immediate consequence of