JUDGMENT : Mr Justice Walker : Commercial Court. 18th March 2008

Introduction

1. An application has been made by the defendant, which I shall refer to as "PDV", to set aside a freezing order granted by Teare J on 24 January 2008 under s 44 of the Arbitration Act 1996 ("the 1996 Act"). The order lasted only for a limited time. There was a cross-application by the claimant, which I shall refer to as "Mobil", to continue Teare J's order. On 18 March 2008 I granted PDV's application and refused Mobil's. I now give my reasons for doing so.

2. Freezing orders are sometimes known as "*Mareva* injunctions" because one of the early cases in which a freezing order was granted was *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyds Reports 509. They are made to prevent what has been described as "dissipation of assets". As a general rule the court will only make an order against someone ("the respondent") if the person seeking it ("the applicant") has given notice to the respondent and the respondent has had an opportunity to be heard. However, in accordance with an exceptional procedure for interim applications under the Civil Procedure Rules, the order in the present case was initially granted without notice and without giving PDV that opportunity. When freezing orders are first made the applicant must justify the use of this exceptional procedure, and applicants generally do so by saying that there is a substantial risk that advance notice would defeat the purpose of the order. At any time, however, it is open to the respondent to ask the court to set aside the order, and that is what PDV has done in the present case.

3. Civil Procedure Rule ("CPR") 62.10 provides that an arbitration application such as that of PDV is to be heard in private unless the court orders that the hearing be in public. As the order of 24 January 2008 had received considerable publicity I concluded that the hearing should be in public save for those aspects of the matter which were confidential. It follows that the present judgment, which is a public document, cannot go into the detail of matters that for reasons of confidentiality were argued in private. I believe, however, that I can deal with all arguments sufficiently in this judgment without any need for a confidential annex.

4. PDV is a corporate entity under the laws of the Bolivarian Republic of Venezuela ("Venezuela"). It is the national oil company of Venezuela, and is wholly owned by Venezuela. Recently PDV published the book value of its assets as at September 2007 in US dollars ("$"). The book value of PDV's net assets in September 2007 was $56 billion (in the sense of thousand million). I am not aware of any previous freezing order made by the courts of England and Wales against a company which said that its net assets had a book value of this size. The order froze PDV's assets worldwide up to a total sum of $12 billion. I am not aware of any previous freezing order made by the courts of England and Wales for a total sum of this size.

5. Unprecedented features of the order do not in themselves give rise to any assumption that it should not have been sought. However there is one potential assumption which needs to be dispelled at the outset. Worldwide freezing orders are made only sparingly. In cases where they are made there is usually compelling evidence of serious international fraud. It is important to stress at the outset that in the present case there is no suggestion whatever of fraud on the part of PDV or any entity or person associated with it.

6. The claim said to justify the freezing order is a contractual claim under a guarantee of certain obligations of one of PDV's subsidiary companies. This company was formerly known as Lagoven Cerro Negro, S.A., and changed its name to PDVSA Cerro Negro, S.A.. I shall refer to it as "CN". Mobil is a Bahamian company forming part of the Exxon Mobil group ("Exxon Mobil"). Exxon Mobil is based in the United States of America and operates globally. Mobil is the assignee of certain rights of another company in the Exxon Mobil group, Mobil Producción e Industrialización, Inc. ("MPIV"), a corporation under the laws of the State of Delaware, USA.

7. In 1997 Exxon Mobil wished to participate in a project to exploit and up-grade extra-heavy oil to be obtained from the Cerro Negro area of the Orinoco belt in Venezuela and deal commercially with the up-graded product ("the Project"). This was achieved by an Association Agreement dated 28 October 1997 and made between CN, MPIV and Veba Oel Venezuela Orinoco GmbH, a limited liability company under the laws of Germany ("Veba OVO"). MPIV assigned its rights under the Association Agreement the following day, 29 October 1997, to Mobil.

8. Venezuelan legislation which took effect in June 2007 in relation to Venezuelan oil brought about the "*migration*" of non-Venezuelan oil interests to companies which were at least 60% Venezuelan owned. It is convenient to refer to this event as "*the expropriation*" and to the relevant legislation as "*the expropriation legislation*". The expropriation legislation envisaged that replacement commercial arrangements would be made with those affected by the expropriation. Negotiations in that regard led to agreement with many other oil companies, but not with Mobil.

9. Mobil says that in these circumstances it has three remedies available to it. First, on 6 September 2007 Mobil began an arbitration against Venezuela at the International Centre for Settlement of Investment Disputes ("ICSID"). Second, Mobil said that under article 15 of the Association Agreement CN agreed to provide compensation in the event of a "Discriminatory Action" that caused "Material Adverse Impact," as these terms are defined in the Association Agreement, and that the expropriation fell within these terms as so defined. This remedy was by the terms of the Association Agreement enforceable by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("the ICC") in New York. Third, on 10 October 2007 Mobil issued PDV with a demand under a guarantee dated 28 October 1997 ("the Guarantee") by which PDV guaranteed the performance of the obligations of CN under the Association Agreement. This remedy was by the terms of the Guarantee also enforceable by ICC arbitration in New York.

10. It was in respect of this third remedy only that Mobil sought a freezing order from this court. At the time the order was sought Mobil had not commenced any ICC arbitration, but it told the court that it would do so. Mobil says that the loss caused to it is enormous, as is the amount payable to it pursuant to the Guarantee – hence the $12 billion total amount specified in the order.

11. Both the Association Agreement and the Guarantee are governed by the law of Venezuela. Both are in the Spanish language. Where it is necessary to cite specific provisions I shall use translations which are agreed by the parties.

12. Freezing orders generally require that within a short period after service of the order the defendant must provide the claimant with information as to the value, location and details of assets over a minimum value. In the present case paragraph 11 of the order specifies that the minimum value is $5,000 and requires the provision of such information within 5 working days of service of the order. It is common ground that, as I shall explain in the next section of this judgment, service has not yet been effected and accordingly the obligation to provide information has not yet arisen.

Service on PDV out of the jurisdiction

13. PDV is based in Venezuela. It has no branch in England and Wales. Mobil had no basis to suggest that PDV could be personally served with the proceedings in England and Wales under the normal procedures for service here. Accordingly it sought permission to serve PDV out of the jurisdiction. Teare J granted permission as set out in paragraph 5 of his order. He did so under CPR 62.5(1)(b), which gives the court a discretion to order that an arbitration claim form seeking relief under s 44 of the 1996 Act may be served out of the jurisdiction.

14. Mobil contends that the court's discretion under CPR 62.5(1)(b) is to be exercised in the same way and according to the same principles as it should be exercised in respect of the court's power to grant remedies sought under s 44 of the 1996 Act. If it is right to grant the remedy, absent exceptional circumstances, it would be right to grant permission to serve the arbitration claim form out of the jurisdiction. If it is not right to grant any remedy under s 44, the permission granted by Teare J should also be set aside.

15. PDV did not contest this way of approaching the matter. I shall accordingly adopt it for present purposes.

16. Service out of the jurisdiction in the present case involves formal procedures which can take time. PDV has insisted that those procedures be followed, and this is why service has not yet been effected. Mobil has issued an application seeking to simplify matters by the grant of an order for service by an alternative method. I have adjourned that application for reasons which I shall give later in this judgment.

Legal principles governing freezing orders under s 44

17. Miss Catharine Otton-Goulder QC appears with Mr Richard Slade, Mr Thomas Sprange and Mr Michael Bools for Mobil. They advance Mobil's application for a freezing order exclusively under s 44 of the 1996 Act. It is open to parties to an arbitration agreement to contract out of s 44: see s 4(2) and the opening words to s 44(1). The arbitration agreement in the Guarantee does not do so.

18. The relevant part of s 44(1) for the purposes of Mobil's application provides that "*the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings*". One of the matters "*listed below*" is the grant of an interim injunction. By s 37 of the Supreme Court Act 1981 ("the 1981 Act") it is provided that:

    The High Court may by order (whether interlocutory or final) grant an injunction…in all cases in which it appears to the court to be just and convenient to do so."

19. Oral argument proceeded on the basis that, subject to limitations imposed by s 44 of the 1996 Act, the power under s 37 of the 1981 Act is, so far as it enables freezing orders, a power available to the court for the purposes of and in relation to arbitral proceedings. Mobil reserved its position on limitations imposed by s 44 in the event that the present matter were to go to a higher court. In any event, however, Mobil accepts that in order to sustain the freezing order it must show that the provisions of that order are "just and convenient" as required by s 37 of the 1981 Act. This is a substantial hurdle for Mobil to surmount.

20. Mr Gordon Pollock QC appears with Mr Paul McGrath for PDV. They say that this hurdle is not surmounted for reasons which I analyse below.

21. Further, there are two important restrictions on the making of applications under s 44. First, under s 44(4), if the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties. Second, under s 44(5), in any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively. It is common ground in the present case that as the tribunal has yet to be constituted s 44(5) does not arise. As to s 44(4), s 44(3) provides:

    If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

22. Accordingly Mobil accepts that in order to overcome s 44(4) it must surmount a second hurdle by showing that "*the case is one of urgency*" within s 44(3). PDV acknowledges that the right to apply under s 44(3) is not restricted to orders for the preservation of evidence or assets, but includes other orders to the extent necessary for the purpose of preserving evidence or assets (see ***Cetelem SA v Roust Holdings Ltd*** [2005] 1 WLR 355). However PDV firmly contests the assertion that the case is one of urgency.

23. Mobil recognises that it must surmount a third hurdle. It is common ground that the ICC arbitration under the Guarantee, which Mobil has now commenced, has its seat in New York. The 1996 Act deals in s 2 with the scope of application of its provisions. Subsection (3) deals in part with orders under s 44. It needs to be seen in context, so I quote below from subsections (1) to (4):

2 (1) The provisions of this Part apply where the seat of the arbitration is in England and Wales …

(2) The following sections apply even if the seat of the arbitration is outside England and Wales … or no seat has been designated or determined –

(a) sections 9 to 11 (stay of legal proceedings, etc.) and

(b) section 66 (enforcement of arbitral awards).

(3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales … or no seat has been designated or determined–

(a) section 43 (securing the attendance of witnesses), and

(b) section 44 (court powers exercisable in support of arbitral proceedings);

but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales …, or that when designated or determined the seat is likely to be outside England and Wales …, makes it inappropriate to do so.

(4) The court may exercise a power conferred by any provision of this Part not mentioned in subsection (2) or (3) for the purpose of supporting the arbitral process where

(a) no seat of the arbitration has been determined, and

(b) by reason of a connection with England and Wales … the court is satisfied that it is appropriate to do so.

24. Miss Otton-Goulder contends that the impact of s 2(3) must be left to the final stage of analysis. This contention is opposed by Mr Pollock, who submits that the relevant part of s 2(3) is simply there to make it clear that the seat being abroad is a factor which may justify refusal. For reasons given later in this judgment I consider that Mr Pollock is correct.

25. However, in the present case I do not need to decide this point. In the present case I am satisfied that leaving the impact of s 2(3) to a final stage of analysis will not disadvantage PDV, and I am content to take that course as a matter of discretion.

26. If PDV is right on any of the three hurdles identified above, then the freezing order must be set aside. When considering these hurdles, however, because I have chosen to leave the impact of s 2(3) to the final stage, I shall initially consider the first two hurdles by examining whether –if one works on the basis of an assumption that the law of England and Wales is the law of the seat of the arbitration – Mobil is able to show that the grant of the order is "*just and convenient*" and that "*the case is one of urgency*".

27. PDV's points were not formulated with this assumption in mind. How do they fall to be considered under this approach? It seems to me that particular points fall to be dealt with as follows:

i) Mr Pollock puts at the forefront of his argument a main contention that – unless the case is one of fraud – the first hurdle will not be surmounted because it will only be just and convenient (the test under s 37 of the 1981 Act) for this court to grant a worldwide freezing order if there is a connection with England and Wales. If that is right then it seems to me that, absent any other connection here, the fact that the seat of the arbitration is abroad would make it inappropriate (the test under s 2(3) of the 1996 Act) to grant an order under s 44 and Mobil would fail the third hurdle. It is common ground that this court has no personal jurisdiction over PDV. As to other connections, Mobil asserts that PDV has assets here, but PDV denies this. Of course if the law of England and Wales were the law of the seat of the arbitration then there would be a connection. It seems to me that, as I have chosen to proceed initially by assuming that the law of England and Wales is the law of the seat of the arbitration, I must therefore leave Mr Pollock's main contention to the final stage of my analysis – at which stage another point advanced by PDV would also come into play (see below).

ii) PDV contends that the first hurdle will not be surmounted for another reason. Here PDV says that it will only be just and convenient for this court to grant a worldwide freezing order if there is a good arguable case that Mobil has an accrued cause of action against it. I shall deal with this point as the first stage of my analysis.

iii) It is common ground that for the purposes of the first hurdle a freezing order will only be just and convenient if there is a real risk of "*dissipation of assets*". I place these words in quotation marks for reasons which I shall explain below. PDV contends that there is no such risk, while Mobil strenuously argues to the contrary. I shall deal with "d*issipation* of assets" as the second stage of my analysis. Stage 2A will examine the law as to what "*dissipation of assets*" involves. Stage 2B will consider the factual material relied on by Mobil. It seems to me that this aspect of the case is closely bound up with the second hurdle: whether "*the case is one of urgency*" within s 44(3) of the 1996 Act. I shall deal with "*urgency*" as the third stage of my analysis.

iv) That leaves the impact of s 2(3) of the 1996 Act as the fourth and final stage of analysis. It begins with a first aspect of Mr Pollock's main contention: the question of principle whether, given that fraud is not alleged, it will only be just and convenient for this court to grant a worldwide freezing order if there is a connection with England and Wales. I shall refer to this question of principle as stage 4A. The remaining aspect is whether Mobil is right to say that there is such a connection in the form of assets of PDV here: this will be stage 4B. At stage 4C a separate contention on behalf of PDV comes into play. Here PDV identifies two features of the law of New York which it says point against this court granting a worldwide freezing order – either because

under s 37 of the 1981 Act they militate against such an order being "just and convenient" or because under s 2(3) of the 1996 Act they make it "inappropriate" to exercise power under s 44 of that Act.

My conclusions on each of stages 1 to 4

28. My conclusions are as follows:

i) At the first stage I am persuaded that Mobil has a sufficiently arguable case, for present purposes only, that it has an accrued cause of action.

ii) At stage 2, however, I conclude that Mobil cannot surmount the first hurdle (s 37 of the 1981 Act) because it has no good arguable case that PDV's conduct in relation to its assets is unjustified.

iii) At stage 3 I conclude that Mobil cannot surmount the second hurdle (s 44(3) of the 1996 Act) because it cannot show that the case is one of urgency.

iv) At stage 4A I conclude that in order to surmount the first hurdle Mobil, in the absence of any exceptional feature such as fraud, would have had to demonstrate a link with this jurisdiction in the form of substantial assets of PDV located here. At stage 4B I conclude that Mobil cannot demonstrate such a link and thus fails to surmount the first hurdle for this reason as well as the reason identified at stage 2.

v) Equally at stages 4A and 4B I conclude that, in the absence of any exceptional feature such as fraud, and in the absence of substantial assets of PDV located here, the fact that the seat of the arbitration is not here makes it inappropriate to grant an order under s 2(3) of the 1996 Act and thus Mobil fails the third hurdle.

vi) At stage 4C I conclude that it is inappropriate for me to determine whether particular features of New York law point against the grant of a worldwide freezing order.

29. The following sections of this judgment explain my reasons on each stage in turn. I then give my reasons for thinking that the court is not statutorily required to leave the impact of s 2(3) of the 1996 Act to a final stage of analysis. In conclusion I explain why I adjourned the application to permit service by an alternative method and I deal with consequential matters.

Stage 1: accrued cause of action

30. Mobil's claim against PDV is under article 3 of the Guarantee. By that article if CN failed to perform any of its obligations in the manner and at the time required, PDV undertook to perform or procure the performance of such obligation upon demand. Whether Mobil has any accrued cause of action against PDV therefore depends on whether on 10 October 2007, the date of Mobil's demand under the guarantee, CN had failed to perform any of its obligations in the manner and at the time required. The demand identified 3 particular failures of CN under Article XV of the Association Agreement. That article states:

ARTICLE XV

CONSEQUENCES OF CERTAIN GOVERNMENTAL ACTIONS

15.1 General (a) In the event that a Foreign Party determines that a Discriminatory Action has occurred which may lead to a Material Adverse Impact, such Foreign Party shall promptly provide notice of the Discriminatory Action to Lagoven CN. Further, in the event that such Foreign Party determines that it has actually suffered a Material Adverse Impact as a result of Discriminatory Actions of which it has previously notified Lagoven CN, it must promptly give notice of such determination to Lagoven CN (a "Notice of Discriminatory Action"). To the extent any legal remedy is available to reverse or obtain relief from such Discriminatory Action, the Foreign Party will commence and pursue legal action to mitigate any damages suffered as a result of the Discriminatory Action. If Lagoven CN concurs that Discriminatory Action(s) have occurred and have resulted in a Material Adverse Impact, Lagoven CN shall cooperate with the Foreign party in pursuing the aforesaid legal action and the Parties shall negotiate in good faith compensatory damages and/or possible modifications to the Agreement designed to restore the economic benefit that the Foreign Party would have received had the Discriminatory Action(s) not occurred. Any net proceeds received by the Foreign Party as a result of pursuit of the aforesaid legal action (after deduction of the Foreign Party's legal costs incurred in connection therewith) will be (i) applied against any amounts ultimately determined to be owing by Lagoven CN pursuant to this Article or (ii) reimbursed to Lagoven CN if Lagoven CN has previously made payment to the Foreign Party with respect to the Discriminatory Action(s) in question.

(b) If Lagoven CN does not, within ninety (90) days of receiving a Notice of Discriminatory Action, give the Foreign Party notice of its concurrence that Discriminatory Action(s) resulting in a Materials Adverse Impact have occurred, any Party may commence binding arbitration proceedings in accordance with Section 18.2. In no event, however, may any Party initiate arbitration proceedings more than once per calendar year. The scope of the arbitration proceedings shall include: (i) a determination of whether one or more Discriminatory Actions have occurred and, if so, whether such events have had a Material Adverse Impact on the Foreign Party: and (ii) in the event of a positive response to the two questions specified in clause (i) of this sentence, an award of damages to compensate the Foreign Party for the economic consequences of the Discriminatory Action suffered by it to date and recommendations on amendments to the Agreements that would restore the economic benefit that the Foreign Party would have received had the Discriminatory Action(s) not occurred."

(c) In the event that a Discriminatory Action for which Lagoven CN is paying compensation to a Foreign Party, or in response to which the Agreement has been modified, is reversed or otherwise ceases to be in effect, the obligation of Lagoven CN to pay compensation, or the modification made to the Agreement, shall cease to be effective: provided that the Foreign Party shall have been compensated for the damages previously suffered as a result of such Discriminatory Action: and provided further that, in the event that Lagoven CN has made

payments to the Foreign Party with respect to a Discriminatory Action which is reversed or otherwise ceases to be in effect in excess of the damages actually suffered as a result of such Discriminatory Action, the Foreign Party shall promptly reimburse to Lagoven CN the amount of such excess

15.2 Limitations on Lagoven CN's Obligation. (a) Notwithstanding the foregoing, after the first period of six (6) consecutive months during which the Price of Brent Crude Oil is in excess of the Threshold Price, Lagoven CN will not be required to compensate any Foreign Party for any Discriminatory Action(s) with respect to any Fiscal Year in which the average Price of Brent Crude Oil is in excess of the Threshold Price, and such Foreign Party received Net Cash Flow commensurate, after taking into account the effect of the Discriminatory Action(s), with a reference price for the Production produced by the Parties that bears at least a reasonable relationship, adjusted for quality and transportation differences, to the Threshold Cash Flow for such Fiscal Year.

(b) In any event, Lagoven CN shall have no obligation to compensate a Foreign Party for any damages suffered, or to agree to any amendments the Agreement, as a result of any Discriminatory Action occurring after the date, if any, on which the State of Venezuela reduces its direct or indirect interest to (i) less than 12.5% in the Project or (ii) less than 49.9% of Lagoven or such other substantial operating oil company subsidiary of PDVSA to which the shares of Lagoven CN or its interest in the Project may have been transferred.

31. The 3 particular breaches relied on are expressed in the demand in this way:

In spite of acknowledging the expropriation of [Mobil's] interests in the Cerro Negro joint venture, and contrary to the duty to perform its contractual obligations in good faith, [CN] has failed to take the steps contemplated in Article 15.1, paragraphs (a) and (b) of the Association Agreement. In particular, and without limiting the generality of the foregoing, [CN] has failed (i) to give notice of concurrence that the aforesaid expropriation constitutes a Discriminatory Action resulting in a Material Adverse Impact under the terms of the Association Agreement; (ii) to engage in good faith in a joint calculation of the compensation due to [Mobil] under the Association Agreement; and (iii) without prejudice to [Mobil's] right to full indemnification from the Venezuelan Government, to pay [Mobil] compensatory damages as required and determined under Article 15 of the Association Agreement …

In the exercise of its rights under [the Guarantee], [Mobil] demands that [PDV] immediately perform the unperformed obligations of [CN] under the Association Agreement.

32. Mr Pollock points out that the Association Agreement imposed no contractual obligation on CN requiring it to ensure that no expropriation measures were taken by Venezuela. The scheme of the contract was that if such measures were taken then money might be payable to Mobil by CN to compensate Mobil for the loss inflicted upon it by the actions of Venezuela, a third party. The contractual mechanism for fixing the amount (if any) of that compensation was either the agreement of the parties or, in the absence of agreement, determination by the ICC arbitrators. Unless and until the amount had been fixed by one or other of those methods there was nothing on which the obligation of CN to pay could bite, and there is therefore no basis for saying that PDV has failed to honour the terms of its guarantee.

33. If the position is analysed under English law I can see considerable force in those observations. However, the Association Agreement is governed by the law of Venezuela. Miss Otton-Goulder submits orally that under that law there is an obligation of good faith, and that CN's failure to give notice of concurrence was in bad faith. Moreover, as I shall explain below, the question whether CN was in breach of the Association Agreement was considered by the United States District Court of the Southern District of New York. At a hearing on 13 February 2008 Judge Batts of that court concluded that CN probably was in breach.

34. Neither the court in New York nor any expert on Venezuelan law has, so far as appears from the material before me, expressly grappled with Mr Pollock's detailed points set out above. In these circumstances I cannot go so far as to say that Mobil probably has an accrued cause of action. However the way that Miss Otton-Goulder put the matter orally may – I say no more – be enough to answer Mr Pollock's detailed points. I am persuaded, for the purposes of this stage only, that Mobil has a sufficiently arguable case that it has an accrued cause of action. That does not involve any assumption that the cause of action is worth $12 billion.

Stage 2A: "dissipation of assets" - the law

35. It is common ground that an applicant for a freezing order must demonstrate that there is a real risk of "dissipation of assets". What does this mean? I put these words in quotations. They describe an essential feature which the applicant must demonstrate, but it is not a question of going to a dictionary and finding out whether what the applicant complains of would fall within the dictionary meaning of the words "dissipation" and "assets". The expression "dissipation of assets" focuses on the conduct of the defendant as regards the defendant's assets, and the question is whether a particular course of conduct in relation to assets by the defendant, actual or feared, is conduct which should or may lead the court to conclude that the grant of a freezing order is just and convenient. Here the court must be guided by principles which have been established over the course of time.

36. A fundamental principle is that freezing orders are not granted in order to provide security for a claim. By procuring an order that assets are frozen an applicant is not put in a better position than any other creditor. The mere fact that a defendant's creditworthiness is in doubt does not justify the making of a freezing order.

37. A second principle is that the risk of "dissipation" must involve a risk of impairing the claimant's ability to enforce a judgment or award. In ***Ninemia Maritime Corp v. Trave Schiffarhrtsgesellschaft GmbH (The Niedersachen)*** [1983] 1 W.L.R. 1412, 1422 it was said that:

... the test is whether, on the assumption that the plaintiffs have shown at least 'a good arguable case', the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied.

38. Mobil asserts that

*There is a real risk of disposal where even an apparently financially solid company transfers its assets outside the jurisdiction if enforcement overseas would cause extra costs and delays: **Stronghold Insurance Co. Ltd v. Overseas Union Insurance Ltd** [1996] L.R.L.R. 13, 18-19, per Potter J. Provided the claimant can demonstrate that the effect of the transfer would be to make the enforcement of any judgment more difficult, it will have discharged the burden of demonstrating a real risk of disposal.*

39. For the purposes of the present application I am prepared to assume in Mobil's favour that this contention is sound.

40. In the application of this principle it is not *necessary* for the claimant to prove that enforcement in England and Wales, rather than elsewhere, will be impaired. Nor is it *necessary* for the claimant to prove that the purpose of the defendant's actual or feared conduct is to frustrate the enforcement of any judgment which is obtained, provided that, objectively, that would be its effect: see Gee, *Commercial Injunctions* 5th ed 2004 paras 12-034 to 12-036.

41. Third, the mere fact that the actual or feared conduct would risk impairing the claimant's ability to enforce a judgment or award does not in every case mean that a freezing order should be granted: see Gee, *Commercial Injunctions* at paras 12-037 and 12-038. The conduct in question must be unjustifiable. This statement of principle is found in the judgment of Stuart-Smith LJ in ***Ketchum International v Group Public Relations Holdings*** [1997] 1 WLR 4 at 10. The principle was put in a similar way by the Court of Appeal **in *Mediterranean Feeders v Berndt Meyering Schiffarts*** (June 1997, unreported):

there must be a risk that it [the asset] will be used otherwise than for normal and proper commercial purposes

42. Mobil's skeleton arguments contained no express acknowledgement of either of these cases. Miss Otton-Goulder's oral submissions were to the effect that earlier cases drew a dividing line between carrying on business in a pre-existing way (which would not be "*dissipation*" even though it risked impairing the ability to enforce) and re-organising the way in which business was done (which would be "*dissipation*" even though it risked impairing the ability to enforce). I doubt whether there was in truth such a dividing line, but if there were it cannot have survived the statements of principle in ***Ketchum*** and ***Mediterranean Feeders***.

43. In the course of argument Mobil gave examples of matters which may be relevant when the court is assessing whether there is a real risk of "*dissipation of assets*." These examples were

(a) The nature of the assets – the more easily disposed of, the easier it is to establish that there is a risk they may be dissipated.

(b) The nature and financial standing of the defendant's business.

(c)The length of time the defendant has been in business.

(d) The domicile or residence of the defendant.

(e) The defendant's past or existing credit record.

(f) Any intentions expressed by the defendant about future dealings with his English assets, or assets outside the jurisdiction.

(g) Any connections which the defendant may have with other companies which have defaulted on arbitration awards or judgments.

(h) The defendant's behaviour in relation to the claimant's claim: "a pattern of evasiveness, or unwillingness to participate in the litigation or arbitration, or raising thin defences after admitting liability, or total silence, may be factors which assist the claimant".

44. I shall comment on these examples, where appropriate, in my analysis of the facts.

Stage 2B: "dissipation of assets" - the facts

45. Can Mobil demonstrate unjustifiable conduct on the part of PDV in relation to PDV's assets? In this context it seems to me to be fundamental that PDV is a Venezuelan company, that anyone dealing with it can hardly be surprised to find that the bulk of its assets are in Venezuela, and that Mobil's own evidence acknowledges that PDV has the right to exploit the oil and natural gas reserves of Venezuela and that considering its vertical integration, world operations, level of revenue, size of reserves, output level and refining capacity, PDV is one of the top five integrated oil firms in the world. It is common ground that Venezuela is a party to the New York convention on the enforcement of arbitration awards, that an ICC award under the guarantee could be enforced against PDV in Venezuela in accordance with the New York convention, and that the courts of Venezuela would have power to grant Mobil relief of a similar nature to a freezing order in relation to PDV's assets in Venezuela if it were appropriate to do so.

46. Mobil's written outline submissions for the hearing before me made reference to reports that the judiciary in Venezuela "*is influenced by the executive*". Unless there is very strong evidence to the contrary this court does not proceed on the basis that courts of other foreign friendly countries do not behave properly. Any such suggestion was abandoned by Mobil at the hearing before Teare J. There was no attempt by Mobil to change its position in that regard at the oral hearing before me. No evidence was advanced that enforcement against PDV in Venezuela would be any more difficult than enforcement against PDV in the United States of America or in Europe. As mentioned earlier the financial statements produced by PDV showed on their face that PDV's net

assets had a book value $56 billion as recently as September 2007. In its application for service by an alternative method, shortly before the hearing of the discharge application, Mobil made reference to actual or potential difficulties facing it in Venezuela. Mobil added in evidence lodged at a late stage on the discharge application that problems it had encountered in obtaining expert evidence "did not augur well for the future." However Mobil has not lodged evidence of difficulties in the enforcement of an ICC award. To the extent that Mobil may fear such difficulties, I have no reason to believe that they could not be appropriately dealt with by the Venezuelan courts.

47. Can Mobil, in the circumstances described in the two preceding paragraphs, show a good arguable case of unjustifiable conduct on the part of PDV in relation to its assets in the context of a contractual claim which Mobil values at $12 billion? That, of course, assumes that the figure of $12 billion is justifiable, an aspect of the matter which I shall not seek to resolve at the present stage. I shall examine below the evidence upon which Mobil relies for this purpose. Mobil's outline argument for the present hearing identified 13 heads in this regard. I shall take each in turn, before commenting on further points and setting out my conclusion on this stage.

(1) Failure to honour contractual obligations

48. In support of a risk of dissipation Mobil says, first, that PDV and CN:

… have failed to honour their contractual obligations under [the Guarantee] and the Association Agreement, respectively, concerning the compensation due to [Mobil] for the expropriation of its interests in the Project and other Discriminatory Actions which caused a Materially Adverse Impact on [Mobil's] cash flows.

49. This head of argument does not advance Mobil's case at stage 2. It assumes that Mobil's claims against PDV and CN are correct both in law and in fact. At stage 1 I concluded that Mobil had a sufficiently arguable case that it has an accrued cause of action. However, for the reasons I gave when discussing stage 1, I cannot say that Mobil's case will probably succeed.

50. In later heads of stage 2 Mobil seeks to build on the failure to pay by CN and PDV so as to bring the case within example (h) quoted in paragraph 43 above. I shall deal with these heads as they arise.

(2) Declared intention of not honouring contractual obligation to pay

51. Second, Mobil says that PDV has openly declared that it intends, so far as possible, to avoid compensating Mobil in the manner to which Mobil is contractually entitled. Two declarations by or on behalf of PDV are relied upon. The first was that

"PDVSA will only pay the book value of the nationalized assets"

52. The second was by the Venezuelan Minister for Oil, who is also the president of PDV. He said on television:

"We do not expect to pay out money in order to arrive at some arrangement with the oil companies".

53. Here, as I understand it, Mobil is seeking to build on the failure to pay by CN and PDV so as to bring the case within example (h). However, the two declarations relied upon are inconsistent: one contemplates paying money, the other does not. Second, and more importantly, they are declarations of PDV's negotiating stance generally in relation to arrangements with oil companies following the expropriation. Mr Pollock observes, and Miss Otton-Goulder does not deny, that in the case of 30 out of 32 companies affected Venezuela in conjunction with PDV has successfully concluded such negotiations. The declarations now relied upon offer no basis for thinking that there is a real risk of "dissipation of assets."

(3) Policy of reversing "apertura petrolera"

54. What is said here by Mobil is:

The Venezuelan Government has sought to reverse the policy of apertura petrolera [ie the policy in place when the Association Agreement was made]. Participation by entities which gained rights under the apertura petrolera legislation are now faced with Government imposed punitive terms if they wish to continue their participation. The present Government of Venezuela has disavowed the former policies of the "old [PDV]". The Oil Minister has asserted that "the [PDV] of old had fallen prey to a strategy of agency capture on the part of certain consuming countries and international oil companies". According to the Oil Minister, the establishment of a new order has been:

"a tough process which under the leadership of President Chavez, has required the mobilization of all our people in defence of our main resource, in an uncompromising confrontation with trans-national interests and their domestic political agents…".

55. What does this amount to? There has been a change of government since the Association Agreement was made. The new government strongly disagrees with previous policy. It has condemned the previous policy, and spoken of the need for change, in strong terms. The "uncompromising confrontation" referred to has not prevented the negotiation of mutually acceptable arrangements with the vast majority of foreign oil interests. I cannot say that the passages cited give rise to any substantial basis for fearing that there will be unjustifiable conduct on the part of PDV in relation to its assets.

(4) The Venezuelan Government and PDVSA have adopted a policy against international arbitration

56. Mobil asserted that PDV has adopted a firm policy against international arbitration which raises serious doubts that PDVSA intends to honour a ICC award against it. In support Mobil cited statements by the President of PDV and others that Venezuela would not accept international arbitration.

57. In fact, however, on 31 January 2008 Venezuela wrote to ICSID appointing its arbitrator for the claim against it by Mobil. On 7 March 2008 lawyers for PDV and CN wrote to the ICC appointing their arbitrator for the claims against them by Mobil.

58. It is said by Mobil that Venezuela appointed its ICSID arbitrator late and only after "a threat of compulsion" and has reserved the right to make jurisdictional challenges in that arbitration. Mobil adds that PDV has sought an extension of 60 days to file its answer in the ICC arbitration, that if this court had not shown an interest in the status of the ICC arbitration PDV would have delayed until Mobil took coercive measures, and that the delay in providing its answer in the ICC arbitration enables PDV to conceal whether it will proceed with the ICC arbitration in good faith. Finally Mobil describes as "*equivocal*" a statement by Mr Pollock that it was not PDV's intention "to *run away from the arbitration.*"

59. These objections by Mobil are insubstantial. A letter dated 28.1.08 from Mobil's lawyers to ICSID makes it clear that the need for extra time to appoint its ICSID arbitrator was explained in advance correspondence, that Venezuela's arbitrator was appointed on the date when Venezuela said he would be appointed, and Mobil's "threat of compulsion" was issued 3 days prior to that same date. There is nothing improper in reserving the right to make jurisdictional challenges. I see no reason to make any adverse inference as regards the ICC arbitration. In these circumstances I cannot hold that there is any such firm policy against international arbitration as could assist Mobil.

(5) Policy of disposing of assets in America and Europe

60. Mobil's general contention under this head is as follows:

PDVSA has avowedly adopted a policy and established a practice of disposing of assets in America and Europe and transferring them to countries perceived to be friendly to the present Venezuelan government, including plans to sell eight American oil refineries as well as its refineries in the Bahamas, Germany, Sweden and the UK.

61. Fifteen particular matters are relied upon in support. The details (some of which are in dispute) do not matter. It is common ground that PDV's policy is to dispose of assets in America and Europe and transfer them to countries perceived to be friendly to the present Venezuelan government. Of course PDV's policy in this regard reflects government policy. The mere existence of such a policy gives no substantial basis for fearing that there will be unjustifiable conduct on the part of PDV in relation to its assets.

(6) Easily transferable assets

62. Here Mobil says that the assets of PDV "of which [Mobil] is aware (including shares in joint venture companies) are easily transferable." This seems to be an attempt to bring the case within example (a) cited earlier. What is said may be true of some assets of PDV's commercial subsidiaries. Evidence adduced in private was relied upon as showing the ease and speed with which money can be moved from one account and one jurisdiction to others. I need not analyse that evidence. It is obvious that commercial subsidiaries which sell oil and receive funds in payment of the price can, within the limits of exchange control and other restrictions, readily transfer those funds. Whether shares in joint venture companies are easily transferable will depend on the precise terms of the agreement between the joint venturers. There is nothing unusual about any of this, and it does not assist Mobil.

(7) Refusal to comply with freezing and disclosure order for over 4 weeks

63. Here Mobil says:

Despite the terms of paragraph 11 of the Freezing Order (which ordered the value, location and details of PDVSA's assets to be disclosed within 5 working days), PDVSA has refused to supply this information. It has taken technical points on service, refusing to grant its solicitors Stephenson Harwood authority to accept service of the Freezing Order, even though Stephenson Harwood's central role in the English court is to handle the Freezing Order. It is suspicious that PDVSA is doing what it can to prevent any realistic assessment of the current quantum or current whereabouts of its current assets.

64. Where there are allegations of fraud I can understand that one may take a suspicious approach to a defendant who relies upon technical points. There may be other cases where it is appropriate to do so. In the present case, however, there is no allegation of fraud, nor is it said that conduct on the part of PDV is akin to fraud. Technical points are there to be taken by a respondent who genuinely objects to the order. In this case, as I explain below, both PDV and Venezuela believe that the order involves an unwarranted extension of territorial jurisdiction. I happen to agree with them, but even if I did not, a belief of this kind, held on reasonable grounds, is entitled to respect. I see no reason to draw the adverse inference which Mobil seeks.

(8) Most of PDVSA's assets are inaccessible to Mobil CN

65. Mobil said that most of PDV's assets were probably located in Venezuela, or in countries perceived to be friendly to the present Venezuelan government. I am prepared to assume that this assertion is correct. However as noted earlier there was no evidence that enforcement was thereby made any more difficult than in other countries. Mobil coupled this assertion with a claim that assets not in those locations were "*concealed behind structures which Mobil cannot penetrate*". There is however no evidence of "*concealment*" on the part of PDV. In the absence of a court order it is up to PDV to decide whether it will permit Mobil or any other oil company to "*penetrate*" its structures. Whether this court should make such an order is, of course, one of the points for me to decide. The mere fact that PDV has declined to reveal its "*structures*" does not advance Mobil's case on "*dissipation of assets.*"

(9) The Venezuelan courts may be unable to assist

66. As I indicated at the outset of this section, at the oral hearing before me, Mobil did not attempt to persist with this head of argument.

(10) Huge claim

67. Here Mobil says:

The claim now faced by PDVSA is huge – in the region of US$ 12 billion (far in excess of what PDVSA paid to the Venezuelan government in 2005, and almost matching the US$ 13 billion paid to the government in 2006). It represents a very substantial percentage of PDVSA's assets, whether they are US$62 billion or US$90 billion.

68. These considerations are similar to those identified at example (b) above. Mobil has advanced a huge claim. PDV is a huge enterprise. The size of the claim, when compared with the nature and financial standing of PDV, gives no assistance to Mobil.

(11) Paucity of identifiable PDVSA assets outside Venezuela

69. Here Mobil says:

Mobil CN has only been able to identify PDVSA assets outside Venezuela and outside America to a value of US$ 0.57bn (on a book value basis), which falls far short of the compensation which PDVSA is contractually obliged to pay Mobil CN. Mobil CN has only been able to identify PDVSA assets outside Venezuela to a value of US$ 4.07bn (on a book value basis), which also falls far short of Mobil CN's claim.

70. For present purposes I assume this to be correct – although PDV maintains its assets in the United States have an actual value far higher than $4.7 billion. As pointed out earlier, anyone doing business with PDV would expect that the bulk of its assets would be in Venezuela. I cannot understand how Mobil derives any assistance from a failure on the part of PDV to rearrange its assets so as to move them to places where Mobil would wish them to be.

(12) Recent & rapid deterioration in PDVSA's financial stability

71. Here Mobil says:

PDVSA suggests that its balance sheet as at 30th September 2007 contained assets valued at US$ 97.29 billion, and its total liabilities total US$ 40.9 billion. But there are cogent grounds to believe that PDVSA's financial situation is deteriorating sharply:

i) A report from a Caracas-based economic institute estimated that PDVSA had a net loss of US$ 3.7bn in 2006 (a year when most oil companies made record profits);

ii) PDVSA's spending on government social programs has greatly increased (up to US$13.26bn in 2006 from US$ 6.9bn in 2005). It handed over about 70% of its gross revenue to the Venezuelan Government. As the Wall Street Journal has reported, Venezuela's President "has staffed the national oil company with political allies and spends some $14 billion a year of its profits on social programs. Short of investment, PDVSA has seen its oil output plunge";

iii) PDVSA's debt has soared. PDVSA has been involved in recent arrangements to borrow US$ 10 billion (a US$ 5 billion bond issue, US$ 4 billion on a facility from China and US$ 1 billion through Citgo);

iv) PDVSA has been cash flow negative in the first 9 months of 2007;

v) S&P rate PDVSA at BB-, below investment grade, and Moody's rates PDVSA as B1 ("speculative and subject to high credit risk");

vi) Cash coming in to PDVSA from sales was down in 2007;

vii) There is evidence that PDVSA is short of liquid funds:

a) In January 2008, PDVSA shortened its payment terms from 30 days to 8 days;

b) On 2nd February 2008, PDVSA sought a tender for 16 million barrels of sulphur fuel oil, to be paid for the day after the close of the tender with a US$ 1 billion upfront payment; and

c) PDVSA is late in paying US$ 53 million owed to the US-based driller Helmerich & Payne;

viii) It appears that PDVSA is moving away from selling oil for cash, and moving towards borrowing money and agreeing to repay with oil. Japan loaned PDVSA US$ 3.5 billion in March 2007, repayable in crude oil. China loaned Venezuela US$ 4 billion repayable in fuel oil. This has been described by a former director of Banco Central de Venezuela as "mortgaging" PDVSA's reserves because of a cash crunch;

ix) Since 30th September 2007, there have been media reports of additional loans taken by PDVSA of US$ 5 billion (from China and from Citgo), and renewal of a BNP Paribas loan of US$ 1.15 billion. As a result, PDVSA's debt to equity ratio has soared;

x) Despite the surge in PDVSA's borrowings, its capital expenditure appears to have fallen short of the investment plans announced in PDVDSA's April 2007 prospectus for the April 2007 bond issue. That prospectus reported a plan for PDVSA to invest US$ 10.748 in capital. However, the "property, plant and equipment" entry in its balance sheet at 30th September 2007 increased only by US$ 1.252 billion. There is a strong inference that much of the debt raised by PDVSA during 2007 was to pay for current operations and not for capital expenditure;

xi) There has been a surge in PDVSA's Accounts Receivable balance from US$ 9.5 billion to US$ 13.65 billion. This may reflect generous deals done by PDVSA in order to win favour with Venezuela's potential allies (eg Cuba and Nicaragua).

72. Credit ratings are not in themselves a basis for a freezing order. The substance of the reports relied on here is to the effect that government policies have left PDV in a position where it has needed to take measures to increase

its liquid reserves. There is no reason to doubt that banks have been and remain prepared to assist PDV in this regard. In these circumstances I do not see that this head of argument shows a substantial basis for fearing unjustifiable conduct by PDV in relation to its assets.

(13) Specific dissipation of PDVSA assets

73. Mobil asserts that when faced with adverse court decisions, existing or imminent, PDV has acted fast to move or divert its assets. The first point made in this regard concerns the case in New York mentioned earlier. For some time prior to 27 December 2007, in relation to a matter entirely separate from the present dispute, lawyers for Mobil were negotiating with CN the circumstances in which a sum of $300m would be transferred to CN in New York. As the date for that transfer approached, different lawyers on behalf of Mobil were preparing to apply to the New York court, without notice to CN, for the $300m to be attached in support of Mobil's claim against CN under the Association Agreement. On 27 December 2007 the $300m was transferred to accounts of CN at the Bank of New York, Mobil launched its application at a private court hearing in the absence of CN, and it obtained the attachment order for $300m that it sought. The point now made by Mobil is that, unknown to CN and the New York court, an additional $11m was removed from CN's accounts between 2 and 8 January 2007.

74. There is no suggestion by Mobil that the removal of the $11m contravened any order of the New York court. Both the application for the attachment order and the removal of the $11m took place at a stage when negotiations between PDV and Mobil had broken down and Mobil had made it clear that it would deploy every possible legal remedy in support of its claim. In the context of a claim which involves no allegation of fraud, and against a background in which Mobil accepts that PDV had assets worth at least $4.7 billion elsewhere in the United States, I do not consider that there was any obligation on CN or PDV to inform Mobil that there was a further $11m in New York. Indeed Mobil acknowledges this. All that one is left with is lawful action by CN in New York to pre-empt what CN and PDV regarded as unwarranted tactical manoeuvring by Mobil.

75. The remaining basis for this head of argument relied on evidence which I heard in private. The essential elements, however, are straightforward and I do not need to examine aspects which might interfere with the privacy of third parties. In summary, after learning of this court's worldwide freezing order, new arrangements were made to change the way in which funds emanating from outside England and Wales were received by PDV or its operating subsidiaries. These new arrangements were designed to ensure that obligations on the part of PDV or its operating subsidiaries to pay money to a third party beyond reach of this court were discharged more quickly and in a way which might be thought less likely to cause banks to fear that they would be acting in breach of this court's order.

76. In the light of the evidence before me as to PDV's assets, I conclude that these new arrangements involved no breach whatever of the worldwide freezing order. Quite apart from the question whether the relevant funds were assets of PDV rather than its operating subsidiaries, paragraph 10 of that order permitted PDV to deal with its assets outside England and Wales in whatever way PDV chose, provided that $12 billion of its assets somewhere in the world remained unencumbered. The material available to me gives no reason to doubt that this proviso was satisfied. Miss Otton-Goulder took me to specific features of the balance sheet, but there is nothing in those features that detracts from the calculation of net book value described earlier in this judgement.

77. Miss Otton-Goulder urged that passages in the judgment of the Court of Appeal in *Motorola (No 2)* demonstrated that a respondent might be required to disclose information as to the whereabouts of its assets worldwide even where there were identified unencumbered assets in a third country which exceeded the total value of the worldwide freezing order. It seems to me that the court in that case had a concern whether there could in practical terms be any enforcement against the identified unencumbered assets. I have no evidence before me warranting any such concern in the present case.

78. Nothing that I say under this head should be regarded as any encouragement to respondents or third parties to pre-empt a decision by the court as to whether the terms of a freezing order have been complied with. The case before me is an exceptional one in which there has been no suggestion of fraud and in which there is no substantial reason to doubt compliance with the proviso to paragraph 10.

79. In these circumstances I do not consider that the matters relied on under this head of argument give rise to a good arguable case of unjustifiable conduct on the part of PDV in relation to its assets.

Additional points and conclusion on "dissipation"

80. Further material was relied upon by Mobil in relation to certain of the above heads of argument after Mobil's outline submissions had been lodged. I do not need to go into the detail: the broad impact of the material in question can fairly be summarised as "*more of the same*". It does not affect the reasoning which has led me to conclude that none of these heads of argument assist Mobil. Accordingly I conclude that Mobil cannot surmount the first hurdle (s 37 of the 1981 Act) because it has no good arguable case that PDV's conduct in relation to its assets is unjustified.

Stage 3: Urgency

81. This court's powers only arise under s 44(3) of the 1996 Act if Mobil can surmount the hurdle of showing that "the case is one of urgency". Here it is for Mobil to show that an urgent order is needed from me without waiting for permission from the ICC arbitrators as would normally be required under s 44(4) of the 1996 Act. The only urgency relied upon concerned a need for prompt action to prevent "dissipation of assets". My conclusion at stage 2 that Mobil has shown no good arguable case of "dissipation of assets" accordingly means that the case is not in fact one of urgency. It follows that Mobil does not surmount the hurdle imposed by s 44(3) of the 1996 Act.

82. The parties made conflicting submissions directed to whether the application to Teare J lacked urgency because Mobil had taken its time to wait until the $300m became available in New York. I do not consider that any useful purpose is served by seeking to resolve this conflict, and I do not attempt to do so.

Stage 4: s 2(3) and connection with England & Wales

83. As indicated earlier, I have chosen as a matter of discretion to leave the impact of s 2(3) of the 1996 Act to the final stage of analysis. I have now reached that stage, and accordingly I discard the assumption that the seat of the arbitration is in England and Wales. This means that I can now turn to deal with three issues:

A. Relevance of connection to England and Wales under s 44;

B. Whether PDV has assets here;

C. Relevance of features of the law of New York.

Stage 4A: Connection to England and Wales under s 44

84. PDV says that it has no relevant connection with England and Wales. I shall in due course examine whether this is so. On the assumption that it is, the stance of PDV is set out at paragraph 77 (a)and (d) of PDV's skeleton argument:

> *(a) … there is no connection of any sort between the Defendant and the English jurisdiction. The Defendant is a foreign incorporated body which has no assets within the jurisdiction, which does not carry on business within the jurisdiction, and which has no presence within the jurisdiction. This is not a fraud case and there is no call whatsoever for the English court to adopt the role of international policeman or to stretch the bounds of its jurisdiction. … The contract out of which the dispute arises has nothing to do with England, and nothing has been done in England by the Defendant which has any connection with, or effect on, either the contract or the dispute which has arisen under it.*
>
> …
>
> *(d) … the English court has no legitimate ground for seeking to exercise in personam jurisdiction over the Defendant, and the Defendant objects strenuously to any attempted assertion of jurisdiction over it by the English court. Whilst the Defendant has all the respect due to so august an institution as the English High Court, it has difficulty in accepting that it owes it any duty of obedience in the circumstances of this case.*

85. In oral argument Mr Pollock made it clear that he was not suggesting a statutory bar on the grant of an injunction under s 44(3) in the absence of a link with England and Wales. His contention was that as a matter of discretion it would not be right for the court to exercise its powers in aid of a foreign arbitration under s 44(3) in the absence of such a link. The parties have not identified any previous case in which this aspect of s 44(3) has directly arisen for consideration. PDV contends that relevant principles can be found in cases dealing with worldwide freezing orders in aid of foreign litigation. I shall examine the principal cases cited by PDV and Mobil in this regard before turning to consider their relevance to s 44(3).

Freezing orders in aid of foreign litigation

86. The submission for PDV is that previous cases on worldwide freezing orders in aid of foreign litigation have identified general principles founded on this court's territorial jurisdiction and the importance of comity with courts elsewhere. That does not mean that this court can only act in relation to respondents who are here and in relation to orders that something be done here. There are well-established circumstances where it is legitimate for this court to require someone who is not within its territorial jurisdiction to defend a claim that has been brought here – for example where it is said that there is an agreement that this court should have power to resolve the dispute. There may be circumstances where it is legitimate for this court to require a respondent within its territorial jurisdiction to do something outside this court's territorial jurisdiction in aid of foreign litigation. Equally, it may be legitimate in aid of foreign litigation for this court to make orders about assets here of a person abroad. In these cases the court goes beyond its territorial jurisdiction because there is a relevant link with England and Wales. Mr Pollock accepted that the importance of combating international fraud may be so great that the court will grant an order in aid of foreign litigation even where the link with England and Wales is small or non-existent. He contends that in the absence of something exceptional such as fraud the authorities on injunctions in aid of foreign litigation show that such injunctions should only be granted where there is a relevant link with England and Wales. On this general principle there is little dispute between Mobil and PDV – Mobil's contention being that the position is different when an injunction is sought in aid of a foreign arbitration. In order to assess whether Mobil's contention is right, however, it is necessary to describe in some detail the position concerning injunctions in aid of foreign litigation.

87. The leading cases cited by PDV have been concerned with s 25 of the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act"), which when enacted conferred power on the courts here to grant interim relief where substantive proceedings were pending in a state party to the Brussels Convention of 1968 as amended and the subject matter was within that convention. In 1991 the scope of the 1982 Act was extended by amendment so as to reflect the Lugano Convention of 1988. Subsequently the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, SI 1997/302 ("the CJJA Order"), which came into force on 1 April 1997, extended the scope of s 25 to non-Convention countries and proceedings. In all these cases, however, by s 25(2):

> *the court may refuse to grant … relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject matter of the proceedings in question makes it inexpedient for the court to grant it."*

88. As will be seen below, cases under s 25 of the 1982 Act remain cases where s 37(1) of the 1981 Act applies to the grant of an injunction. The court will only be able to grant the injunction sought if it is "just and convenient" to do so.

89. The submissions of Mr Pollock on injunctions in aid of foreign litigation began with a case which, he said, "*stretched the jurisdiction to the limit*". This was ***Republic of Haiti v Duvalier*** [1990] 1QB 202. The former president of Haiti and members of his family were resident in France. The Republic of Haiti started proceedings in France to recover $120 million alleged to be the Republic's money embezzled by them. It then issued a writ here against the Duvaliers in reliance upon s 25 of the 1982 Act, France being a party to the Brussels Convention of 1968. The High Court granted orders restraining the Duvaliers from disposing of assets wherever situated and requiring them to disclose information relating to the assets. Their appeal was dismissed by the Court of Appeal.

90. The leading judgment was given by Staughton LJ, with whom Fox and Stocker LJJ agreed. In a section of his judgment entitled "Discretion", Staughton LJ noted at page 215 that discretion arose in two ways. First, the judge had to consider whether it was just and convenient to grant an injunction, in terms of s 37(1) of the 1981 Act. Second, interim relief ought to be refused under s 25(2) if the fact that the court has no jurisdiction apart from that section. Staughton LJ then turned to an argument advanced by the defendants that as they were not resident here and the assets concerned were mainly, if not wholly, outside the jurisdiction, the proper courts to make orders restraining dealings with assets were either the court dealing with the French litigation or the court or courts having jurisdiction where the assets were located. While the latter point had considerable force, the Republic did not know where the assets were located. One of the objects of the English proceedings was to find out, and the proceedings had been started here because it was here the information was available. In that regard Staughton LJ thought there was a case to be made for any injunction assets abroad to be of limited duration. This would preserve the Republic's position until there had been a reasonable opportunity, after discovering where the assets were, to apply for some interim relief in the jurisdictions where the assets were.

91. Staughton LJ added:

It is beyond question that the injunction granted [in the High Court] was a most unusual measure, such as should very rarely be granted. But this case is most unusual. It is not the nature or strength of the republic's cause of action which puts it in that category. What to my mind is determinative is the plain and admitted intention of the defendants to move their assets out of the reach of the courts of law, coupled with the resources they have obtained and the skill they have hitherto shown in doing that, and the vast amount of money involved. This case demands international cooperation between all nations. As the judge said, if ever there was a case for the exercise of court's powers, this must be it. Or to quote Kerr LJ in the ***Babanaft*** *case, at p33D-E: 'some situations cry out – as a matter of justice to the plaintiffs – for disclosure orders and Mareva type injunctions covering foreign assets of the defendants even before judgement.' And I think this is such a case. If the Duvalier family have a defence to the substantive claim, and feel that they are being persecuted, then their remedy, as I have said, is to cooperate in securing an early trial of the dispute. It is not to secrete their assets where even the most just decision in the world cannot reach them.*

92. Mr Pollock commented that this was a case of alleged fraud, where there was an admitted plan not merely to dissipate but to secrete assets. He cited from an article by Professor Lawrence Collins in *Essays in International Litigation and the Conflict of Laws* (1994):

For an English court to enjoin a person properly subject to its jurisdiction from disposing of assets abroad cannot in this sense be regarded as exorbitant. Perhaps ***Republic of Haiti v Duvalier*** *goes to the very edge of what is permissible. For the sole connection of England with that case was the presence in England of solicitors with access to the foreign assets. The exercise of jurisdiction can be justified on the basis that the solicitors could be treated as agents of the defendants, and the relevant information was located in England.*

93. Mr Pollock then turned to a case in the Court of Appeal nine years later: ***Credit Suisse Fides Trust v Cuoghi*** [1998] QB 818. The plaintiff company had brought proceedings against a former employee, Voellmin, who was Swiss domiciled and resident and who was alleged to have stolen his employer's money. The Swiss proceedings had also named as a defendant one Cuoghi, who was resident and domiciled in England, and who was alleged to have been complicit in the activities of Voellmin, and indeed to have carried out acts in England which were part of the fraud. The Swiss courts had no power under Swiss law to make a world wide freezing and disclosure order against Cuoghi because he was not resident in Switzerland. The grant of such an order against Cuoghi by the High Court in this country was upheld by the Court of Appeal. In this case, as in the ***Republic of Haiti*** case, the courts of England and Wales had jurisdiction under s 25 of the 1982 Act – on this occasion because Swtizerland was party to the Lugano Convention.

94. Millett LJ gave the first judgment. He noted at p. 825 that when freezing orders were first granted in this country so as to restrain defendants from dealing with their assets both inside and outside the jurisdiction, the court was concerned not to make an unwarranted assumption of extra territorial jurisdiction:

It [the court] recognised that it would be wrong to make an order which, though purporting merely to restrain the actions of a defendant already subject to the jurisdiction of the court, might be understood to impose obligations upon persons resident abroad and not subject to its jurisdiction. This danger was avoided by including provisions in the order which made it clear that it was not to affect parties not subject to the jurisdiction of the court in respect of acts outside the jurisdiction save to the extent that the order might be enforced by the local courts. The jurisdiction to make such orders is now firmly established. It is exercised with caution, and a sufficient case to justify its exercise must always be made out; but such orders are nowadays routinely made in cases of international fraud and the conditions necessary in order to preserve international comity and prevent conflicts of jurisdiction have become standardised.

95. In the present case the danger referred to by Millett LJ is dealt with by paragraph 21 of the order of 24 January 2008:

"21 Persons outside England and Wales

(1) Except as provided in paragraph (2) below, the terms of this order do not affect or concern anyone outside the jurisdiction of this court.

(2) The terms of this order will affect the following persons in a country or state outside the jurisdiction of this court –

(a) the Respondent(s) [i.e. PDV] or its officer or agent appointed by the power of attorney;

(b) any person who –

(i) is subject to the jurisdiction of this court;

(ii) has been given written notice of this order at his residence or place of business within the jurisdiction of this court;

(iii) is able to prevent acts or omissions outside the jurisdiction of this court which constitute or assist in a breach of the terms of this order; and

(c) any other person, only to the extent that this order is declared enforceable by or is enforced by a court in that country or state.

96. Millett LJ discussed s 25(2) and concluded that the English court should in principle be willing to grant appropriate interim relief in support of substantive proceedings taking place elsewhere, and that it should not be deterred from doing so by the fact that its role is only an ancillary one unless the circumstances of the particular case make the grant of such relief inexpedient. He rejected a submission that it was inappropriate to exercise the jurisdiction conferred by s 25 to grant a worldwide freezing order in support of proceedings pending in another country. Professor Collins in the essay cited earlier stated that there was no reason in principle why an English injunction could not restrain a person properly before the court from disposing of assets abroad. In the words of the sixth edition of *Kerr on Injunctions* published in 1927, an order of that kind was

"not granted upon any pretension to the exercise of judicial or administrative rights abroad, but on the circumstance or [[of]] the person to whom the order is addressed being within the reach of the court…"

97. Millett LJ continued:

"It is, of course, the case that statute and Convention apart, the jurisdiction of the English court does not depend on domicile but on service. Proceedings may be served on persons temporarily present within the jurisdiction, or with leave… on persons outside the jurisdiction. It is a strong thing to restrain a defendant who is not resident within the jurisdiction from disposing of assets outside the jurisdiction. But where the defendant is domiciled within the jurisdiction such an order cannot be regarded as exorbitant or as going beyond what is internationally acceptable. To treat it as such merely because the substantive proceedings are pending in another country would be contrary to the policy which informs both article 24 and section 25. Where a defendant and his assets are located outside the jurisdiction of the court seised of the substantive proceedings, it is in my opinion most appropriate that protective measures should be granted by those courts best able to make their orders effective. In relation to orders taking direct effect against the assets, this means the courts of the state where the assets are located; and in relation to orders in personam, including orders for disclosure, this means the courts of the state where the person enjoined resides.

98. Millett LJ went on at p. 828 to comment on the ***Republic of Haiti*** case:

The only connection with England was the presence here of solicitors who knew where the assets were located. That was an extreme case, which Professor Collins describes as perhaps going 'to the very edge of what is permissible' … . The circumstances can be said to have been 'very exceptional', although to my mind the circumstance which justified the exercise of the jurisdiction was that otherwise no effective protection could be given to the plaintiffs anywhere.

99. Commenting generally on the approach to be taken by a court in cases under s 25, Millett LJ said:

It is in my judgment regrettable that a gloss has been placed on the words of section 25(2). The question for consideration is not whether the circumstances are exceptional or very exceptional, but whether it would be inexpedient to make the order. Where an application is made for in personam relief in ancillary proceedings, two considerations which are highly material are the place where the person sought to be enjoined is domiciled, and the likely reaction of the court which is seised of the substantive dispute. Where a similar order has been applied for and refused by that court, it would generally be wrong for us to interfere. But where the other court lacks jurisdiction to make an effective order against a defendant because he is resident in England, it does not at all follow that it would find our order objectionable.

100. Lord Bingham of Cornhill CJ agreed with Millettt LJ. He added:

Where substantive proceedings are brought in this country, and there is an ancillary application of for a Mareva injunction and an associated disclosure order on a worldwide basis, the court will wish to satisfy itself that the facts are (or appear to be) such as to justify the making of so unusual and far-reaching an order. … It would be unwise to attempt to list all the considerations which might be held to make the grant of relief under section 25 inexpedient or expedient, whether on a municipal or a worldwide basis. But it would obviously weigh heavily, probably conclusively, against the grant of interim relief if such grant would obstruct or hamper the management of the case by the court seized of the substantive proceedings ("the primary court"), or give rise to a risk of conflicting, inconsistent or overlapping orders in other courts. It may weigh against the grant of relief by this court that the primary court could have granted such relief and has not done so, particularly if the primary court has been asked to grant such relief and declined. On the other hand, it may be thought to weigh in favour of granting such relief that a defendant is present

in this country and so liable to effective enforcement of an order made in personam, always provided that by granting such relief this court does not tread on the toes of the primary court or any other court involved in the case. On any application under s 25 this court must recognise that its role is subordinate to and must be supportive of that of the primary court.

101. Potter LJ agreed with both judgments.

102. A further case cited by Mr Pollock was the decision of the Court of Appeal in ***Motorola Credit Corporation v Uzan and Ors (No.2)*** [2004] 1 WLR 113, involving the extended scope of s 25 under the CJJA Order. PDV's submissions, so far as relevant for present purposes, were set out in paragraphs 29-31 of its skeleton argument:

> *29. … There was a powerful case that the members of a Turkish family called Uzan had defrauded the plaintiffs of very large sums of money. The plaintiffs commenced proceedings against four members of the family in New York and claimed injunctive relief from those courts. By virtue of the law there that relief was limited to assets situate within the United States. The plaintiffs then started proceedings in England against the first defendant alone, who although not resident within the jurisdiction owned a house and had other assets here. The application made against him under sec 25 in support of the New York proceedings was limited to a freezing order over those English assets. Subsequently there was a hearing in New York which resulted in the American judge expressing strong views adverse to the defendants. In addition, the defendants then failed to comply with an order of the New York court relating to the securing of shares. In the light of these facts the plaintiffs applied to the English court for a world wide freezing and disclosure order against all four defendants which was granted. Applications to discharge the order were dismissed, and the defendants subsequently failed to comply with orders of the English court relating to disclosure of assets and were adjudged to be in contempt. Their appeals against the refusal to discharge the order then came before the Court of Appeal. Only those of the first three defendants are relevant for present purposes, since the fourth defendant confined her appeal to grounds relating to the existence of a prima facie case against her.*
>
> *30. The Court of Appeal upheld the freezing order against the first defendant on the basis that the presence of assets owned by him within the jurisdiction justified the exercise of the draconian power. It discharged the orders against the second and third defendants, however, on the basis that since they were neither resident within the jurisdiction nor had any assets here, there was no connection which would justify the English court in granting a world wide freezing order against them which, in any event it would be unable to enforce against them.*
>
> *31. The judgment of the Court, which was delivered by Potter LJ, contained a review of the authorities and derived therefrom the existence of five particular considerations to be borne in mind when considering whether it was inexpedient to make the order. These were expressed [in paragraph 115 of the judgment] as follows: First, whether the making of the order will interfere with the management of the case in the primary court eg where the order is inconsistent with an order of the primary court or overlaps with it. … Second, whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders. Third, whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located. If so, then respect for the territorial jurisdiction of that state should discourage the English court from using its unusually wide powers against a foreign defendant. Fourth, whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order. Fifth, whether in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce. (147 E-H).*

103. Mr Pollock stressed at an early stage in his argument that the considerations identified in paragraph 115 were considerations as to "*whether it is inexpedient to make an order*." Those considerations, submitted Mr Pollock, only came into play if a sufficient connection with England and Wales existed in the first place. This can be seen from the preceding paragraph where Potter LJ cited jurisprudence of the European Court of Justice requiring, in Convention cases, "*a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the contracting state of the court before which those measures are sought*." His submission was that Mobil's written outline submissions had misunderstood the position in this regard.

104. Mr Pollock also referred to paragraphs 64-69, where Potter LJ discussed the ***Republic of Haiti*** case. Potter LJ noted that the decision was a Convention case, so that what was or was not expedient was informed by the content of the treaty obligations which s 25 of the 1982 Act was originally drafted to cover. By contrast, *Motorola (No 2)* was not a Convention case and what was or was not expedient was informed "by normal considerations of comity and the principles ordinarily going to the courts discretion to grant injunctions." At paragraph 66 Potter LJ noted that the appeal before Fox, Stocker and Staughton LJJ had been preceded by an earlier appeal in which the Court of Appeal had affirmed an order directing the solicitors to provide information to the Republic. Against that background Potter LJ concluded that the principal basis of the decision to affirm the freezing order was the fact that England was the only place which had any known connection with the asset concealment scheme and was therefore the place where information was most likely to be obtainable.

105. Mr Pollock made a further point on *Motorola (No 2)*. This concerned the distinction drawn between the second and third defendants on the one hand and the first and fourth defendants on the other. The second and third defendants were said by Potter LJ at paragraph 125 to fall into a category "*Where the connection of the defendant with this country is tenuous or non-existent.*" The judge below had been concerned to assist in a case of international fraud. However, even in such a case, it was important to bear in mind - *"quite apart from*

considerations of comity" - the fact that there was every reason to suppose that the orders of the English court would be disobeyed with no real sanction against the second and third defendants. In those circumstances the Court of Appeal set aside the order against the second and third defendants.

106. That was to be contrasted with the position of the fourth defendant and the first defendant. The fourth defendant was resident and had substantial assets here. She neither did nor could dispute the jurisdiction of the court to grant world-wide relief against her (see paragraph 127). The first defendant did not reside here, but had a house and other assets here worth millions of pounds. While there was reason to suppose in his case that he might disobey the order, it was not a case where the court would be devoid of means of enforcement if that were so. In those circumstances the Court of Appeal was not prepared to interfere with the Judge's exercise of discretion in favour of granting the order in an apparently serious case of international fraud (see paragraph 128).

107. The conclusion urged in PDV's skeleton argument was that, as regards worldwide freezing orders in aid of foreign litigation:

… it has not been considered to be a proper exercise of the power contained in sec 25 to issue a worldwide Mareva against a defendant where the substantive proceedings were taking place elsewhere and where the defendant had no connection whatever with England. In any ordinary circumstances that connection ought to be that of the residence of the defendant within the jurisdiction, but in exceptional circumstances, such as those involving fraud and concealment, some other connection such as the presence of assets or the carrying on of relevant activities within the jurisdiction might serve.

108. Miss Otton-Goulder submitted that the arguments for PDV misunderstood the two stages in a world wide freezing order. The first was the initial grant of the freezing order and the requirement for disclosure of assets. The requirement for disclosure was important, for without it the freezing order would be toothless: see Waller LJ in ***Motorola (No. 1)*** [2002] 2 All ER (Comm) 945 at 953. It was a severe order but it contained protections. First the claimant must give an undertaking in the terms given by Mobil at undertaking (9) of Schedule B to the injunction granted on 24 January 2008:

"(9) the applicant will not without the permission of the court seek to enforce this order in any country outside England and Wales or seek an order of a similar nature including orders conferring a charge or other security against the respondent or the respondent's assets from any court outside England and Wales …"

109. A second protection for the benefit of third parties was contained in paragraph 21 of the injunction (quoted above). Under paragraph 21 (2)(c) of the standard form of order, a claimant would have to decide in which states it would seek to "*domesticate*" the injunction, and it would be guided by the disclosure made in accordance with the injunction's requirements.

110. Mobil also placed reliance on *Motorola (No. 2)*. Miss Otton-Goulder noted that the assets of the first defendant here were relatively modest in comparison with a claim for $2 billion – yet the court had thought it right to make a world-wide freezing order against him.

111. As regards the second and third defendants, she submitted that the decision demonstrated the true nature of the focus, in cases under s 25, on a need for some connection with England and Wales. This was the desirability that the court should have some means of enforcing its order, especially in circumstances where the court knew that those subject to that order would disobey it.

112. Miss Otton-Goulder drew attention to the stress which judges had placed on the undoubted value of this jurisdiction. She referred in that regard to ***Refco Inc v Eastern Trading Co*** [1999] Lloyds Reports 159. Refco acted as futures broker for Eastern Trading Company ("ETC"), a Dubai general partnership, under a customer agreement which contained a jurisdiction clause in favour of the courts of Illinois. The partners in ETC were Mr Ashraf senior and his five sons. The eldest son, Zahid, was authorised by power of attorney to carry out all the functions of the partnership. After expressing concern at the size of ETC's open positions, Refco liquidated them giving rise to a debt from ETC to Refco of $27.9 million. By a promissory note entered into for ETC by Zahid in July 1996, ETC and Zahid acknowledged the indebtedness in that amount and jointly and severally promised to pay monthly instalments of not less than $2 million until the whole had been paid on or before 30 September 1997. Over a period of months some of this amount was paid, but there remained a substantial sum outstanding. According to ETC, it was not until summer 1997 when Mr Ashraf senior was visiting London that he and the other partners discovered the scale and outturn of the operations with Refco which had been conducted by Zahid in the name of ETC. They and ETC commenced proceedings in September 1997 in Illinois against Refco, saying that Zahid acted without authority, that Refco had bee involved in a conspiracy to defraud ETC and that Zahid had been induced by the fraud and duress of Refco to execute the promissory note. Refco counterclaimed in those proceedings as promisee of the note and as the person to whom the underlying debt was owed, and joined Zahid as the defendant to the counterclaim. On 17 December 1997 there was an arbitration award in Zahid's favour against an American corporation in the sum of $13 million. Two days later Refco began proceedings in England under s 25 of the 1982 Act and obtained a freezing order limited to the sum of $16.75 million. Following an application by ETC and the other partners to discharge that order, Zahid assigned to ETC the benefit of the arbitration award in his favour.

113. The application to discharge came before Rix J who continued the freezing order, but only for a period of 3 weeks in order to enable Refco to seek the equivalent relief in Illinois. He regarded the question of dissipation of assets as so bound up with the overall merits that the English court should not express any view until the Illinois court had done so. For that reason he granted a holding injunction but left it to the Illinois court to determine whether an interlocutory protective order should be made. Thereafter he granted an extension of time and continued the injunction pending

an application in Illinois based on an alleged fraudulent conveyance. Refco applied to the Illinois court, but for declaratory relief only. This was refused by the Illinois judge on the ground that the court did not exist to give advisory opinions, but in the course of her judgment the judge made plain that she deferred to the courts of England as to the preservation of assets of the defendants in England. In these circumstances Rix J dismissed the proceedings in England against all defendants except Zahid. Refco appealed, contending among other things that the question whether there was a risk of dissipation did not require a decision of the Illinois court.

114. In the Court of Appeal Millettt, Morritt and Potter LJJ adopted a two stage approach, beginning by examining whether an injunction would have been granted if the substantive proceedings had been brought in England. They concluded that while there was a good arguable case, there was an absence of evidence of a real risk of dissipation, along with an effective security over the arbitration award, and accordingly if the substantive proceedings had been brought in England no freezing order would have been granted. Each member of the court made observations, which were not necessary to the court's decision, on the relevance of Illinois law should it have been necessary to proceed to the second stage. I shall return to these at stage 4C below. For present purposes Miss Otton-Goulder stressed that ***Refco*** was not a case of fraud, but even so Millettt LJ at page 175 described the courts power to grant freezing orders as "*a valuable jurisdiction*".

115. Generally on s 25, Miss Otton-Goulder accepted that mere presence of solicitors for a defendant in this country would not be sufficient. In so far as a worldwide freezing order under that section required some kind of connection with England and Wales, however, the presence of assets here would suffice. That neither residence here, nor presence of assets here, were essential was shown by the fact that worldwide freezing orders under s 25 were granted without them in cases of fraud. Miss Otton-Goulder submitted that *Refco* showed that a worldwide freezing order could be granted under s 25 in cases not involving a claim of fraud even where no defendant was present in this country and no assets were located here.

116. I do not accept that the true nature of the focus on a need for some connection with England and Wales, in cases under s 25, is merely the desirability that the court should have some means of enforcing its order, especially in circumstances where the court knew that those subject to that order would disobey it. That desirability may well be highly relevant or even determinative. It is not, however, the same thing as consideration of the extent to which it is appropriate for this court to make an order affecting assets not located here. The discussion by Potter LJ of the position of the second and third defendants in *Motorola (No. 2)* makes this plain by using the words "*quite apart from considerations of comity*".

117. For the purposes of the present case I find it helpful to seek to identify how considerations of comity affect the exercise of discretion to grant an application in aid of foreign litigation for a freezing order affecting assets not located here. Considerations of comity affecting the exercise of discretion to grant an application in aid of foreign litigation are not confined to cases under s 25. Where relevant assets are not located here such considerations will arise even though it may have been possible to serve the respondent here – although their impact may, as is recognised by Lord Bingham in *Credit Suisse Fides Trust,* differ according to whether, for example, the respondent is resident here.

118. Nor do I accept that the need for caution identified in the authorities applies with any less force to the initial disclosure order which was the subject of ***Motorola (No. 1).*** I readily accept that, in circumstances of the kind applicable in that case, an application for a stay of the obligation to give disclosure will fail. It seems to me that if anything that gives added force to the need for caution at the outset.

119. In my view it is apparent from the cases cited earlier, and is sufficient for present purposes, that this court will only be prepared to exercise discretion to grant an application in aid of foreign litigation for a freezing order affecting assets not located here if the respondent or the dispute has a sufficiently strong link here or, in cases where the European jurisprudence referred to by Potter LJ at paragraph 114 of *Motorola (No. 2)* does not apply, there is some other factor of sufficient strength to justify proceeding in the absence of such a link. This way of putting the matter does not assume that presence of the respondent here will necessarily be sufficient to warrant the exercise of discretion in favour of an applicant – although as was observed by Lord Bingham in *Credit Suisse Fides Trust* it may weigh in favour of granting relief. Nor does it assume that any other particular factor will be sufficient. There will always need to be a careful examination of the justification for any part of the proposed order which would tend to run counter to principles of comity with courts in other jurisdictions.

Principles for freezing orders under s 44(3)

120. Under s 44(3), unlike the cases discussed so far, the court is asked to make an order in support of an arbitration. Mobil suggested that this difference brought into play a statutory régime which – although it involved narrow statutory fetters – freed an applicant from the fetters affecting the grant of orders in aid of foreign litigation. PDV by contrast suggested that this difference should lead the court to proceed with even greater caution in relation to the factors applicable to the grant of orders in aid of foreign litigation.

121. Mobil added that because the parties chose ICC Arbitration, they must be taken to have agreed that either or both might, in appropriate circumstances, apply to courts: Article 23.2 (headed "C*onservatory and Interim Measures*") provides as follows:
Before the file has been transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures.

122. For purposes of the present judgment I need say only that I am unable to accept Mobil's submissions.

123. In relation to injunctions in support of arbitrations an examination of the position prior to the 1996 Act is found in the speech of Lord Mustill in ***Channel Tunnel Group v Balfour Beatty*** [1993] AC 334. The contractors in the building of the channel tunnel were in dispute with the employers as to certain payments allegedly due to them. They threatened to exercise a right to suspend works which, if they were correct, the contract gave them. The contract contained an elaborate dispute resolution procedure at the apex of which stood arbitration in Belgium. The employers started an action in England claiming an injunction to restrain the contractors from suspending work. The House of Lords held that the High Court had power to grant such an injunction under s 37(1) of the 1981 Act, but that the proposed injunction should be refused as it would pre-empt the decision which the contract conferred upon the arbitrators. Lord Mustill, with whom Lords Keith, Goff, Jauncey and Browne-Wilkinson agreed, noted that the seat of the arbitration was in Belgium, and that Belgian law was thus the "*curial*" law. In those circumstances he commented that the court [here] should be very cautious in its approach, both to the existence and to the exercise of supervisory and supportive measures, lest it cut across the grain of the chosen curial law. It seems to me that this offers considerable support for PDV's approach. I recognize, however, that the 1996 Act involves a different regime from that in place at the time of the *Channel Tunnel* decision, and accordingly I shall put Lord Mustill's observations on one side.

124. The submission for Mobil is that, while it accepts that comity requires that courts of one jurisdiction respect the orders of another, the considerations applicable to orders sought here in aid of foreign litigation have only limited relevance to orders in aid of foreign arbitration. There must be a focus on the source and nature of any fetters on the court's jurisdiction. In the present context, any injunction must be in aid of the tribunal of primary jurisdiction and must not usurp the function of that tribunal – both of which I am prepared to assume in Mobil's favour for the purposes of stage 4A.

125. Turning to the 1996 Act, Miss Otton-Goulder relied upon the general principles set out in s 1:

> "*1 The provisions of this Part are founded on the following principles, and shall be construed accordingly –*
>
> *(a) The object of arbitration is to obtain the fair resolution of disputes by an impartial Tribunal without unnecessary delay or expense;*
>
> *(b) The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;*
>
> *(c) In matters governed by this Part the court should not intervene except as provided by this Part."*

She commented that as s 44 was found in Part 1, the provisions for intervention in that section must have been thought necessary in the public interest. This I readily accept, but it does not seem to me to advance matters. There is nothing here to suggest that general principles of comity have a restricted application.

126. Next, Miss Otton-Goulder referred to s 2. I have set out relevant parts of this section at paragraph 23 above. There was, she submitted, a contrast between the provisions of (4) and those of subsection (3). The statute clearly identified in (4) a case where some sort of connection with England and Wales was required. No reference to such a requirement was made in (3) and the inference can be drawn that none was required. This linked with the provisions in s 4 and Schedule 1 as to the extent to which it was possible to contract out of the statute. S 44 was a provision which could be contracted out of. Where the parties did not contract out of it, the presumption should be that the power was to be exercised unless the seat being outside England, Wales and Northern Ireland made it inappropriate to do so.

127. In a case where the parties, the contract itself, and the arbitration agreement have no connection whatever with England and Wales I do not think it is realistic to draw any inference from a failure to contract out of a provision of a statute having effect in England and Wales. Nor do I see that any inference should be drawn from the language of s 2(4), which is concerned with the position where no seat of the arbitration has been designated or determined.

128. Miss Otton-Goulder's main submission was that s 44 had narrow limits. It applied only as regards the matters listed in subsection (2), which themselves were limited by subsection (1). In those limited areas the court could only make an order "*for the purposes*" of the arbitral proceedings. Subsection (4) prohibited the court, unless the case was one of urgency, from making an order unless either the tribunal had granted permission for it or the other parties had agreed in writing. This was a serious limitation on the court's powers as the period before the arbitral tribunal was fully constituted might be when a party would most need the help of the court. There might also be a similar period after the award had been delivered, perhaps for a freezing order to assist in enforcement, but again the court would have no power to assist unless the application were urgent.

129. Miss Otton-Goulder submitted that subsections (5) and (6) made s 44 even more restrictive. The court could act only if or to the extent that the arbitral tribunal, or other body vested by the parties with power in that regard had no power or was unable for the time being to act effectively, and the court could stipulate that its order could cease to have effect in whole or in part on the order of the arbitral tribunal or other body having power to act in relation to the subject matter of the order.

130. It was in the context of s 44 being very closely circumscribed by the terms of the section itself that Miss Otton-Goulder submitted it was wrong for PDV to say that principles applicable where an injunction was sought to assist foreign legal proceedings further narrowed the operation of that section. That involved re-writing s 44 (3) to use the words "*absence of connection*".

131. In support of her submissions Miss Otton-Goulder cited ***Cetelem SA v Roust Holdings Ltd*** [2005] 1WLR 3555. A sale agreement which would indirectly bring about the transfer of shares in a Russian bank was expressly governed by English law and provided for the resolution of disputes by ICC arbitration in London. Approval of the Russian Central Bank was a condition precedent of the agreement. The claimant made an application for an interim mandatory injunction requiring the defendant to submit its application for approval to the Russian Central Bank, and this was granted by the judge.

132. The Court of Appeal (Sir Andrew Morrit V-C, Clarke and Neuberger LJJ) dismissed an appeal by the defendant. Clarke LJ, with whom Sir Andrew Morrit V-C and Neuberger LJ agreed, stressed that under s 44(3) the court only had jurisdiction to make such orders as it thought necessary for the purpose of preserving evidence or assets. At paragraphs 48 and 49, he observed that the section did not preclude the court from making a preliminary (or even a final) determination of an issue which the parties had agreed to submit to arbitration. Whether it was appropriate for a court to make an order in such circumstances might, however, be an important matter to take into consideration in deciding how to exercise the discretion conferred by s 44(3). Moreover, that discretion extended to such orders as were thought necessary for the purpose of preserving evidence or assets. This reflected paragraphs 214-216 of the departmental advisory committee report preceding the 1996 Act (see paragraph 36 of the judgment). At paragraph 62 Clarke LJ commented that it was evident that the purpose of the order must be to facilitate the arbitration or the enforcement of an award and not to usurp the functions of the arbitral process.

133. Having thus sought to demonstrate that s 44 was much more restrictive than the case law under s 25, Miss Otton-Goulder continued that there were good reasons for treating the grant of relief in aid of court proceedings differently from its grant in aid of arbitrations. Where a court in one jurisdiction makes an order, especially where it grants an injunction, in relation to legal proceedings in another, especially where the Defendants are resident in yet another, there is an obvious risk of conflicting decisions and affronts to judicial comity. No such concerns arise where the arbitral tribunal is seised of the disputes between the parties and the court complies with the requirements of the 1996 Act, especially if the order in question is a freezing order. There is no report of any arbitral tribunal making any such order or granting any injunction in conflict with the grant of any such freezing order or ancillary disclosure order.

134. Miss Otton-Goulder added that:

i) The making of such orders could not interfere with the management of the case by the arbitral tribunal because the latter has no power to make any such order, or is unable for the indefinite future to act effectively if an application were made to it for such an order; and, in any event, such orders do not affect the management of the arbitration between Mobil and PDV on the substantive issues. On the contrary, such orders would support the arbitral tribunal, would maintain the status quo, and would prevent the arbitral process and the arbitral award from being futile;

ii) It is impossible to say that it is the policy of the arbitral tribunal not itself to make worldwide freezing orders, since it has not yet been constituted, and therefore has no policy as yet; it is impossible to say that it is the policy of all arbitral tribunals never to make such orders; it is also impossible to determine, given the ordinary confidentiality of arbitral proceedings, whether such orders have been made by arbitral tribunals; and accordingly no such inference can properly be drawn from the fact that no such orders have ever been made by any such tribunal.

135. As to this principal argument, I acknowledge that s 44 has imposed severe restrictions on the circumstances when a worldwide freezing order can be sought. I do not see, however, that it follows that general principles of comity should have a reduced part to play as a matter of principle. I do not consider that anything said in the ***Cetelem*** case is intended to have that effect. It may be that in particular cases the fact that an arbitral tribunal is involved will lead to fewer practical problems. Where, however, a proposed order would tend to run counter to principles of comity, in particular because it involves assuming jurisdiction over assets not located here, it seems to me that the court must exercise at least the same degree of caution as it would in relation to an order in aid of foreign litigation.

How these principles apply to the present case

136. I accept that the presence of assets here might in appropriate circumstances be relied upon as demonstrating a relevant link with this country. I shall examine that aspect at stage 4B. What would be the position, however, if PDV had no substantial assets here?

137. Miss Otton-Goulder acknowledged that this was not a fraud case. She claimed that it concerned expropriation "*without compensation*" by the government of Venezuela through a nationalisation decree. PDV was not an ordinary company: it was owned by Venezuela, the President of PDV was the Venezuelan minister for oil, and 70% of its revenues went to Venezuela. The reality, Miss Otton-Goulder submitted, was that the commercial interests of PDV and Venezuela in the present context were indistinguishable. To my mind, even if – which I doubt – this can properly be described as a case involving a lack of compensation – none of these observations bring to the present case concerns akin to those which arise in cases of fraud.

138. The only other possible factor in the present case concerns Mobil's submission that PDV was very different from the second and third defendants in ***Motorola No 2.*** They were individuals. By contrast PDV is a corporation which is a very big player in the oil market. For it to be in contempt of court would have a huge impact. Mobil submitted that PDV had gone to great lengths to avoid service of the order dated 24 January 2008, and that this was because once the order was served PDV would feel it necessary to comply with the order rather than attract the opprobrium of being in contempt of court, with all the disruption to its business that a finding of contempt of this

court would entail. Overall on this aspect of the case, Miss Otton-Goulder submitted that even if PDV had no assets in England and Wales, it was an important oil company with considerable business interests both in this jurisdiction and in Western Europe. If Teare J's order were to be confirmed and served on PDV it would comply with it, because failure to comply would lead to a finding of contempt of court with a huge impact on its ability to conduct business in Western Europe. Indeed acting in contempt of court would affect its reputation world wide, as well as the ability of it and its subsidiaries here to carry on business. Any business involving money going through London would be seriously affected, and current arrangements to supply the Eastham refinery and arrangements with transport to London could not continue. The president of PDV was the minister of oil for Venezuela, and contempt of court by PDV would pose difficulties for him in visiting London or transiting here when going elsewhere. These were powerful practical reasons why PDV would obey an order, and thus why the English court would have a means of enforcing its order.

139. These observations seem to me to put the cart before the horse. It might be that a particular foreign respondent would feel a practical obligation to comply with an order of this court. That seems to me to be yet another factor which points towards caution before putting a foreign respondent under that practical obligation.

140. Miss Otton-Goulder added that at this stage one should take into account the position in other jurisdictions, in particular the inability in Venezuela to get a world wide freezing order. It was common ground that relief akin to a freezing order available in Venezuela could only extend to an order having effect in that country. If PDV were right, this court would be unable to make an order in support of arbitral process in a friendly state. Here, however, it seems to me that the onus must be on Mobil to seek relief in Venezuela, the country which is PDV's home and where the bulk of its assets are located. I consider that it runs strongly counter to considerations of comity for Mobil to come to this country for an order affecting assets in Venezuela when it has not even attempted to seek the assistance of the courts in Venezuela.

141. That leaves for consideration only Mobil's contentions as to the effect of article 23 of the ICC Rules. Here too it seems to me that Mobil is putting the cart before the horse. Assuming for present purposes that "competent" refers to the assessment by the court of its own competence, that must nevertheless bring with it a consideration by the court of considerations of comity. For the reasons given above – putting on one side the question of assets here – I have concluded that considerations of comity would point strongly against granting an order under s 44(3).

Stage 4B: assets in England and Wales

142. The major difficulty confronting Mobil in this regard is that affidavits and affirmations by senior officers of PDV have been lodged which state expressly that it has no office, conducts no business operations, and has no bank accounts, real property or other assets of any kind in England and Wales. Mobil is not content to accept these assurances. However, there is no reason whatever to think that those who have given these assurances have sought to deceive the court or have misunderstood the ordinary meaning of the words used.

143. Miss Otton-Goulder noted that the evidence lodged on behalf of the defendant had not expressly dealt with the possibility there might be bank accounts in England that were not in PDV's name but over which it had "*effective control*". I can see no basis for inferring that PDV's evidence was carefully drafted so as to leave open this possibility. The matter has, in any event, been addressed in further evidence lodged after Miss Otton-Goulder made this assertion.

144. Mobil's case as to assets when seeking the freezing order was reflected in paragraphs 8 and 9 of the order itself:

> "8. *Paragraph 7 [i.e. the world wide freezing order] applies to all the Respondent's assets whether or not they are in its own name and whether they are solely or jointly owned. For the purpose of this order the Respondent's assets include any asset which it has the power, directly or indirectly, to dispose of or deal with as if it were its own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with its direct or indirect instructions. 9. This prohibition includes the following assets in particular –*
>
> *(a) those shareholdings, in which the Respondent has an interest, whether directly or indirectly, in the following UK inforporated companies:*
> *(i) Nynas Limited;*
> *(ii) Eastham Refinery Limited;*
> *(iii) Nynas Biturnen Limited;*
> *(iv) Nynas Naphthenics Limited;*
> *(v) Bitor Energy Plc;*
> *(vi) Bitor Europe Limited;*
>
> *(b) the assets of Nynas UK Aktiebolag's UK branch*
>
> *(c) Nynas UK Aktiebolag's interest under a lease granted in respect of the refinery at East Camperdown Street, Dundee, DD1 3LG, Scotland;*
>
> *(d) any money standing to the credit of any bank account in the name of PDVSA or any company in which it has an interest, whether directly or indirectly, including the amount of any cheque drawn on such account which has not been cleared."*

145. The first affidavit of Mr Sprange on behalf of Mobil set out Mobil's factual evidence as to the extent to which the particular shareholdings identified in paragraph 9 (a) of the order and the bank accounts identified at paragraph 9(d) of the order were located in England and Wales. It also set out Mobil's factual evidence as to the particular

assets identified at paragraph 9(b) and 9(c) being located in the United Kingdom. In my view the entirety of this part of Mr Sprange's evidence suffered from a fundamental defect. For the reasons given earlier, in order to establish a relevant connecting link with England and Wales, Mobil would need to show that there were assets of *PDV* located here. However the factual material in Mr Sprange's first affidavit demonstrated that PDV did not directly own any of the assets described in paragraph 9 (a) to (c). They were all owned by non-United Kingdom companies. In some cases these were direct or indirect subsidiaries of PDV. In other cases the owner was a joint venture company part of which was indirectly owned by PDV. To the extent that Mr Sprange's first affidavit sought to demonstrate that bank accounts were in England and Wales, the same was true. Although paragraph 130 of the affidavit asserted that PDV was likely to have bank accounts here, paragraphs 179-184 did not identify any bank account directly operated by PDV here. The essential nature of the claim was that PDV "through its corporate interests in the jurisdiction" held or had held bank accounts here. As regards the assets identified in paragraph 9 of the order, however, to the extent that they were relied upon as showing a link with this jurisdiction, the relevant link only arose if a non-United Kingdom company other than PDV could be treated as if it were PDV.

146. There is often a concern that the defendant to a freezing order may hide its assets by putting them in the names of others. For that reason it is standard to include the extended definition of "the respondent's assets" found in paragraph 8 of the order. This will plainly catch assets whose owners are no more than nominees of the respondent. What is the position where ordinary arrangements are made for a holding company to have operating subsidiaries? Miss Otton-Goulder submitted that the test would be whether the respondent was the effective controller of the asset in question. Applying that test, the case for Mobil became rather different from that advanced before Teare J.

147. In two instances Mobil submitted that the owner of the assets was no more than a nominee of PDV. These two instances concerned the Bitor companies identified at paragraph 9(a)(v)(vi) of the order. In this regard Miss Otton-Goulder drew attention to evidence lodged on behalf of the defendant in relation to the four companies identified at paragraph 9(a)(i) to (iv). This evidence explained that those companies were owned by joint ventures in which PDV through its subsidiaries had no majority shareholding, and accordingly stated that PDV could not control those four companies. There was no similar statement in PDV's evidence that PDV could not control the Bitor companies. It was on this basis that Mobil suggested that the court could infer that the Bitor companies were merely nominees. The suggested inference, however, is untenable. PDV's evidence in relation to the first four companies ("the Nynas companies") was seeking to explain the nature of the joint venture arrangements. The mere fact that PDV relied upon those arrangements as demonstrating its inability to control the Nynas companies provides no basis for any inference that PDV was the "effective controller" of UK companies which were owned non-UK operating subsidiaries of PDV. In the circumstances of this case I see no reason to think that the "*effective controller*" of the Bitor companies was anything other than the relevant non-UK operating subsidiary of PDV.

148. As regards bank accounts, Miss Otton-Goulder relied upon three letters that had been received by her instructing solicitors, each of them being sent by banks and each of them suggesting that accounts with the bank were or might be covered by Teare J's order. When one examines the terms of paragraph 9(d) of the order, however, the order appears to bite upon a bank account of any company in which PDV has an interest. It follows that there is nothing in these letters to suggest a good arguable case that the evidence filed by PDV in this regard is incorrect.

149. In relation to the Nynas companies Miss Otton-Goulder put forward a new case that there was likely to be a debt owed by the Nynas Group to PDV. As the debtor company was likely to be in this country, it followed that the debt was an asset located here. Four matters were relied upon. As to these:

i) The Nynas Group operated the Eastham Refinery in Cheshire and had stated in public documents that it bought fuel from PDV "via AB Nynas Petroleum." Mobil acknowledged that this latter company was Swedish and that if it were the debtor company then the debt would not be located here. However, Mobil suggested that it might be no more than an agent. In my view that is speculation that cannot be sufficient to give Mobil any good arguable case in this regard. I add that it seems to me likely that the reference to purchasing from PDV in the public document is intended to cover purchases from operating companies of PDV.

ii) The public documents were said by Mobile to demonstrate that Nynas Group bought oil from PDV. However, the relevant documents referred to a contractual price formula and to a long term contract with the Isla refinery at Curacao, which was a subsidiary of PDV. This seems to me to point to the purchase being payable to an operating subsidiary of PDV, and I see no basis in the circumstances of this case to infer that PDV is the "effective controller" of that asset.

iii) English solicitors acting for the Nynas Group had agreed to a proposed variation order to allow for business done by the Nynas Group with PDV. However, it appears to me clear that the reason the Nynas Group expressed concern was the width of paragraph 9 of the order. Mr Pollock rightly observed that those who received the order could not be sure whether any particular item fell to be treated as an asset of PDV under the order. For reasons similar to those in relation to the three banks discussed above, it seems to me that the concerns expressed by the Nynas Group do not assist Mobil.

iv) Mobil suggested that the Nynas Group might have contracted for the purchase of oil with the Dutch operating subsidiary of PDV. If so, Mobil had secured an order attaching that companies shares in the Netherlands, and Mobil would be able to ask the Dutch court to freeze its assets. All of this is speculation. There is no basis in Mobil's evidence for any assumption that the contract is likely to be with PDV's Dutch subsidiary. Even if it were, I cannot see how this points to any relevant link with England and Wales.

150. Miss Otton-Goulder asserted that a contractual entitlement to borrow from a bank branch in this country would be an asset in this jurisdiction. Of course, if that right were exercised, funds drawn down by PDV would be assets here so long as they remained here. I question whether the right to draw down funds itself can constitute an asset of any commercial value – it can hardly be bought or sold. In any event, there is nothing to suggest that any right to draw down funds is a right to draw down funds from a branch in this country or that it is a right over which PDV is the "*effective controller*".

151. The final matter relied upon by Miss Otton-Goulder concerned an agreement between The Greater London Authority and PDV Europe BV, a company owned by PDV's Dutch operating subsidiary. PDV's website had said that the agreement "*will assist*" in providing diesel to Transport for London. In fact the agreement provides for PDV Europe BV to make a financial contribution in return for consultancy services to be provided by the Greater London Authority. I can see nothing in this material to provide a good arguable case that PDV is the "effective *controller*" of assets here.

152. For these reasons I find that Mobil lacks any good arguable case that PDV has, or is the "effective controller" of, any substantial assets here. In those circumstances the question whether the presence of such assets would make it appropriate to grant a worldwide freezing order does not arise.

Stage 4C: Relevance of New York Law

153. If it were found that assets here were such as to constitute a sufficient link for the grant of a worldwide freezing order, or that there was no need for any such link, then Mr Pollock sought to rely upon two features of New York law as pointing against the exercise by this court of its discretionary power to grant such an order. It is common ground that the New York court would regard itself as having jurisdiction only to grant a freezing order in relation to assets within the state of New York, and as having no power to grant a worldwide freezing order. Second, it is common ground that under the law of New York (but not the law of England and Wales) PDV is entitled to sovereign immunity. Under the guarantee it waived that immunity in large part, but the waiver did not extend to "*pre-judgment attachment*".

154. Questions arise whether factors such as these should be regarded as pointing towards or against the grant by this court of a worldwide freezing order. Mr Pollock relies, among other things, upon observations of Lord Mustill in the ***Channel Tunnel*** case. Miss Otton-Goulder relies, among other things, on observations of Sir Andrew Morritt V-C and Potter LJ in ***Refco***. I consider it highly undesirable in the present case to seek to determine how a first instance court should approach those differences of opinion. Whatever conclusion I might come to could have no bearing upon the way in which, in the light of my earlier findings, I am bound to resolve the present matter. In these circumstances I say nothing about those questions.

Stage 4: Conclusion

155. At stage 4A I have concluded that in order to surmount the first hurdle Mobil, in the absence of any exceptional feature such as fraud, would at least have had to demonstrate a link with this jurisdiction in the form of substantial assets of PDV located here. By "*exceptional feature*" I mean a factor of such strength as to make it appropriate to grant an order in the absence of any connection with this country. At stage 4B I conclude that Mobil cannot demonstrate such a link in the form of substantial assets here and thus fails to surmount the first hurdle for this reason as well as the reason identified at stage 2.

156. Equally at stages 4A and 4B it follows that, in the absence of any exceptional feature such as fraud, and in the absence of substantial assets of PDV located here, the fact that the seat of the arbitration is not here makes it inappropriate to grant an order under s 2(3) of the 1996 Act and thus Mobil fails the third hurdle.

157. In these circumstances stage 4C does not arise and, for the reasons given above, I do not think it right to seek to deal with it.

Does s 2(3) involve a compulsory final stage?

158. Miss Otton-Goulder contends that the impact of s 2(3) must be left to the final stage of analysis. The choice of the word "*inappropriate*" as opposed to "*appropriate*" suggests that, once the court has decided that it would grant the injunction sought, were the seat of the arbitration in the jurisdiction of the court in question, then the court should grant the injunction, unless *"in the opinion of the court"* it would be inappropriate to do so. She submits that if this were to be considered with other factors Parliament would have said so.

159. It followed that Miss Otton-Goulder advocated a three stage approach. The first stage was to ask, are the powers under s 37 wide enough to grant a worldwide freezing order? The second stage dealt with matters other than the seat of the arbitration being in New York. Thus at the second stage one asked whether the requirements of s 44 were satisfied, in particular (2), (3) and (5), and whether, on the assumption that the seat of the arbitration was in England and Wales, it would be appropriate to grant an order. That then left the third and final stage, examination of the question whether the seat of the arbitration being in New York made it inappropriate to grant an order. The reason parliament had separated that aspect out was that there would be a wide range of circumstances in which the seat would be of very limited significance. Another reason was that there was a potential for conflict between this jurisdiction and that of the courts of the seat of the arbitration a conflict which did not arise in the present case. Miss Otton-Goulder likened this issue to the question as to when the court should examine inexpediency under s 25(2) of the 1982 Act.

160. As indicated earlier, although I need not decide the point, I consider that Mr Pollock's rival submission is correct. I do not accept the analogy with the 1982 Act. In the case of the 1996 Act, the purpose of s 2(3) is bound up with

the general rule in s 2(1), which makes it clear that Part 1 of the 1996 Act normally only applies where the arbitration agreement contains a link with this country by making it the seat of the arbitration (the "*seat link*"). So far as s 44 is concerned, if the parties have not agreed otherwise, the operative part of s 2(3) confers a limited additional jurisdiction on this court. It does so even though the seat link is not present. Having done this, the remainder of the section is there to counter any suggestion that by conferring jurisdiction in this way Parliament is indicating that the absence of a seat link is an irrelevant factor when deciding whether to exercise the jurisdiction. I see no reason to infer any intention that the impact of this factor must be left until a final stage. That might be inefficient or unjust. Sometimes at the outset a court can say that a particular factor will be determinative whatever the outcome of disputed issues on other aspects of a particular case. On other occasions a court may conclude that it can best consider the impact of this factor in conjunction with others. In those circumstances unnecessary expense and delay may be incurred by reserving the factor in question to a final stage. One would expect there to be some good reason for requiring a more cumbersome approach. So far as s 2(3) is concerned Mobil have not identified any aspect of justice or fairness, or any other good reason, for doing so.

Service by an alternative method

161. As mentioned earlier, I adjourned Mobil's application for an order permitting service by an alternative method. Mobil urged that I should deal with the matter at the conclusion of argument on PDV's application to set aside the order. PDV responded that the practical effect of service by an alternative method would be to start the clock under paragraph 5 of the Order – requiring PDV within 5 working days to inform Mobil's solicitors of all its assets worldwide exceeding $5,000 in value. It would be wrong, when I had heard argument and preparation of my judgment was underway, to require PDV to spend substantial time and money when my conclusion might well be that the whole of the Order should be set aside. In response Mobil relied on *Motorola (No. 1)* where a stay of the obligation to provide information under a freezing order had been sought pending argument on an application to set aside that order. The judge refused a stay and an appeal was dismissed by the Court of Appeal.

162. In my view there were significant differences between the present case and ***Motorola (No. 1)***. First, this was not a case involving allegations of fraud. Second, in the present case, unlike ***Motorola (No. 1)***, oral argument on the discharge application was complete. Third, my initial impression was that the merits of the discharge application were very strong and that any danger to Mobil arising during the period while I completed my judgment was slight. These factors led me to conclude that it would be wrong to require PDV to spend substantial time and money on the disclosure of information prior to my decision on the discharge application, and accordingly in the exercise of my discretion I adjourned the application for service by an alternative method until after that decision.

Conclusion and consequential orders

163. I conclude that PDV succeeds in its application to set aside the order made on 24 January 2008. Conversely, Mobil fails in its application to continue that order. The application for service by an alternative method also fails.

Miss Catharine Otton-Goulder QC, Mr Richard Slade, Mr Thomas Sprange and Mr Michael Bools (instructed by Steptoe & Johnson) for the claimant
Mr Gordon Pollock QC and Mr Paul McGrath (instructed by Stephenson Harwood) for the defendant