JUDGMENT : Mr Justice Mann : Chancery Division. 1st July 2005

Introduction

1. In these proceedings, the claimant ("Law Debenture") seeks to enforce the payment of monies due under bonds issued by the first defendant ("the issuer") and guaranteed by the second defendant ("the guarantor") of which Law Debenture is trustee for the various bondholders. I shall call those defendants together "the Elektrim defendants". The trust deed contains provisions which provide for arbitration in certain events. By two applications before me, one issued by Law Debenture and the other by the issuer and the guarantor, the parties raise questions as to the extent to which these proceedings should be stayed to allow for arbitration, and in particular the extent to which this court, rather than the arbitral tribunal, should determine what should and should not go off to arbitration. The third defendant to these proceedings, Concord Trust ("Concord") is a bondholder and has been joined at its own request. It supports the position of Law Debenture.

The Debenture Trust Deed

2. The original bond trust deed was dated 2nd July 1999. By virtue of various amendments, the current arrangements as between the issuer and the guarantor on the one hand and Law Debenture on the other is governed by an amended and restated trust deed dated 15th November 2002, and I do not need to go into the earlier documentation. Nor do I need to deal with or set out many of the provisions in that document. The issuer is the primary obligor under the deed. The amount of the principal and interest said to be currently owing under the bonds exceeds €440m. Clause 12 of the bond conditions provides that in the event of certain specified events of default, Law Debenture, as bond trustees, may demand repayment of the outstanding principal by an acceleration notice. Subject to that, the principal is repayable in December 2005.

3. The arbitration provisions which lie at the heart of the present dispute are contained in clause 29 of the restated trust deed. Clause 29.1 provides that the deed is governed by English law. The remaining relevant provisions of clause 29 are as follows:

"29.2 Any dispute arising out of or in connection with these presents…… may be submitted by any party to arbitration for final settlement under … (the UNCITRAL Arbitration Rules), which rules are deemed to be incorporated by reference into this Clause 29.2

29.3 The tribunal shall consist of three arbitrators. The Claimant party shall appoint one arbitrator. The Respondent party to the arbitration shall appoint one arbitrator…..The Claimant party or parties and the Respondent party or parties to the arbitration shall jointly appoint the third arbitrator who shall be the chairman of the arbitral tribunal. The LCIA … shall act as the "appointing authority" under the UNICITRAL Arbitral Rules in the event that:

(A) any party or parties to the arbitration fail to appoint an arbitrator; or

(B) the parties to the arbitration fail to appoint jointly the third arbitrator within the time limits specified in the UNICITRAL Arbitration Rules.

29.4 The place of any such arbitration shall be London, and the language of the arbitration shall be English. The decision and award of the arbitrators shall be final and binding and shall be enforceable in any court of competent jurisdiction.

29.5 Save as provided in Clause 29.8 below, the parties exclude the jurisdiction of the courts under Section 45 and 69 of the Arbitration Act 1996.

29.6 The agreement by all the parties to refer all disputes arising out of or in connection with these presents …. to arbitration in accordance with Clause 29.2 above is exclusive such that neither [ESA] nor [EFBV] shall be permitted to bring proceedings in any other court or tribunal other than by way of counterclaim in respect of proceedings brought by the Trustee and/or each of the Bondholders in respect of any of the above documents in such other court or tribunal in accordance with this Clause.

29.7 Notwithstanding Clause 29.2, for the exclusive benefit of the Trustee and each of the Bondholders, [EFBV] and [ESA] hereby agree that the Trustee and each of the Bondholders shall have the exclusive right, at their option, to apply to the courts of England, who shall have non-exclusive jurisdiction to settle any disputes which may arise out of or in connection with these presents …. and that accordingly any suit, action or proceedings (together referred to as "Proceedings") arising out of or in connection with any of the above may be brought in such courts. ……

29.8 [EFBV] and [ESA] respectively:

(A) waive objection to the English courts on grounds of inconvenient forum or otherwise as regards Proceedings in connection with these presents ….; and

(B) agree that a judgement or order of an English court in connection with any of these presents …. is conclusive and binding on them and may be enforced against them in the courts of any other jurisdiction.

29.9 Each of [EFBV] and [ESA] hereby appoints Law Debenture Corporate Services Limited at its offices for the time being at Fifth Floor, 100 Wood Street, London EC2V 7EX as its agent to receive service of process in any Proceedings in England based on these presents, …"

The background to this dispute

4. By February 2004 an event had happened which was, or might have been, capable of being an event of default under the bonds. The details of that do not matter, and I will not lengthen this judgment by setting them out here. In that month Law Debenture sought directions as to whether it should take certain steps; the respondent to the application was Concord and other bondholder defendants. On 16th February 2004 Peter Smith J delivered

judgment in relation to that, as a result of which on 17th February 2004 Law Debenture certified that the event in question was materially prejudicial for the purposes of the "events of default" provisions. There were then further proceedings with Concord as claimant and Law Debenture as defendant in which what was in issue was the extent to which Law Debenture were obliged to issue a notice of acceleration which would accelerate the date of the payment of principal under the bond. The details of those proceedings, which went up to the House of Lords, can be seen in the report of the House of Lords decision in *Concord Trust v The Law Debenture Trust Corporation plc* [2005] 1 WLR 1591. The effect of that decision was that, given certain requests by bondholders, Law Debenture was obliged to serve an acceleration notice. Judgment was given by the House of Lords on 28th April 2005. While all this was going on, Law Debenture gave notice of various events of default. Once again, the details do not matter; the dates were 17th February 2004, 11th November 2004 and 29th December 2004. Based on those three events of default, an acceleration notice was served on 18th January 2005. On 22nd February 2005 Law Debenture notified a fourth event (a bankruptcy application in Poland) as being a further event of default and served a second acceleration notice.

5. On 7th January 2005 the guarantor gave notice of arbitration challenging whether the first three events of default were indeed events of default, saying that they were not and claiming damages. On 21st January 2005, a supplemental arbitration notice was served, challenging the acceleration notice served on 18th January 2005. In accordance with the arbitration procedure, the guarantor appointed its arbitrator (a Polish lawyer). Under that procedure, it then falls to Law Debenture to appoint an arbitrator, and for both parties to appoint a third. However, while Law Debenture corresponded with the LCIA, it did not appoint and says that nothing that it did amounted to participation in the arbitration. That being the case, on the application of the guarantor, the LCIA appointed Lord Browne-Wilkinson as second arbitrator. Just to complete that picture, on 26th May 2005 the guarantor asked the LCIA to initiate a procedure to appoint the third arbitrator. The arbitration proceedings deal with the validity of only the first three alleged events of default, and the acceleration notice served in reliance on those three events. No arbitration proceedings have been commenced in relation to the fourth alleged event of default; as I understand it the reason for that is that the Elektrim parties considered that the relevant event is somehow spent because the bankruptcy proceedings were dismissed.

6. Law Debenture did not wish to go down the arbitration route in order to have the issues between the parties determined. On 9th March 2005 it issued a claim form seeking a declaration that the bonds were due and owing, judgment in the full amount due under the bonds, the recovery of certain costs and interest (and costs in the proceedings). The claim form recites that Concord has requested to be joined to the claim as one of the holders of the bonds. No relief is sought against it. Concord was represented before me by counsel who supported Law Debenture and its submissions (made by Mr Glick QC).

The issues arising before this court

7. As a result of that background, disputes have arisen as to the extent to which the issues between the parties should be the subject of arbitration under clause 29 of the trust deed, or whether Law Debenture is entitled to commence proceedings in this jurisdiction making the claims that it has. In addition, there is a dispute as to whether that question itself should be determined by this court or by the arbitrators. On 19th April 2005 Law Debenture issued an application seeking permission to amend its particulars of claim, in particular to raise the jurisdiction point, and seeking a determination under section 72 of the Arbitration Act 1996 ("the Act") that there was no valid arbitration agreement between it and the guarantor and that the English courts have jurisdiction by contract to hear the dispute. On 21st April the Elektrim parties issued a counter-application seeking directions pursuant to CPR 62.8(3) for the trial of a preliminary question as to whether or not "an arbitration agreement has been concluded" and whether the disputes in the present proceedings fall within the scope of such an arbitration. It also seeks a stay pursuant to 62.8(3) pending determination of that preliminary question, and a stay under Section 9 of the Act and/or pursuant to Section 49(3) of the Supreme Court Act 1981. On 27th April 2005 Mr Justice Blackburne ordered that the defendants' application be heard at the same time as a trial of a preliminary issue on written evidence alone, and the preliminary issue was defined in terms of the claims made in paragraphs (3) and (4) of the prayer to the amended particulars of claim (added by the amendment just referred to). Those paragraphs read as follows:

> *"(3) A declaration that the court has jurisdiction to hear and determine the claims contained herein.*
>
> *(4) An order restraining the second defendant from pursuing further or taking any further steps in the arbitration proceedings commenced by it by notices of arbitration dated 7th January and 21st January 2005."*

8. It is therefore those jurisdictional and stay issues that I have to decide. Put another way, the basic questions which arise are whether the arbitrators or this court should hear the substantive issues arising in the arbitration and in these proceedings, and whether the arbitrators or this court should determine that question of jurisdiction. The Elektrim parties' case is that there is an arbitration agreement in place, and that the arbitral body should decide the prior jurisdiction question, and should decide the substantive question too. Law Debenture and Concord say that this court has, and should exercise, jurisdiction in relation to both.

The Elektrim parties' case on stay and jurisdiction decisions.

9. The Elektrim parties start from the position that there is an arbitration agreement within the meaning of section 6 of the 1996 Act. Under this section an arbitration agreement is defined as: *"an agreement to submit to arbitration present or future disputes (whether they are contractual or not)."*

10. They rely on clause 29.2 of the deed. Then they rely on section 9, which provides:

"9(1) A party to an arbitration agreement against whom legal proceedings are brought … in respect of a matter which under the agreement is to be referred to arbitration may … apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

Having established that, they then seek to say that the provisions of sections 30 to 32 of the Act, when taken with section 9, provide a regime under which the jurisdiction question which arises in this case should be referred to the arbitral tribunal. Mr Auld QC, who appeared for the Elektrim defendants, relies on the principle set out in section 1(c):

"The provisions of this Part are founded on the following principles, and shall be construed accordingly –

(c) in matters governed by this Part the court should not intervene except as provided by this Part."

He says that when all those provisions are taken together they produce a regime under which it is apparent that the arbitral tribunal should determine questions as to its own jurisdiction. Section 9 requires a stay because Law Debenture cannot bring itself within any of the three categories of cases in subsection (4) (and does not try to do so). I should therefore stay these proceedings so that the current arbitration can take its course, and I should not embark on a consideration of the effect and scope of clause 29. (If I am to embark on that topic then he makes further submissions about it, to which I will refer below.) So far as Law Debenture seeks to rely on section 72 of the Act, he says that it is not entitled to do so because it has taken part in the arbitration (within the meaning of that section) so as to disqualify it from relying on the section.

Law Debenture's submissions on stay and jurisdiction

11. Law Debenture meets these submissions in a number of ways. It says that there is indeed a dispute about jurisdiction. However, there is no arbitration agreement because clause 29 does not amount to one in the events which have happened; or if there is one then (again, in the events which have happened) then the current disputes are not ones which it has been agreed shall be referred to arbitration because the parties have agreed that Law Debenture is entitled to litigate it (clause 29.7); and in any event it has brought an application under section 72 which cannot be ducked and I have to deal with it (unless barred by participation in the arbitration, which Law Debenture denies). Section 72 provides:

"72(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question – (a) whether there is a valid arbitration agreement… (c) what matters have been submitted to arbitration in accordance with the arbitration agreement….by proceedings in the court for a declaration or injunction or other appropriate relief."

Should this court determine the jurisdiction point?

12. The parties agreed that the decision of Thomas J in ***Vale do Rio v Bao Steel*** [2000] 2 Lloyds Rep 1 contained a summary of the position of the court in relation to arbitration disputes which is helpful. In that case shipowners sought a declaration that a shipping company was party to an arbitration agreement. For reasons that do not matter that question was litigated as between the owners and brokers. At paragraphs 44 to 51 Thomas J considered how the Act worked, and pointed out the availability of sections 30 to 32 of the Act. Section 30 provides that an arbitral tribunal has power to determine its jurisdiction (and various specific heads are identified) and section 32 provides a mechanism for referring jurisdiction disputes to the court. It is important to bear in mind that the judge was faced with the propriety of an action brought by a person who was seeking to assert that there was an arbitration agreement, and that the alleged counterparty was a party to that agreement. That distinguishes the case from one in which a claim is brought by a person who says they are not a party to such an agreement. He held that the proper course for the claimant in his case (a party asserting there was an agreement) was not to commence court proceedings but was to commence the arbitration and utilise the arbitration procedure, if necessary invoking section 30. It was in that context that he reinforced the principle that the arbitration mechanism was to be respected. However, in the course of his judgment he said two things which are particularly germane to the present case. The first was in paragraph 52:

"52. I accept the owners' submission that the use of the word "should" [in section 1(c), quoted above] as opposed to the word "shall" shows that an absolute prohibition on intervention by the Court in circumstances other than those specified in Part I was not intended."

That demonstrates that I cannot treat section 1(c) as imposing some sort of absolute bar, a point which becomes important when considering the question of a stay under section 9.

13. The second was in paragraph 54. In that paragraph he sets out: *"… the steps that a party who contends that there is another party to an arbitration agreement should take"*

He describes the appointment of an arbitrator, and subsequent steps. He points out that the arbitral tribunal can then determine its jurisdiction, and then refers to two safeguards available to the other party (who is, presumably, challenging the jurisdiction). The first is a challenge to the award under s 67. Then: *"The rights of the party who challenges the existence of the arbitration agreement and takes no part are protected by s 72; he is given the right of recourse to the Courts in the circumstances set out."*

It is plain, therefore, that what he has said about the primacy of the arbitral process does not apply to such a challenge. They are obviously intended to apply to positive claims that there is an arbitration agreement.

14. The right of the objecting party to bring section 72 proceedings is supported by two further authorities. First, in ***Caparo Group Ltd v Fagor Arrasate Sociedad Co-operative*** [2000] ADRLJ 254 Clarke J quoted with approval the remarks of a departmental advisory committee in relation to what became section 72: *"To our minds, this is a vital provision. A person who disputes that an arbitral tribunal has jurisdiction cannot be required to take part in the arbitration proceedings or to take positive steps to defend his position, for any such requirement would beg the question whether or not his objection has any substance and thus be likely to lead to gross injustice. Such a person must be entitled, if he wishes, simply to ignore the arbitral process, though of course (if his objection is not well founded) he runs the risk of an enforceable award being made against him. Those who do decide to take part in the arbitral proceedings in order to challenge the jurisdiction are, of course, in a different category, for then, having made that choice, such people can fairly and properly be required to abide by the time limits etc that we have proposed."*

15. Second, there are remarks of Rix J in ***Azov Shipping Co v Baltic Shipping Co*** [1999] 1 Lloyd's Rep 68. He said (at page 69):

"Where a challenge to an arbitrator's substantive jurisdiction is made, the party that challenges the jurisdiction has a number of options under the Act. It may agree to participate in the argument before the arbitrator of the question of his competence and jurisdiction: see s.30 of the Act. It may do so while reserving its right to challenge the arbitrator's award as to his one competence (see s.67)…

Alternatively, it may seek, without arguing the matter before the arbitrator, to promote the determination of the preliminary point of jurisdiction by the court under s.32….

The third option of someone disputing an arbitrator's jurisdiction is to stand aloof and question the status of the arbitration by proceedings in Court for a declaration, injunction or other appropriate relief under s.72 of the Act. In such a case he is in the same position as a party to arbitral proceedings who challenges an award under s.67 on the ground that there was no substantive jurisdiction."

16. I therefore reject Mr Auld's submission that the proper approach, in accordance with the Act, is to require the matter to be dealt with by the arbitrators. That means that in the present case Law Debenture can, if it can bring itself within the wording of section 72, invite this court to consider the jurisdictional point under that section. At this point the Elektrim defendants make two points. First, they say that there is, on any footing, an arbitration agreement to which Law Debenture is a party, so it is not merely "alleged to be a party" to arbitral proceedings (as section 72 describes the permitted applicant to be), it is an actual or real party. That disqualifies it. Second, it says that Law Debenture has participated in an arbitration which is clearly, and on any basis, on foot, and so cannot avail itself of the section and has to take the jurisdictional point before the arbitrators.

17. In support of its first submission the Elektrim defendants have to embark on a consideration of the true construction of clause 29. They say that on the true effect of the clause, the guarantor was perfectly entitled to serve its arbitration notice and to commence the arbitration, and the arbitration was thereby validly commenced. Even on Law Debenture's construction of the clause (which Law Debenture says gives it an option to have matters decided by the court) the arbitration was (and indeed remains) a validly constituted arbitration to which Law Debenture is an actual party. The commencement of these proceedings, even if justified, does not prevent that being the case. Law Debenture's answer to this is twofold. First, on the true construction of the clause it is not a party to the arbitral proceedings until it decides not to exercise its option under clause 29.7, so it remains only an "alleged" party. Second, and alternatively, once it has exercised its option to start proceedings (which it has) it ceases to be a party to the arbitration proceedings and at that point becomes only an "alleged" party. Neither the Elektrim defendants nor Law Debenture advanced any authority in support of their respective views (though in Mr Glick's case it is fair to point out that he had to deal with the point on the hoof because it was not foreshadowed by Mr Auld's skeleton argument). The only thing that Mr Auld did pray in aid was a passage in some Department of Trade and Industry notes on the Act when it was still a bill, giving an example of the sort of person who is entitled to apply under section 72: "For example, if a person receives notification that he is a party thereto and that person knows nothing of the alleged contract, arbitration agreement or dispute, that person may choose to take no part in the proceedings at all. In such a case the right of that person to object must be protected and not made subject to the restrictions on challenging jurisdiction set out elsewhere in the Bill (eg clause 31)."

Mr Auld said that the section was for that sort of case, not a case like the present. I do not find that at all helpful. Leaving aside what status should be given to these notes in any event, they are, on any footing, only setting out an example (and probably deliberately taking a strong one). What is more important is the wording of the actual provision.

18. It is clear to me that Mr Auld's point fails. I do not find it necessary to determine whether there were arbitral proceedings which have ceased to be such, or whether there never were any (though I would tend to favour the former analysis). I prefer to construe the words with a view to the obvious purpose of the section. It is intended to allow a challenge to the jurisdiction of the arbitrators by someone who has not yet participated in the proceedings. He is described as an "alleged" party because it has not yet been determined whether he has that status. There are a number of reasons why he might not have that status. One is whether he is a legitimate party at all – for example, he might say that he is not a party to the agreement containing what is clearly on its face an arbitration agreement. Another is while accepting he was a party to the agreement, he might wish to say that for some reason he is not a proper party to what are alleged to be arbitral proceedings – for example, because the agreement does not cover the dispute in question and therefore the proceedings are not proper arbitral

proceedings (see paragraph (c) of s 72(1)). A third is the situation where there is no dispute about the arbitration agreement or the fact that it covers the dispute in question, but there is a dispute as to the constitution of the tribunal in question (see paragraph (b) of the subsection). In this situation the proceedings might be said to be only "alleged proceedings" so that the party can only be an "alleged" party.

19. The key to the subsection is, as I have observed, a challenge to the jurisdiction. This is emphasised by the cross-reference to section 67 in subsection 72(2) – section 67 refers in terms to a challenge to the "substantive jurisdiction". The basis of the permitted challenge under section 72 is that the objecting person is not a party to what are ostensibly arbitration proceedings because those proceedings are not actually proceedings which can be asserted against him. It is in that sense that the word "alleged" is used. If it assists, the subsection can usefully be read as if it (albeit inelegantly) repeated the word "alleged" before the expression "arbitral proceedings". If read in that way then Law Debenture clearly becomes a person qualified to apply. Its case is that the arbitral proceedings were not and are not, or are no longer (it does not matter which for these purposes) capable of encompassing the dispute between it and the Elektrim defendants, so the most that can be said of it is that it is alleged to be a party to those alleged proceedings.

20. I do not overlook the fact that Law Debenture has to bring its section 72 claim within one of more of the paragraphs of that subsection. I find that it clearly does so. On any footing it is challenging whether there is an arbitration agreement which, as events now stand, agrees to submit the current dispute to arbitration, because it says it can insist on litigation instead. That seems to me to come within paragraph (a) – the reference in that paragraph must be taken to allow a challenge to the effect of anything which might once have been an arbitration agreement. Further, it seems to me that it comes within paragraph (c) – it questions the matters that have been submitted to the arbitration because it says that, on the true construction of the agreement between the parties, they were not, or are no longer, proper matters to be submitted to it.

21. I therefore find that, subject to the participation point, Law Debenture is entitled to make its application under section 72.

Has Law Debenture taken part in the arbitral proceedings?

22. The claimant can only apply under section 72 of the Act if it is a person alleged to be a party to arbitral proceedings who "*takes no part in the proceedings*". The Elektrim defendants say that Law Debenture has taken part in the proceedings so as to debar it from making an application under this section. It is said to have participated by virtue of its correspondence with the LCIA after the guarantor gave notice of arbitration, and they say that the correspondence shows that Law Debenture did two things – first it sought to bring about a dismissal of the proceedings in correspondence, and the second was participating in the selection process of the second arbitrator. In order to consider this point I shall have to consider the terms of the correspondence that was sent.

23. Before doing so, I should briefly mention again the one authority on this that was drawn to my attention by both Mr Glick and Mr Auld in this respect, namely ***Caparo Group Ltd v Fagor Arrasate Sociedad Co-operative*** [2000] ADRLJ 254. That was a case in which a similar application was made where there had been correspondence with the International Court of Arbitration. Clarke J was invited to consider an assertion in a letter sent by the non-consenting party to the ICC to the effect that it was not a party to the contract, and was therefore not a party to the arbitration agreement, and suggesting that the request for arbitration should be rejected. Clarke J considered that letter in its context and held that it did not necessarily amount to participation in the proceedings. The context of that case was article 8(3) of the ICC rules which (unlike the UNCITRAL rules in the present case) gave the Court its own role in deciding whether prima facie the arbitration should proceed. He held that in that context, and against the rest of the background, the letter in question did not amount to a participation in a consideration by the Court as to whether it was satisfied that the non-consenting party was prima facie bound by the arbitration agreement. He found that the party was doing no more than asserting that the arbitration had nothing to do with it and that the ICC had no jurisdiction (see page 259), and as such did not amount to participation. That was a decision on its own facts, and since every case depends on its own facts it is of little assistance to me. However, it is noteworthy in that case that Clarke J was able to find that protestations as to the absence of jurisdiction, which were presumably intended to persuade, did not amount to participating in the arbitration even where the body had the additional function of deciding whether there was a prima facie case on jurisdiction.

24. Against that background I turn to consider the points made in the present case. For present purposes the story starts with a letter from the guarantor to the LCIA seeking to commence the LCIA proceedings by asking the LCIA to appoint a second arbitrator in accordance with the UNCITRAL rules. By this time, of course, the English proceedings had already been started. That letter was copied to Law Debenture, and its solicitors (Messrs Simmons & Simmons) responded to the registrar of the LCIA on 30th March 2005. In that letter it shortly set out its case that Law Debenture was entitled to commence proceedings and it described their service. It went on to say: *"Accordingly, there has been no agreement on the part of the trustee to submit disputes to arbitration as asserted by Elektrim SA and the trustee, having taken no steps in the arbitration, has opted to resolve such disputes in the English court proceedings which it has now initiated, rather than an arbitration. Elektrim SA refers in its letter to a failure on the part of the trustee to explain why it has not appointed a second arbitrator. That is not correct. By a letter dated 9th March 2005 (receipt of which has been acknowledged) we advised Elektrim SA as to the position in the following terms: [and there then follows an extract from that letter, pointing out that Law Debenture did not agree to the submission to arbitration]….. In the circumstances there has been no effective submission to arbitration and we*

consider that it would be inappropriate for the LCIA to act on Elektrim SA's request that it appoint a second arbitrator. There is no jurisdiction to comply with such a request and we would be grateful for your confirmation that no appointment will be made by the LCIA."

25. The registrar responded on 31st March 2005 in a letter addressed to both the guarantor and to Simmons & Simmons, setting out certain of the background and saying: *"In the circumstances, I should be grateful if Simmons & Simmons would clarify their position regarding the validity, or otherwise, of Elektrim's Notice of Arbitration."*

26. Simmons & Simmons did that in a letter of 4th April 2005. In the first two substantive paragraphs of that letter it set out various arguments for saying that clause 29.7 of the trust deed had primacy, and that that gave Law Debenture the right to commence these proceedings. It went on to say:

"As to the validity, or otherwise, of Elektrim's Notice of Arbitration, by virtue of the provisions of clause 29, the validity of the Notice of Arbitration was capable of being affirmed by the Trustee either expressly or by taking a step in the arbitration (e.g. by appointing a second arbitrator). However, in the absence of such affirmation and by virtue of the trustee having exercised the option in clause 29.7 to prefer the English courts, the Notice of Arbitration is, we believe, invalid and ineffective, i.e. it falls short of the requirements for an 'arbitration agreement' for the purposes of s.6 Arbitration Act 1996.

We would be grateful for the LCIA's guidance as to how it proposes to deal with this issue….

If Elektrim do dispute our client's understanding of clause 29 and, having considered the position, the LCIA is of the view that a second arbitrator should be appointed, if only to determine the issue of the tribunal's jurisdiction, our client would wish to nominate a second arbitrator, Lord Browne-Wilkinson (without prejudice to its objection to jurisdiction), and would be in a position to do so at short notice."

27. I would observe at this point that nothing thus far seems to me to amount to participation in the arbitration. The correspondence shows that Simmons & Simmons are objecting to the arbitration and taking the jurisdiction point. In arguing its case it is not seeking to advance arguments in the arbitration for the benefit of the arbitrators; it was responding to a request from the registrar that it clarify its position. If that were taken to be *"taking part"* in the arbitration for the purposes of section 72, then I think that Law Debenture could claim with some justification that they had been unfairly trapped into doing so. So far as the appointment of a second arbitrator is concerned, the letter seems to me to make it clear that Law Debenture was in no way nominating or appointing Lord Browne-Wilkinson. That is the only possible construction of the words *"our client would wish to nominate a second arbitrator…and would be in a position to do so at short notice."* A party who states that it would be in a position to do something in the future is not saying that it is doing it now.

28. The correspondence then continued. Omitting some irrelevant material, on 12th April 2005 the guarantor's solicitors (Skadden Arps) wrote to the registrar, with a copy to Simmons & Simmons, reiterating its request that the LCIA move to appoint a second arbitrator, and on 13th April the registrar responded that he proposed to pass the file to the LCIA Court with a request that it consider, without delay, the appointment of the second arbitrator. On 15th April 2005, Simmons & Simmons wrote a further letter to the registrar, but it had been overtaken by events, because a letter of the same date to them and to Skadden Arps from the registrar made it clear that by the time that Simmons & Simmons' letter had been received, the LCIA Court had already decided to appoint Lord Browne-Wilkinson as a second arbitrator. The letter from Simmons & Simmons is a lengthy one which sets out some background, and I will not set out its entire detail. However, it contained the following material: *"It is clear, however, from Skadden's letter that there is a dispute as to the interpretation of clause 29 and the issue therefore arises as to by whom that dispute should, in the circumstances, be resolved. We believe it should properly be resolved by the English court, not by the arbitral tribunal. Should, however, after due consideration by the English court, it be determined that there is (contrary to our client's view) arbitral jurisdiction, our client would not then wish to be in a position where it was obliged to arbitrate without having had any say in the constitution of the arbitral panel. It is therefore concerned that the LCIA Court should not now take any action which, in the unlikely event that arbitral jurisdiction is confirmed, would unfairly prejudice Law Debenture's position in the arbitration. This is an unusual situation, but it seems to us that taking steps now which might deprive Law Debenture of the opportunity of having a say in the constitution of the arbitral tribunal is likely to cause difficulties which can be sensibly avoided, without prejudice to either party, by the LCIA Court deciding not to appoint a second arbitrator until after the jurisdictional issue has been considered by the English court."*

It then goes on to make a number of numbered points, which between them make the point that it is contesting arbitral jurisdiction, that the jurisdiction issue should be considered by the English court, and that it proposed to make an application under Section 72, that it would be unfair to appoint a second arbitrator at that stage (in case Law Debenture lost in the courts and arbitral jurisdiction was subsequently confirmed) but that if the court determined to go ahead and appoint a second arbitrator, to avoid potential future injustice then it should appoint Lord Browne-Wilkinson, to whom Law Debenture had no objection. I accept that in this letter there is a small amount of Simmons & Simmons trying to have its cake and eat it in that it wanted to influence the identity of the second arbitrator without actually appointing him or taking any positive steps in that respect. However, apart from that I do not consider that anything in that letter amounts to taking part in the arbitration either. The letter goes out of its way to submit that the arbitrators should not be acting. It is not attempting to argue its case against jurisdiction so that the arbitrators can consider it; it is trying to achieve a sensible position to protect the legitimate interests of all parties. I do not think that the references to Lord Browne-Wilkinson add anything material to that position. As Mr Glick put it, what Simmons & Simmons are doing in this case is the same as the

non-consenting party in the *Caparo* case, namely asserting that jurisdiction does not exist, though it did it more frequently and at greater length. In doing so, it was asserting non-jurisdiction, not participating in the exercise of it. I consider that the Elektrim parties' case on this material fails.

29. There is one additional aspect of this part of the case. Mr Auld also relied on what passed in a telephone conversation on 9th February 2005 as amounting to Law Debenture's taking part in the arbitration. The evidence appears in a witness statement of Beata Irecka-Piskorz, a Polish attorney, who works for the guarantor. She describes a telephone conference in which she, another Polish lawyer and representatives from Law Debenture's legal department and from Simmons & Simmons took part. She says that towards the end of the call, the Polish lawyer asked whether Law Debenture proposed to appoint its arbitrator. The response was that Law Debenture could not tell them because their litigation lawyer was not on the call, and she makes the point that they made no mention then that they objected to having the validity of the various notices resolved in arbitration or that Law Debenture was intending to issue proceedings in the English court. This is said by Mr Auld to amount to participation in the arbitration. Frankly, I do not see how this even has the beginnings of such a case. There is a simple request for information as to when a step was to be taken, and a failure to provide that information. There was a request about possible future participation, with a non-informative reply. It does not even amount to an indication that there would be participation, much less participation itself. Accordingly, this point fails too.

30. I therefore find that Law Debenture did not take part in the arbitration proceedings for the purposes of section 72.

Conclusions on s 72

31. I therefore conclude that it is open to this court to consider the jurisdictional points taken by Law Debenture, and I shall in due course do so.

The applications for a stay

32. I next need to deal with Mr Auld's submissions that there should be a stay of these proceedings under section 9 and the other jurisdictions invoked. It will be remembered that the Elektrim defendants' applications seek such a stay. Having decided that Law Debenture is entitled to raise the jurisdiction point by way of s 72, this point does not really arise as a contentious point. If I find for Law Debenture that it is entitled to litigate and that deprives the Elektrim defendants of their right to arbitrate, then obviously I would not grant a stay of these proceedings. If I consider that Law Debenture does not have the right to litigate and should be going to arbitration, then a stay would follow.

33. However, I was addressed on the interaction between a stay and jurisdictional disputes, and some of what is said in the authorities supports my decision to allow jurisdictional disputes to be decided in the courts, so I will deal with the fruits of some of those submissions.

34. The course open to a party who said that an arbitration agreement did not bind him to arbitrate in relation to the dispute in question when a stay was sought against him was considered in *Ahmed Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522. In that case the claimant commenced proceedings in respect of a claim which the defendant said was the subject of an arbitration agreement. The defendant made an application to stay under section 9. The judgment of the Court of Appeal was delivered by Waller LJ, and at page 525 he endorsed the approach of HHJ Humphrey Lloyd QC in *Birse Construction Ltd v St David Ltd* [1999] BLR 194. He quoted at length from what the learned judge in that earlier case had said about the courses open to a judge on a section 9 application such as that placed before him. The citations included the following:

"It is common ground that the following courses are open to me:

i. To determine, on the affidavit evidence that has been filed, that an arbitration agreement was made between the parties, in which case the proceedings will be stayed in accordance with section 9 of the 1996 Act….

ii. To stay the proceedings but on the basis that the arbitrator will decide the question of whether or not there is an arbitration agreement….

iii. Not to decide the question immediately but to order an issue to be tried [and he referred to the then RSC order 73 Rule 6(2)]

iv. To decide that there is no arbitration agreement and to dismiss the application to stay.

Mr Darling for the plaintiff contended that there should be no stay of the proceedings unless the court was satisfied that there was clearly an arbitration agreement. I do not consider that the position is that clear cut. The circumstances of the application must be taken into account. I accept that if it is clear on the evidence that a contract did or did not exist then the court should so decide, for it cannot be right either to direct an issue pursuant to Ord 73 r6(2) or to leave the 'dispute' to be determined by an arbitral tribunal. The dominant factors must be the interests of the parties and the avoidance of unnecessary delay or expense. Where the rights and obligations of the parties are clear, the court should enforce them. Unless the parties otherwise agree, section 30 of the Arbitration Act 1996 now permits an arbitral tribunal to decide questions of jurisdiction where it might not previously have been competent to do so. It is not mandatory and, contrary to a suggestion made by Mr Palmer, the existence of the power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed. <u>The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal</u>…. [my emphasis]

In some cases it would be better for the court to act under Ord 73 r6; in other cases it may be appropriate to leave the matter to be decided by an arbitrator. The latter course is likely to be adopted only where the court considers that

it is virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement. One of the matters that the court is bound to take into account is the likelihood of the challenge to an award on jurisdiction under section 67, or under section 69, on some important point of law connected to the existence of the agreement for which leave to appeal might be given… The recent case Azov Shipping Co v Baltic Shipping Co….supports the approach that the court ought to decide questions relating to the existence or the terms of the arbitration agreement for there may otherwise be a real danger that there will be two hearings: the first before the arbitrator under section 30 of the Arbitration Act 1996 and the second before the court on a challenge under section 67."

There is no support there for any suggestion that the court should inevitably allow the arbitral tribunal to decide the jurisdiction question and stay the court proceedings in the meanwhile.

35. Gross J had to consider similar points in *Anglia Oils Ltd v The Owners /Demise Charterers of the Vessel Marine Champion*, unreported, 10th October 2002. That was another application for a stay under section 9, where the claimant was denying that it was party to an arbitration agreement which was being asserted against it by the defendant. He observed that while it was open to him to stay the proceedings pending a determination by the arbitrators of their own jurisdiction, "[*That course] would be inappropriate. In practical terms it involves determining the issue in favour of the defendant by the back door."*

This point was also made in the report of the Departmental Advisory Committee relied on by Clarke J in ***Caparo*** and quoted above. *"[a requirement to take the point in an arbitration] would beg the question whether or not his objection has any substance and thus be likely to lead to gross injustice"*

It seems to me that that is likely to be a very telling consideration in very many cases, and certainly in the present one. If a claimant is saying, on good grounds, that he never agreed to arbitrators deciding a particular dispute, then it seems to be rather unfair that he should be compelled to have that very dispute decided by the arbitrators whose very authority he is disputing.

36. So far as I have any discretion about it, it is quite clear to me that I should decide the question of the extent of the arbitrators' jurisdiction, and the extent of the arbitration agreement. This is for a number of reasons:

a. The point turns on a pure question of construction. That question does not involve any wide ranging factual enquiry, or any cross-examination, or any exercise which it might be said could better be carried out by the arbitral body.

b. In line with the particular factor which I have identified as emerging from the *Marine Champion* case, I do not think it right that the arbitrators in this case should decide whether or not they have jurisdiction at all, bearing in mind the root and branch objections to their jurisdiction raised by Law Debenture.

c. It is the only cost-effective thing to do. To send the matter off to the arbitrators now would require the extra cost of the constitution of the arbitral body (three arbitrators), a mechanism for the determination of the points by them (whether by an oral hearing of not), and a possible appeal back to this court at the end. That hardly seems sensible.

37. Accordingly, so far as the question might still be considered to be live, I would reject an application for a stay under section 9 (or under the Supreme Court Act 1981).

The true construction of the trust deed

38. At long last, therefore, I can turn to consider the question of the true construction and effect of clause 29, and in particular whether, in the events which have happened, Law Debenture are contractually entitled to litigate the present dispute (and to stop the guarantor pursuing a parallel arbitration dealing with the same matters) or whether it is obliged to arbitrate them.

39. In the context of construing clause 29, I was taken by Mr Auld to various authorities on the principles underlying the process of construction. I will not refer to them here. There was no disagreement as to the principles. In essence, I should construe this document as a commercial document in the light of its factual circumstances, and I accept that a construction which gives a sensible commercial effect to the document is to be preferred to one which gives an illogical and/or uncommercial effect. Having said that, I do not think that there are very many underlying factual circumstances which are relevant; indeed, very few are suggested. The documentation in this case was designed to give effect to a familiar type of commercial bond issue transaction. The Elektrim parties obviously had a Polish background, but beyond that I do not think any particularly special factual circumstances have been proved, and even that one I do not find to be particularly helpful or relevant to the dispute in question.

40. The logical starting point in analysing the clause is sub-clause 29.2. That, on its face, contains a blanket arbitration provision which, without more, could be enforced by each party against the other. Sub-clauses 29.3 and 29.4 do not help one way or the other. The same is true of sub-clause 29.5. Sub-clause 29.6 does not make any real sense without sub-clause 29.7, and it is over this latter sub-clause that the real point arises. Leaving aside the first three words for the moment, on its face it gives a right to Law Debenture and the bondholders to apply to the courts to determine disputes arising under the various documents. They have *"the exclusive right….to apply to the courts of England";* that right is *"at their option"*. The effect of that is *"that accordingly any suit, action or proceedings….arising out of or in connection with any of the above may be brought in any such courts." That wording seems to be clear and unequivocal. The Trustee and the Bondholders have an "exclusive" right – they have it and the Elektrim parties do not. That right, of course, detracts from the otherwise clear terms of clause 29.2, but one can still*

make sense of those two provisions together, and if there was any doubt as to the purpose clause 29.7 being to detract from clause 29.2, that is completely dispelled by the opening words of the later sub-clause, "notwithstanding clause 29.2….". Those words can be paraphrased by the words "*despite what is said in clause 29.2"*. When that is done, the two clauses running together make perfect sense. There is a dual dispute resolution regime. Arbitration is available under clause 29.2; litigation is available to Law Debenture and the bondholders, if they wish, as an alternative under clause 29.7.

41. Clause 29.6 operates in that context. This clause provides that the agreement to refer the dispute to arbitration is *"exclusive",* with the consequences that are specified to follow. I am not sure that this is an entirely comfortable use of the word "*exclusive*", and in this context it requires some explanation, but the explanation follows in the succeeding words – "*such that neither the guarantor nor the Issuer shall be permitted to bring proceedings in any other court or tribunal other than by way of counterclaim in respect of proceedings brought by the Trustee and/or each of the bondholders….*". This reinforces the effect of the arbitration provisions so far as any claims by the Elektrim parties are concerned, but it is also consistent with, and reinforces, the right of Law Debenture (and the bondholders) to litigate in the courts, at which point the Elektrim parties do at least have the opportunity to counterclaim. This makes sense when placed with clause 29.7. Clause 29.8 does not, in my view, add very much to the debate; it adds no real weight to the effect of clause 29.7 as it stands.

42. Thus clause 29.7 has the effect of giving Law Debenture an option which the Elektrim parties do not have. They may litigate, but the Elektrim parties can be forced to arbitrate (unless litigation is started, in which case they can counterclaim). Law Debenture cannot be forced to arbitrate if it wishes to commence its own proceedings covering the same subject matter. I have difficulty in seeing any arguable limits, let alone any substantive limits, on the rights of Law Debenture in that respect. The one limit that probably exists is that Law Debenture cannot blow hot and cold, as Mr Glick accepted. If Law Debenture starts an arbitration it would have waived its right (or option) to go by way of litigation. By the same token, if it participates sufficiently in an arbitration, it may well be held to have waived its rights to exercise its option. Subject to that, it has its clear rights.

43. Mr Auld did not accept this. He submitted that the underlying circumstances of this documentation demonstrated that there had to be some limit to Law Debenture's right to have court litigation rather than arbitration. He describes the rights asserted by Law Debenture as a "veto" on the international arbitration procedures, and he claims that that is contrary to common sense and produces absurdity. It would make the arbitration provisions biased or one-sided. His skeleton argument describes the underlying purpose and objective of arbitration clauses as being to provide a fair and even-handed way of resolving disputes, and the court should be reluctant to entertain a construction which, in effect, deprives one party of that process by making it subject to a "veto" at the behest of another. Furthermore, the Elektrim parties had a legitimate interest in an international arbitration, with the input that they could have in their choice of arbitrator, because of the multinational interests involved arising out of their Polish background and the alternative national backgrounds of the Trustee and Bondholders. If Law Debenture were right, he said, then it would involve a rather absurd procedure. Since Law Debenture's case involved the possibility of an arbitration being brought to a halt by litigation commenced by Law Debenture, then his clients would be forced to ask Law Debenture whether it wished to arbitrate before actually commencing the arbitration. Such an absurd procedure could not be read into the clause. The way of resolving these difficulties and absurdities, and of acknowledging the interest that his clients had in having an arbitration, would be to disallow the effects of clause 29.7 if the Elektrim parties started an arbitration first.

44. I am afraid that I take the view that Mr Auld's arguments fail as a matter of rationale, and his conclusion fails his own test of commerciality and common sense. His argument seems to start from the premise that only an international arbitration can give his clients a fair and even-handed dispute resolution procedure which their interests require. It would not only be disappointing, it would be wrong to say that those adjectives could not equally be applied to the process in these courts, and in truth Mr Auld did not go so far as to say that they could not, though he did go so far as to say that his clients' experiences in not being able to participate as they would have wished in the earlier litigation has led them to be disappointed with the process. Accordingly, that part of his logic fails. Next, while it may to an extent be true that his clients have an interest in the potential multi-national features of an international arbitration, it does not follow that that circumstance is strong enough to require a forced and unnatural construction to be given to clause 29.7. I give no weight to the use by Mr Auld of pejorative terms such as "veto". Nor is it correct so say that the provisions are somehow less than even handed in any relevant way. They give an additional advantage to one party, but so do many contractual provisions. Nor does Law Debenture's construction require one to read in the sort of notification procedure that he suggested. It is not necessary to Law Debenture's construction, and the clause is perfectly workable without it. It may or may not be that the Elektrim parties would be wise to indicate to Law Debenture they were going to arbitration and ask if Law Debenture was going to take proceedings which would bring that to a halt, but that does not mean that any procedure has to be implied; nor is the desirability of that step a consideration which impacts on construction. It is neutral.

45. Then there is the commercial absurdity to which his construction gives rise. His suggested rationale for clause 29.7 is that Law Debenture has the right to proceedings if it starts its proceedings before arbitration proceedings are started by the Elektrim parties, covering the same subject matter. With all due respect, that seems to me to be a very strange way of resolving the alleged conflict or interaction. There is absolutely no commercial rationale behind that whatsoever, and it means that whether the dispute is arbitrated or litigated will depend on potential accidents of timing or conceivably an unseemly scramble. Mr Auld drew attention to the fact that a scramble to

get a national court first seised of a given matter is not an unknown effect of the Brussels and Lugano Conventions, but that fact of life does not seem to me to make it commercially sensible to introduce it is a rationale of what seems to me to be an otherwise very artificial construction. I simply fail to see how this is a commercially sensible construction or effect of this commercial document. Its unfortunate and difficult effects can in fact be seen by the facts of the present case. The Elektrim parties have commenced an arbitration in relation to the first three alleged events of default and the acceleration notice based on them. Those proceedings came before the present proceedings. The present proceedings relate to those points, but they also relate to the fourth alleged event of default and a second acceleration notice served in reliance on that. No arbitration has been commenced in relation to that. According to the construction put forward by Mr Auld, these proceedings could be maintained in respect of that latter set of events but not in respect of the former, and that is because the Elektrim parties got in first with their arbitration in respect of the former. A construction which produces that result on these facts cannot be commercially sensible. I find that it is wrong. (I acknowledge that something like the same effect may occur if Law Debenture accepts an arbitration in respect of the first set of events, but having done so, commences litigation in respect of the second, but that is in the nature of an accident arising out of the particular facts; it is not an inherent commercial absurdity underlying the whole operation of clause 29).

46. I was not shown any authority directly in point. However, I was shown an authority on the converse case, namely an agreement where there was an express provision allowing both parties (owners and charterers) to bring proceedings in the English courts but a separate provision apparently giving one party (the owners) only the right to have an arbitration. That authority is ***NB Three Shipping Ltd v Harebell Shipping Ltd*** [2005] 1 Lloyds Rep 509. In that case Morison J found no contradiction in giving one party "better" (his inverted commas) rights than the other. He also found that the arbitration option carried with it the right to stop any court proceedings which had been started first – in that way the effects of any attempt to "jump the starting gun" (the expression used in the judgment). (As to all this, see page 514.). All this goes against Mr Auld's submissions in the present case.

47. I therefore reject Mr Auld's suggested construction of clause 29.7. I find that it means what it says, which is that Law Debenture has the right to start proceedings despite ("notwithstanding") the arbitration provision in clause 29.2. No case has been advanced that it has waived that right. It must follow that the arbitration will have to be halted.

Conclusion

48. I therefore reject all applications for a stay of the present proceedings and determine that, in the events which have happened, Law Debenture is entitled to maintain these present proceedings and the dispute now falls outside the scope of the arbitration provisions of clause 29.2. The precise terms of the orders will be the subject of further submissions if necessary. I also grant an injunction against the guarantor to retrain it from pursuing the arbitration, again in terms which can be the subject of further submissions if necessary.

MR. I. GLICK Q.C. and MR. A. CLUTTERBUCK (instructed by Simmons & Simmons for the Claimants.
MR. S. AULD Q.C. and MR. J. HOPE (instructed by Skadden, Arps, Slate, Meagher & Flom (UK) LLP) for the First and Second Defendants.
MS. S. PREVEZER Q.C. and MR. S. HOUSEMAN (instructed by Bingham McCutchen LLP) for the Third Defendant.