QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

5 July; 20 September 2013

THE LONDON STEAM SHIP OWNERS MUTUAL INSURANCE ASSOCIATION LTD
v
THE KINGDOM OF SPAIN
(THE "PRESTIGE")

[2013] EWHC 2840 (Comm)

Before Mr Justice WALKER

Arbitration — Award — Enforcement — Objection to jurisdiction of arbitrator — Objector not participating in arbitral proceedings — Successful party seeking to enforce award — Objector delaying in challenge to jurisdiction — Whether extension of time should be granted to enable objector to resist enforcement — Arbitration Act 1996, sections 66 and 72.

In November 2002 massive oil pollution damage was caused when the tanker *Prestige* broke up off the coast of Spain. Criminal proceedings were begun in Spain. Spanish law permitted civil claims to be advanced in the course of criminal proceedings. In July 2010 the Spanish court ordered that such claims should be tried against the master, chief officer, and chief engineer, against the owners and managers, and against the present claimant (the Club), who provided P&I insurance to the owners and managers.

The claims made against the Club comprised: (1) a claim that the Club was liable under the International Convention on Civil Liability for Oil Pollution Damage 1992; and (2) a claim that the Club was liable under Spanish law. The Club declined to participate in the Spanish proceedings.

On the footing that the asserted claims were made by the present defendant (the Kingdom), the Club served on the Kingdom a notice of arbitration dated 16 January 2012 seeking, inter alia, a declaration that it was not liable in respect of the asserted claims. The Kingdom denied any obligation to arbitrate and refused to appoint an arbitrator.

In the event, the Commercial Court appointed a sole arbitrator. The Kingdom did not participate in the arbitration. The Club's claim submissions in the arbitration were served on the Kingdom, and the Kingdom was subsequently served with documents including the Club's disclosure list, expert evidence, hearing bundles and opening submissions, all with Spanish translations. A transcript of the hearing, with a Spanish translation, was sent to the Kingdom, with an invitation to make submissions. The Kingdom did not take up the invitation.

The arbitrator published his award on 13 February 2013. He made declarations: (1) that the Kingdom was bound by the arbitration clause contained in Rule 43.2 of the Club Rules and such claims had to be referred to arbitration in London; (2)(a) that actual payment to the Kingdom of the full amount of any insured liability by the owners and/or managers was a condition precedent to any direct liability of the Club to the Kingdom in consequence of the "pay as may be paid clause" contained in Rule 3.1, and accordingly, (b) that in the absence of any such prior payment, the Club was not liable to the Kingdom in respect of such claims; and (3) that the Club's liability to the Kingdom in respect of such claims should, in any event, not exceed the amount of US$1 billion.

On 14 March 2013 the Club issued an arbitration claim form against the Kingdom seeking enforcement of the award pursuant to section 66 of the Arbitration Act 1996. On 19 March 2013 Andrew Smith J granted the proposed order for service out of the jurisdiction. The relevant documents were served on the Kingdom on 15 April 2013. On 1 May 2013 the Kingdom filed an acknowledgement of service contesting the claim.

The Club's section 66 application was listed to be heard on 5 July 2013 with a time estimate of half a day. The Kingdom indicated that it intended to challenge the award under the State Immunity Act 1978, by way of challenge to the substantive jurisdiction of the tribunal under sections 72 and/or 67 of the Arbitration Act 1996, by challenge to enforcement of the award pursuant to section 66(3) of that Act, and by asserting that the court should exercise its general discretion under section 66. The Kingdom said that it did not have sufficient time to prepare for the hearing on 5 July, and that the half day that had been allocated was insufficient. The Club refused the Kingdom's request for the hearing to be adjourned until on or after 4 October 2013.

On 28 June 2013 the Kingdom issued an application notice asking for directions leading to a hearing date not before 4 October 2013. On 2 July 2013 its solicitors filed a witness statement seeking to explain the delay in submitting evidence in response to the section 66 application and for making an application under section 67 of the 1996 Act, and giving reasons for the grant of an extension of time. In response, the Club's

solicitors complained that at the time of filing the statement on 2 July 2013 the Kingdom was just under a month late for the filing of evidence under section 66, and three and a half months late for making a section 67 challenge.

At the hearing on 5 July 2013 the Kingdom submitted that, in the light of *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] 2 Lloyd's Rep 691; [2011] 1 AC 763, everything up to service of the Club's application to enforce was irrelevant. The Kingdom sought an extension of time of only one month to resist the application for enforcement. No extension of time was needed under section 72 of the 1996 Act, for on its true construction there was nothing in section 72 about time limits.

The Club contended that an extension of time under section 67 of the 1996 Act should be refused. The Kingdom could not rely on section 72(1). If the objector was out of time for challenging the award under section 67, the right under section 72 was lost. Section 72(1) was directed to the interlocutory stage whereas section 72(2) was concerned with the position after the award. Section 72(1) was subject to the same time limit as that in section 72(2).

———*Held*, by QBD (Comm Ct) (WALKER J) that:

(1) Even assuming that the Club's construction of the 1996 Act was correct, the court would, in the exercise of its discretion, grant such extensions as would enable the Kingdom to deploy its full armoury of objections to enforcement of the award and the award itself. The Club's contentions involved an unacceptable limitation on the principle identified in *Dallah*. The objector was entitled not to participate in the arbitral proceedings where it took the view that those proceedings were invalid, and the position was no different merely because the tribunal had purported to make a ruling that it had jurisdiction. The *Dallah* principle was so fundamental that it should not be whittled down unless the interests of justice so required. In the particular circumstances of the present case the interests of justice did not so require (*see* para 79);

———*Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] 2 Lloyd's Rep 691; [2011] 1 AC 763, considered.

(2) There was no necessity to confine section 72(1) of the 1996 Act to the position before the issue of an award. The remedies contemplated by section 72(1), namely a declaration or an injunction, were discretionary, and if there were circumstances in any particular case which would make it inappropriate to grant a declaration or injunction then the court would consider those circumstances before concluding whether the remedy should be granted (*see* para 83);

———Dicta of Christopher Clarke J in *The Eastern Navigator* [2006] 1 Lloyd's Rep 537, considered.

(3) As regards section 72(2) there was, by inference from the failure to refer to section 70(3) in the final words of section 72, a clear intention that the 28-day time limit under section 70(3) would apply. However, an objector who had played no part in the arbitral proceedings would retain the right to seek a declaration or injunction under section 72(1), a right which would be subject to a discretion as regards the granting of a remedy. If in addition the objector wished to take the steps which would be open to someone who had participated in the arbitral proceedings, then it was not unjust to require that the time limit be complied with, or if it had not been complied with that an extension should then be sought. The court when considering whether to grant any extension would be able to give consideration to any particular factors which arose from the application of the *Dallah* principle (*see* para 84).

The following cases were referred to in the judgment:

AOOT Kalmneft v Glencore International AG [2002] 1 Lloyd's Rep 128;

Azov Shipping Co v Baltic Shipping Co (No 1) [1999] 1 Lloyd's Rep 68; [1999] 1 All ER 476;

Bernuth Lines Ltd v High Seas Shipping Ltd (The Eastern Navigator) [2005] EWHC 3020 (Comm); [2006] 1 Lloyd's Rep 537;

Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan (SC) [2010] UKSC 46; [2010] 2 Lloyd's Rep 691; [2011] 1 AC 763;

Fred Perry (Holdings) Ltd v Brands Plaza Trading (CA) [2012] EWCA Civ 224; [2012] FSR 28;

People's Insurance Co of China (Hebei Branch) v Vysanthi Shipping Co Ltd (The Joanna V) [2003] EWHC 1655 (Comm); [2003] 2 Lloyd's Rep 617;

Terna Bahrain Holding Co WLL v Al Shamsi [2012] EWHC 3283 (Comm); [2013] 1 Lloyd's Rep 86;

Venulum Property Investments Ltd v Space Architecture Ltd [2013] EWHC 1242 (TCC).

This was an application by the defendant, the Kingdom of Spain, for directions and for an extension of time to enable it to resist an application

by the claimant, The London Steam Ship Owners Mutual Insurance Association Ltd, for enforcement of an arbitration award dated 13 February 2013 which declared that the claimant was not liable to the defendant in respect of oil pollution damage caused by the loss of the vessel *Prestige* in November 2002.

Sara Cockerill QC and Anna Dilnot, instructed by K & L Gates LLP, for the defendant; Christopher Hancock QC and Charlotte Tan, instructed by Ince & Co LP, for the claimant.

The further facts are stated in the judgment of Walker J.

Judgment was reserved.

Friday, 20 September 2013

JUDGMENT

Mr Justice WALKER:

A. Introduction

1. In this judgment I give reasons for a ruling which I made at a hearing on 5 July 2013. At that hearing I was concerned with various procedural issues which arose between the claimant, a protection and indemnity association (which I shall refer to as "the Club"), and the defendant, The Kingdom of Spain (which I shall refer to as "the Kingdom").

B. The casualty and the Spanish proceedings

2. In November 2002 massive oil pollution damage was caused when M/T *Prestige* ("the vessel") broke up off the coast of Spain. Criminal proceedings were begun in Spain later that month. The vessel was entered with, and her owners and managers were members of, the Club. Accordingly the Club, pursuant to a contract of insurance (the "Insurance Contract") on terms set out in its rules ("the Rules") provided protection and indemnity ("P&I") insurance, along with freight, demurrage and defence ("FD&D") insurance, in respect of the vessel.

3. Spanish law permits civil claims to be advanced in the course of criminal proceedings. In July 2010 the Spanish court ordered that such claims should be tried against the master, chief officer, and chief engineer, against the owners and managers, and against the Club.

4. The Club maintains that the claims against it ("the Asserted Claims") can broadly be described as:

(i) "The CLC claim": that the Club is liable under the International Convention on Civil Liability for Oil Pollution Damage 1992 ("the CLC"); and

(ii) "The Spanish law claim": that the Club is liable under Spanish law, including pursuant to the provisions of article 76 of a statute of 1980 ("the Spanish Insurance Contract Act 1980") and/or article 117 of the Spanish Penal Code.

C. The Club's notice of arbitration

5. The Club declined to participate in the Spanish proceedings. On the footing that the Asserted Claims were made by the Kingdom, the Club served on the Kingdom a notice of arbitration dated 16 January 2012.

6. The notice of arbitration began with an introductory section which asserted that:

(i) the Club provided indemnity insurance in respect of the vessel under the Insurance Contract as set out above;

(ii) in the case of the vessel, the CLC provided the exclusive basis upon which claims for pollution damage were to be compensated;

(iii) the Club had lodged in cash with the Spanish court on 28 May 2003 (at the then exchange rate) the full amount of the vessel's CLC limitation fund, namely €22,777,986; and

(iv) the Rules provided by Rule 1.2 and Rule 43.2 for English law to apply to the Insurance Contract, while Rule 43.2 provided, among other things:

"... for any difference or dispute arising out of or in connection with the Rules and/or the Insurance Contract and/or as to the rights or obligations of the Club thereunder or in connection therewith or as to any other matter whatsoever, to be referred to arbitration in London before a tribunal consisting of a sole arbitrator."

7. The second section of the notice of arbitration was headed "Notice of arbitration for the purposes of Arbitration Act 1996 s14". It said that the Asserted Claims purported to claim for sums in excess of and in addition to the CLC Fund. The position taken by the Club in that regard was then set out:

"To the extent that such claims are in excess of and in addition to the CLC Fund, such claims are claims to enforce the Insurance Contract in accordance with its terms including Rule 43.2 which provides for London Arbitration and English law. Accordingly, your claims should be determined in London Arbitration.

The Club denies and disputes that it has any liability at all in respect of the Asserted Claims to you under or in connection with the Insurance Contract. The Claimants seek declaratory relief to that effect.

Given these disputes, the Asserted Claims and the Club's claims for declaratory relief should be referred for determination to arbitration in London before a sole arbitrator."

8. The second section concluded:

"Accordingly, the Club hereby gives you notice of commencement of London arbitral proceedings in respect of all differences or disputes arising out of or in connection with the Insurance Contract or the Rules in respect of the loss of the M/T PRESTIGE and any resulting loss or damage (save for claims under the CLC) and calls upon and requires you to agree to the appointment of a sole arbitrator."

9. The third section was headed "Appointment of sole arbitrator". It requested the Kingdom, pursuant to section 16(3) of the Arbitration Act 1996, to join in the appointment of Mr Alistair Schaff QC as sole arbitrator. A warning was then given that the Club would apply to the court if an arbitrator had not been appointed within 28 days of service of the notice.

D. The arbitration proceedings

10. The Kingdom responded to the notice of arbitration by denying any obligation to arbitrate and refusing to appoint an arbitrator. This led to an application to the court by the Club under section 18 of the Arbitration Act 1996, served on the Kingdom on 10 May 2012. The response of the Kingdom on 1 June 2012 was that it did not intend to participate. At a hearing on 27 July 2012 the court appointed Mr Schaff QC as the sole arbitrator.

11. The Club's claim submissions in the arbitration were served on the Kingdom on 3 August 2012. An order by the arbitrator for defence submissions to be filed by 21 September met with a response in which the Kingdom reiterated its intention not to participate. It was given a further time extension on the basis that any participation would be without prejudice to threshold questions, but this did not lead the Kingdom to change its position.

12. Later in 2012 the Kingdom was served with documents including the Club's disclosure list, expert evidence, hearing bundles and opening submissions, all of them with Spanish translations. The hearing took place over two days in January 2013. A transcript of the hearing, with a Spanish translation, was sent to the Kingdom, with an invitation to make submissions. The Kingdom did not take up the invitation.

13. The award was published on 13 February 2013. In the award the arbitrator made three declarations as regards all claims arising out of the loss of the vessel and the resulting loss and damage "which are currently brought in Spain by the Respondent [ie the Kingdom] against the Claimant [ie the Club] by way of alleged direct public liability under the Spanish Penal Code":

"(1) the Respondent is bound by the arbitration clause contained in Rule 43.2 of the Club Rules and such claims must be referred to arbitration in London;

(2)(i) actual payment to the Respondent of the full amount of any insured liability by the Owners and/or Managers (out of monies belonging to them absolutely and not by way of loan or otherwise) is a condition precedent to any direct liability of the Claimant to the Respondent in consequence of the 'pay as may be paid clause' contained in Rule 3.1; and accordingly

(ii) pursuant to the 'pay as may be paid clause,' and in the absence of any such prior payment, the Claimant is not liable to the Respondent in respect of such claims.

(3) the Claimant's liability to the Respondent in respect of such claims shall, in any event, not exceed the amount of US$1,000,000,000 (US Dollars One Billion)."

E. The Club's enforcement application

14. On 14 March 2013 the Club issued an arbitration claim form against the Kingdom. In the claim form, which was given the number 2013 Folio 368, it was said that the claim was made without notice. The remedy claimed was that the court should make four orders. They were described in this way:

"1. Pursuant to section 66(1) of the Arbitration Act 1996, the Claimants shall have leave to enforce an arbitration award dated 13 February 2013 made by an Arbitration Tribunal consisting of Mr Alistair Schaff QC pursuant to an arbitration agreement, in the same manner as a judgment or order of the court to the same effect.

2. Pursuant to section 66(2) of the Arbitration Act 1996, judgment shall be entered in terms of the Award.

3. That the Defendants shall pay the costs of this application, including the costs of any judgment which may be entered hereunder.

4. The Claimants have liberty to apply for enforcement of any costs award which the arbitral tribunal may make in the near future."

15. Also issued by the Club against the Kingdom on 14 March 2013 was an application notice in 2013 Folio 368. The application notice sought that the application be dealt with on paper. Two orders were sought in the application. First, the Club asked

for an order permitting service of the arbitration claim form and other relevant documents out of the jurisdiction in Spain. Secondly, the Club asked for an order permitting service of those documents by an alternative means, using email and courier rather than diplomatic channels.

16. Both the arbitration claim form and the application notice were supported by a witness statement of Eva Nickel, a solicitor of the firm Ince & Co LLP, who act as solicitors for the Club. Her witness statement gave an account of the history of events culminating in the making of the award. At paras 41 and 42 of her witness statement Ms Nickel relied upon, among other things, the tribunal's ruling that it had jurisdiction to hear the reference and make the award. On that footing she suggested that the Club was entitled to enforce the award and to enter judgment in terms of the award pursuant to section 66 of the 1996 Act. At paras 43 to 54 Ms Nickel noted that in general the power to enforce an award summarily should be used in all but exceptional cases where there was real ground for doubting the validity of the award. In that regard she mentioned two points which might be relied upon by the Club and explained why she considered that the Club was able to answer them.

17. The first point identified by Ms Nickel was dealt with at paras 45 to 48:

"45. First, I note that section 66(3) states that 'Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award. The right to raise such an objection may have been lost (see section 73)'.

46. Section 73(2) states that 'When the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling:

(i) by any available arbitral process of appeal or review, or

(ii) by challenging the award,

does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.'

47. In the present case, the Tribunal made its award on 13 February 2013. If the Spanish State had wished to challenge the Tribunal's jurisdiction pursuant to section 67 of the Arbitration Act, it would have had to lodge such a challenge within 28 days of the Award ie by no later than 13 March 2013. That time has now passed and no challenge has been made. Accordingly, I believe that any right to raise any objection to the Tribunal's jurisdiction has been lost.

48. Further and in any event, for the reasons given in the Award, I believe that any challenge to the Tribunal's jurisdiction is likely to fail."

18. The second point identified by Ms Nickel concerned the fact that the award had granted negative declaratory relief. She noted at paras 50 and 51 that the Court of Appeal had recently held that the court could give leave under section 66 to enter judgment in terms of a negative declaratory award in an appropriate case. At paras 52 to 54 she explained that the Club sought to establish the primacy of the declaratory award over a potential inconsistent judgment of the Spanish court. An order under section 66 in the present case would, in that regard, make a positive contribution to the securing of the material benefit of the award. Ms Nickel added that there was a real argument that a section 66 judgment would be a "Regulation judgment" such as to preclude enforcement or recognition of a contrary judgment of the Spanish court.

19. Later in her witness statement Ms Nickel identified provisions permitting service of the arbitration claim form out of the jurisdiction. In that regard, as she had done when setting out the grounds for seeking an order under section 66, Ms Nickel sought to identify arguments that might be raised by the Kingdom. Among other things, Ms Nickel noted that the Kingdom might claim immunity from the present court proceedings under the State Immunity Act 1978 ("SIA 1978"). She stated, however, that she believed that such an argument would not succeed for two cumulative or alternative reasons:

(a) Pursuant to section 9(1) of the SIA 1978, where a state has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the state is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration. The award has determined that, in respect of the respondents' claims by way of alleged direct public liability, the respondents are "bound by the arbitration clause contained in Rule 43.2 of the Club Rules and such claims must be referred to arbitration in London". I believe that the Respondents are therefore taken to have agreed in writing to submit the relevant disputes to arbitration. These proceedings are plainly court proceedings which relate to that arbitration. In the premises, the respondents would not be entitled to claim immunity in these proceedings;

(b) Further or alternatively, pursuant to section 3(1)(b) of the SIA 1978, a state is not immune as respects proceedings relating to an obligation of the state which by virtue of a contract (whether a commercial transaction

or not) falls to be performed wholly or partly in the United Kingdom. In the present case, the relevant contractual obligation to which these proceedings relate is the obligation to arbitrate and to do so in London. Thus, for this additional reason, the respondents are not entitled to claim immunity in relation to these proceedings.

20. Turning to the application for an alternative method of service, Ms Nickel dealt with a number of matters at paras 75 to 90 of her witness statement. At para 88 she said this:

"88. As noted above, the Club is being pursued in the Spanish Proceedings for extensive damages arising from a cause of action whose proper forum, as confirmed by the Award, is London arbitration. The trial in the Spanish Proceedings commenced on 16 October 2012 and was originally scheduled to run until, approximately, end of May 2013. I understand that the trial has been extended with closings due to be completed in July 2013. In the circumstances, a delay of several months in having the judgment entered in the terms of the Award will pose a very real risk of prejudice to the Club's position."

21. On 19 March 2013 Andrew Smith J considered the matter on the papers. He granted the proposed order for service out of the jurisdiction, but not the proposed order under section 66. In a note dated 26 March 2013 he explained that he was not prepared to make a without notice order under section 66 on a paper application. If the Club wished to press for such an order, then the matter should be listed for a hearing. Otherwise the proceedings should be served and the Kingdom invited to make observations on the application.

22. The Club did not press for a without notice order under section 66. Instead, the relevant documents were served by email and courier in accordance with Andrew Smith J's order. The date of service was 15 April 2013.

23. An acknowledgement of service was filed by the Kingdom on 14 May 2013. In section B of the acknowledgement of service the Kingdom gave reasons why it intended to contest the claim. I set out those reasons below, adding paragraph numbers in square brackets for convenience:

"[1] The Claimant's liability is currently subjudice in criminal proceedings in Spain. The Claimant has refused to be a party to those proceedings.

[2] The Defendant is not party to an arbitration agreement with the Claimant and it has refused to be a party to the English Arbitration proceedings to date. It files this acknowledgement of service without prejudice to that position and reserving all rights of any description, whether jurisdictional or otherwise following receipt of the Claimant's Arbitration Claim Form and the Order of Andrew Smith J dated 19 March 2013 (the 'Order').

[3] The Defendant intends to apply to set aside this Order including pursuant to S66(3) of the Arbitration Act 1996, on the grounds set out in the Act including lack of jurisdiction, and pursuant to CPR 3.1 and 23; and to seek any necessary extension of time.

[4] The Defendant intends to apply to the Court for a declaration that the arbitral tribunal which made the award lacked the requisite jurisdiction and accordingly the award to which the Claimant's Arbitration Claim Form relates is of no effect or other appropriate relief.

[5] The Defendant will rely on grounds of challenge available under the Arbitration Act 1996 and also under the Sovereign Immunity Act 1978."

24. Section E of the acknowledgement of service stated that written evidence would be filed. In section G a statement that the defendant believed that the facts stated in the acknowledgement of service were true was signed by an official of the Spanish Ministry of Justice. The final section of the acknowledgement of service concerned an address to which notices about the case could be sent to the Kingdom. The address given was that of a solicitors firm, K & L Gates LLP, in London.

25. In its skeleton argument for the present hearing the Kingdom reserved its position as to a contention that it is not a legal entity and lacks legal personality for the purposes of private international law, existing only in the public international law sphere (for the signing of international treaties and to assume international obligations). The skeleton argument added that the Kingdom was therefore represented in this matter by lawyers instructed by the Spanish Ministry of Justice, part of the Spanish State Administration. No argument was directed to this point at the hearing. It is not necessary for me to decide it and I do not address it further.

F. The Kingdom's applications

26. On 29 May 2013 K & L Gates LLP was formally instructed to act on behalf of the Kingdom. It informed Ince & Co LLP of this that day. On 10 June 2013 K & L Gates LLP advised Ince & Co LLP that the Kingdom would be making a jurisdictional challenge to the award and seeking any required extensions of time, and that they would revert as soon as they were in a position to clarify the Kingdom's position.

27. The stance taken by Ince & Co LLP was that the Club's section 66 application should be heard and determined on 5 July 2013. After taking advice from leading counsel, K & L Gates LLP by letter

dated 21 June 2013 maintained that this would not allow the Kingdom adequate time to prepare, and that the half day which had been allocated to the proposed 5 July hearing was insufficient.

28. After recording what had been said in the letter of 10 June 2013, the letter of 21 June 2013 stated that the Kingdom would challenge the award on, among other things, grounds of immunity from the jurisdiction of the tribunal and the English courts pursuant to the SIA 1978, by way of challenge to the substantive jurisdiction of the tribunal under sections 72 and/or 67 of the 1996 Act, by challenge to enforcement of the award pursuant to section 66(3) of that Act, and by asserting that the court should exercise its general discretion under section 66 as enforcement would constitute an improper interruption to a legitimate, bone fide criminal process in Spain. In relation to the challenge under sections 72 and/or 67 the letter of 21 June 2013 said this:

> "The Kingdom of Spain did not participate in the arbitration proceedings, and is thus entitled to seek appropriate relief pursuant to Section 72 on the basis that there was no valid arbitration agreement between the Kingdom of Spain and your client. In the alternative, our client will challenge the Tribunal's substantive jurisdiction under Section 67 and will argue, inter alia, that the Court should grant an extension of the 28 day deadline pursuant to its general discretion under Section 80(5) of the Act. Our client will assert that it is not a signatory nor a party to any relevant insurance contract containing an agreement to arbitrate."

29. Accompanying the letter of 21 June 2013 were proposed directions which would lead to a hearing on or after 4 October 2013. In support of those directions, the letter said that there would be a need for the court to consider expert evidence on Spanish law in relation to the proper characterisation of the claims made in the Spanish courts. That issue was not simple: it had taken the tribunal three days to hear the Club's unopposed submissions on this point in the arbitration.

30. On 28 June 2013 the Kingdom issued an application notice identifying orders that it would seek. Also on 28 June 2013 the Kingdom appears to have prepared an arbitration claim form identifying orders that would be sought. These two documents were couched in slightly different terms, but the substance was essentially similar. What was proposed was that there be directions leading to a hearing date not before 4 October 2013, for which purpose the Kingdom would no later than 5 August 2013 file and serve any application challenging the award under section 72 and/or 67, expert reports on issues of Spanish law, and evidence in response to the Club's application.

31. In support of its proposed orders the Kingdom filed a witness statement of Ian Meredith, the partner at K & L Gates LLP having conduct of the proceedings. Among other things:

> (i) He explained that the Kingdom had first contacted his firm on 8 May 2013. At the time when the acknowledgement of service was lodged, the Kingdom had not instructed the firm to represent it. In order to take that step the Kingdom had to go through a formal process which took a number of weeks. Prior to instructions the firm was "extremely limited" as to the extent to which it could assist the Kingdom, but agreed to act as a postbox in the matter.
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> (ii) As to the nature of the Kingdom's jurisdiction challenge, Mr Meredith put at the forefront of his witness statement an assertion that the Kingdom was not a party to the Spanish law claim. The proceedings in relation to the Spanish law claim had been initiated, he said, by "the Spanish Claimants" – a number of Spanish public entities (including local and regional governments) each having separate legal personality under Spanish law. The Club had, therefore, proceeded against the wrong party, and there was no basis to assert that the Kingdom was itself bound by any relevant arbitration clause.
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> (iii) Mr Meredith's witness statement acknowledged that the Kingdom had missed the deadline for submitting evidence in response to the Club's section 66 application and for making an application under section 67 of the Act. Reasons for granting such an extension were then set out, in the course of which Mr Meredith added that the Kingdom's primary submission was that it was entitled to apply to challenge the award under section 72 and that the 28-day time limit provided for in relation to section 67 was inapplicable.

32. In response to Mr Meredith's witness statement a third witness statement of Michael Volikas, the partner at Ince & Co LLP with conduct of the matter, was filed on behalf of the Club. Among other things, Mr Volikas noted that at the time of filing the statement on 2 July 2013 the Kingdom was just under a month late for the filing of evidence under section 66 and three and a half months late for making a section 67 challenge. Mr Volikas recorded that all documents in both the section 18 application and the arbitration were served on the Kingdom contemporaneously along with certified Spanish language translations. Mr Volikas set out a summary of the history. I do not repeat it here as the essential points have been set out earlier in this judgment. Mr Volikas added, among other things, that:

(i) the Kingdom had been on notice of the Club's arbitration claim for well over one and a half years, and had had sight of the detail of the Club's case, including its expert evidence, for almost 14 months;

(ii) as a sovereign state, it was fair to assume that the Kingdom had access to considerable resources and the very best legal advice;

(iii) there was no good reason for the Kingdom to have simply ignored the documents being served on them without taking any steps to consider the detail;

(iv) there had been no explanation by Mr Meredith of what steps were involved in the formal "process" required before instructing lawyers, and there was no good reason for not being ready to instruct lawyers promptly upon receiving the enforcement proceedings;

(v) the Kingdom had only stated its position (still in outline) on 21 June, well over a month after filing its acknowledgement of service.

33. Three further points were set out by Mr Volikas at paras 34 to 36 of his witness statement:

"34. Further, I note that the Defendants have, to date, failed to articulate any Spanish law principles on which they base their jurisdictional challenge. They say they are seeking to instruct Spanish legal experts (para 55.1(b) [M]). Since the Defendants are the Spanish State it is difficult to see why it has taken them 2 months since service of the s 66 proceedings (or indeed 14 months since service of the Claimant's Spanish law expert report in the s 18 Application) to engage Spanish legal experts (if, indeed, no such experts have been consulted so far) and/or explain their position as a matter of Spanish law.

35. Finally, I note that any further delays in the progress of this matter could be of the utmost prejudice to the Claimants. I have been informed by Mr Ruiz Soroa that closing submissions in the Spanish trial are due to finish next week and a judgment can be expected from the Court thereafter, perhaps as early as October. Since the parties are engaged in a "race to judgment", it is plain that the Defendants' proposed approach will lead to great prejudice to the Claimants.

36. I should also mention my understanding of developments in relation to the Defendants' submissions to the Spanish Criminal Court on issues of civil liability in the Spanish proceedings. I am advised by Mr Jose Maria Ruiz Soroa, who is representing the Owners and the Master in those proceedings, that closing oral submissions have been made by the State Lawyer representing the Kingdom of Spain (on 20 and 25 June 2013) and the Public Prosecutor (on behalf of all claimants in the Spanish criminal proceedings, including the Defendants) (on 19 June 2013) in relation to the basis upon which the vessel interests, including the Claimants, are claimed to be civilly liable for losses alleged to have been suffered. I understand that, in those submissions, the State Lawyer and the Public Prosecutor have both made reference to the Award, its findings and the arguments raised before the Tribunal. This further demonstrates the Defendants' awareness of the nature and detail of the arguments in play in the London arbitration and the case being made against it. Further, the Spanish closing submissions clearly placed reliance on Article 117 of the Penal Code. Therefore, any suggestion that the Defendants are unfamiliar with the relevant provisions of Spanish law and should require further substantial time to obtain Spanish legal advice for the purposes of challenging the Award seems at odds with the Defendants' position in the Spanish proceedings."

34. In response to Mr Volikas's third witness statement, a witness statement of Ania Farren, a lawyer at K & L Gates LLP, was made on 4 July 2013 and filed on behalf of the Kingdom. Accompanying the witness statement was an exhibit which included communications from the Spanish Ministry of Justice indicating that judgment was likely to be given by the Spanish court in the second half of November 2013. The exhibit also included a communication from the Spanish Ministry of Justice confirming that no English law advice was sought prior to contacting K & L Gates LLP, and giving details of the relevant regulation and protocol which required advice from the State Legal Service and the Ministry of Foreign Affairs, along with prior authorisation from the Ministry of Finance and the Public Administration, before engaging legal assistance. The witness statement gave the identities of the Kingdom's proposed expert witnesses on Spanish constitutional law and on the Spanish law claims.

G. The Arbitration Act 1996

35. The Departmental Advisory Committee on Arbitration Law ("the DAC"), under its then chairman, Mustill LJ, was asked to consider whether England, Wales and Northern Ireland should adopt the UNCITRAL Model Law on International Commercial Arbitration. The DAC's report, published in June 1989, did not advise adoption of the Model Law. Instead, the DAC recommended that there should be a new and improved Arbitration Act for England, Wales and Northern Ireland.

36. A draft Bill to give effect to that recommendation was circulated in February 1994. After considering responses to the draft Bill, the view of the DAC was that a new draft should be prepared which was much more along the lines of a restatement of the law following, as far as possible, the structure and spirit of the Model Law, rather than simply a classic exercise in consolidation. By this time Saville LJ had taken over as chairman. A new draft was circulated for public consultation in July 1995. In the light of that consultation a "final draft" Bill was prepared. A further report by the DAC in February 1996 ("the DAC 1996 report") contained, among other things, a guide to the provisions of the final draft Bill. The final draft Bill formed the basis for the Arbitration Act 1996 which received the Royal Assent on 17 June 1996 and came into force on 31 January 1997. I shall refer to it as "the 1996 Act".

37. The long title of the 1996 Act was as follows:

"An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes."

38. Part I of the 1996 Act dealt with arbitration pursuant to an arbitration agreement. Under the heading "Introductory" Part I included the following:

"1. General principles

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.

...

4. Mandatory and non-mandatory provisions

(1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.

(2) The other provisions of this Part ('the non-mandatory provisions') allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.

(3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.

(4) It is immaterial whether or not the law applicable to the parties' agreement is the law of England and Wales or, as the case may be, Northern Ireland.

(5) The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.

For this purpose an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties."

39. Under the heading "Powers of the court in relation to award", Part I included the following:

"66. Enforcement of the award

(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

(2) Where leave is so given, judgment may be entered in terms of the award.

(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.

The right to raise such an objection may have been lost (see section 73).

...

67. Challenging the award: substantive jurisdiction.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court:

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

...

68. Challenging the award: serious irregularity.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity

affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)

...

69. Appeal on point of law.

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

...

(2) An appeal shall not be brought under this section except:

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

...

70. Challenge or appeal: supplementary provisions.

(1) The following provisions apply to an application or appeal under section 67, 68 or 69.

(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted:

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award).

(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process."

40. Under the heading "Miscellaneous", Part I included the following:

"72. Saving for rights of person who takes no part in proceedings.

(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,

(b) whether the tribunal is properly constituted, or

(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.

(2) He also has the same right as a party to the arbitral proceedings to challenge an award:

(a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or

(b) by an application under section 68 on the ground of serious irregularity (within the meaning of that section affecting him);

and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case.

73. Loss of right to object.

(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection:

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling:

(a) by any available arbitral process of appeal or review, or

(b) by challenging the award,

does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling."

41. Under the heading "Supplementary", Part I included the following:

"79. Power of court to extend time limits relating to arbitral proceedings.

(1) Unless the parties otherwise agree, the court may by order extend any time limit agreed by them in relation to any matter relating to the arbitral proceedings or specified in any provision of this Part having effect in default of such agreement.

...

(2) An application for an order may be made:

(a) by any party to the arbitral proceedings (upon notice to the other parties and to the tribunal), or

(b) by the arbitral tribunal (upon notice to the parties).

80. Notice and other requirements in connection with legal proceedings.

...

(4) References in this Part to making an application or appeal to the court within a specified period are to the issue within that period of the appropriate originating process in accordance with rules of court.

(5) Where any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement.

(6) Provision may be made by rules of court amending the provisions of this Part:

(a) with respect to the time within which any application or appeal to the court must be made,

(b) so as to keep any provision made by this Part in relation to arbitral proceedings in step with the corresponding provision of rules of court applying in relation to proceedings in the court, or

(c) so as to keep any provision made by this Part in relation to legal proceedings in step with the corresponding provision of rules of court applying generally in relation to proceedings in the court."

H. The Civil Procedure Rules

42. As set out above, section 80(5) of the 1996 Act concerns provisions in Part I which require an application or appeal to be made to the court within a specified time. In that regard relevant rules of court are to apply. Those rules of court are now found in the Civil Procedure Rules 1998. The Club places particular reliance on Rule 3. It seems to me, however, that it is important to begin with the overriding objective as set out in Rule 1.1 and applied in Rules 1.2 and 1.3. Rules 1.1 to 1.3 in their current form (at 20 September 2013) are set out below; changes which took effect from 1 April 2013 are shown in square brackets:

"1.1 The overriding objective

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly [and at proportionate cost].

(2) Dealing with a case justly [and at proportionate cost] includes, so far as is practicable–

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate:

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases [; and]

[(f) enforcing compliance with rules, practice directions and orders.]

1.2 Application by the court of the overriding objective

The court must seek to give effect to the overriding objective when it:

(a) exercises any power given to it by the Rules; or

(b) interprets any rule ...

1.3 Duty of the parties

The parties are required to help the court to further the overriding objective."

43. The outline submissions for the Club drew attention to CPR 3, and noted that the Kingdom had not sought relevant extensions of time until after the expiry of the relevant period. In those circumstances it was said that the Kingdom was in effect seeking relief from a sanction, and accordingly that CPR 3.9 applied – in a revised form with effect from 1 April 2013.

44. I set out relevant parts of CPR 3.1, along with CPR 3.9 as it was prior to 1 April 2013:

"3.1 The court's general powers of management

(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(2) Except where these Rules provide otherwise, the court may:

(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);

...

(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.

...

3.9 Relief from sanctions

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including:

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party.

(2) An application for relief must be supported by evidence."

45. With effect from 1 April 2013 CPR 3.9 has been amended. It now reads:

"**3.9 Relief from sanctions**

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need:

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence."

46. In *Fred Perry (Holdings) Ltd v Brands Plaza Trading* [2012] FSR 28 Jackson LJ warned that:

"there is a concern that relief against sanctions is being granted too readily at the present time. Such a culture of delay and non-compliance is injurious to the civil justice system and to litigants generally."

47. After referring to the new CPR 3.9, Jackson LJ noted that:

"litigants who substantially disregard court orders or the requirements of the CPR will receive significantly less indulgence than hitherto."

48. In *Venulum Property Investments Ltd v Space Architecture Ltd* [2013] EWHC 1242 (TCC) Edwards-Stuart J refused an extension of time. Referring to *Fred Perry* he noted the:

"stricter approach that must now be taken by the courts towards those who fail to comply with rules following the new changes to the CPR."

I. The DAC 1996 report

49. The skeleton argument for the Kingdom drew attention to para 295 of the DAC 1996 report, dealing with what became section 72 of the 1996 Act. In oral argument reference was made to the whole of what was said by the DAC in relation to the provisions in the Bill which were to become sections 72 and 73. The passage in question comprises paras 295 to 298:

"Clause 72 Saving for Rights of Person who Takes no Part in Proceedings

295. 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.

296. This is a mandatory provision.

Clause 73 Loss of Right to Object

297. Recalcitrant parties or those who have had an award made against them often seek to delay proceedings or to avoid honouring the award by raising points on jurisdiction, etc. which they have been saving up for this purpose or which they could and should have discovered and raised at an earlier stage. Article 4 of the Model Law contains some provisions designed to combat this sort of behaviour (which does the efficiency of arbitration as a form of dispute resolution no good) and we have attempted to address the same point in this Clause. In particular, unlike the Model Law, we have required a party to arbitration proceedings who has taken part or continued to take part without raising the objection in due time, to show that at that stage he neither knew nor could with reasonable diligence have

discovered the grounds for his objection (the latter being an important modification to the Model Law, without which one would have to demonstrate actual knowledge, which may be virtually impossible to do). It seems to us that this is preferable to requiring the innocent party to prove the opposite, which for obvious reasons it might be difficult or impossible to do.

298. For the reasons explained when considering Clause 72, the provision under discussion cannot, of course, be applied to a party who has chosen to play no part at all in the arbitral proceedings."

J. Court decisions

50. An early decision on section 67 of the 1996 Act was *Azov Shipping Co v Baltic Shipping Co (No 1)* [1999] 1 Lloyd's Rep 68; [1999] 1 All ER 476. In that case it was common ground that if an arbitrator had not made a ruling on jurisdiction then at a hearing in the court on an application under section 67 the case challenging jurisdiction could be presented with "the full panoply of oral evidence and cross examination". It was submitted, however, that where an arbitrator had made a ruling on jurisdiction it may be appropriate for the court to give directions which restricted that ability. Rix J rejected that submission. At [1999] 1 Lloyd's Rep 68 at page 70 col 2; [1999]1 All ER 476 page 479h to j he said this:

"I can quite see that there is an interest in encouraging parties to put their arguments on jurisdiction before the arbitrator himself under s 30. In many cases, and perhaps in the ordinary and normal case of such a challenge, where, for instance, there is simply an issue as to the width of an arbitration clause and no issue as to whether a party is bound to the relevant contract in the first place, the arbitrator's view may be accepted. If it is not, a challenge to the court is likely to be a limited affair raising, essentially, a point of construction on the clause and thus no problem arises. Where, however, there are substantial issues of fact as to whether a party has made the relevant agreement in the first place, then it seems to me that, even if there has already been a full hearing before the arbitrators the court, upon a challenge under s 67, should not be placed in a worse position than the arbitrator for the purpose of determining that challenge."

51. *AOOT Kalmneft v Glencore International AG* [2002] 1 Lloyd's Rep 128 concerned, among other things, applications under sections 67 and 68 of the 1996 Act which had been made 11 and 14 weeks out of time respectively. Refusing to extend time, Colman J noted that section 80(5) of the 1996 Act incorporated into the Act relevant rules of court relating to extending periods of time. At paras 47 to 60 he said this:

"47. ... At the time when the Act became law, the relevant rule was RSC, O 3, r 5. Now, under the new regime, it is CPR 3.1.2 which provides:

'Except where these Rules provide otherwise, the court may:

(a) extend or shorten the time for compliance with any rule, practice direction or court order even if an application for extension is made after the time for compliance has expired.'

48. The effect of s 80(5) is to introduce the broad discretionary approach under this rule into applications for the extension of the 28 days time limit under ss 67, 68 and 69 of the 1996 Act.

49. It is therefore necessary to identify the criteria applicable to such applications under the Arbitration Act, for they may differ from those applicable under the CPR.

50. In determining the relative weight that should be attached to discretionary criteria the starting point must be to take into account the fact that the 1996 Act is founded on a philosophy which differs in important respects from that of the CPR.

51. Thus, the twin principles of party autonomy and finality of awards which pervade the Act tend to restrict the supervisory role of the court and to minimise the occasion for the court's intervention in the conduct of arbitrations. Nowhere is this more clearly demonstrated than in s 68 itself where there was superimposed upon the availability of a remedy for what used to be called 'misconduct' by the arbitrator and was re-defined as 'serious irregularity' a requirement that it had caused or would cause substantial injustice to the applicant. No longer was it enough to demonstrate failure by the arbitrator scrupulously to adhere to the audi alteram partem rule.

52. Section 12 also reflects this general approach by redefining the circumstances in which the court will extend the time for the commencement of arbitration fixed by the arbitration agreement: as explained in *Harbour & General Works Ltd v Environment Agency* [2000] 1 Lloyd's Rep 65 at p 69. Further, the relatively short period of time for making an application for relief under ss 67, 68 and 69 also reflects the principle of finality. Once an award has been made the parties have to live with it unless they move with great expedition. Were it otherwise, the old mischief of over long unenforceability of awards due to the pendency of supervisory proceedings would be encouraged.

53. At this point it is necessary to have in mind the general principles set out in s 1 of the 1996 Act:

> '(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.'

54. The reference to unnecessary delay is pertinent to identifying the relevant discretionary criteria.

55. The need for expedition in proceedings before the court is reflected in ... appendix 19 of the Commercial Court Guide. ...

56. It is however also to be remembered that the threshold requirement set out in s 79(3)(b) for extension of time limits to which s 79 relates – 'that a substantial injustice would otherwise be done' – is not expressed to be applicable to extensions of time under s 80(5). In that respect, therefore, a lower unfairness threshold must be presumed to have been intended.

57. In approaching the identification of the applicable criteria it is also important to take into account the fact that, at least in international arbitrations, English arbitration is probably the most widely chosen jurisdiction of all. It is chosen because of the ready availability of highly skilled and experienced arbitrators operating under a well-defined regime of legal and procedural principles in what is often a neutral forum. Supervisory intervention by the courts is minimal and well-defined and the opportunities for a respondent with a weak case to delay the making of an award or to interfere with its status of finality are very restricted. Accordingly, much weight has to be attached to the avoidance of delay at all stages of an arbitration, both before and after an interim or final award. If the English courts were seen by foreign commercial institutions to be over-indulgent in the face of unjustifiable non-compliance with time limits, those institutions might well be deterred from using references to English arbitration in their contracts. This is a distinct public policy factor which has to be given due weight in the discretionary balance.

58. On the other hand it has to be recognised that because of the extremely wide international nature of the market for English arbitration many of the parties may be located in remote jurisdictions and may have little or no previous experience of international or English arbitration. When these relatively unsophisticated parties find themselves involved in such an arbitration, it is only to be expected that they move somewhat more tentatively than would an international trading house well experienced in this field. It would therefore be wrong to fail to make at least some allowance for this factor in evaluating the element of fault in failing to comply with time limits.

59. Accordingly, although each case turns on its own facts, the following considerations are, in my judgment, likely to be material:

> (i) the length of the delay;
>
> (ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;
>
> (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;
>
> (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;
>
> (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred the determination of the application by the court might now have;
>
> (vi) the strength of the application;
>
> (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.

60. The relative weight to be given to these considerations in the discretionary balance in any given case is likely to be influenced by the general considerations relating to international arbitration to which I have already referred."

52. In *People's Insurance Co of China (Hebei Branch) v Vysanthi Shipping Co Ltd (The Joanna V)* [2003] 2 Lloyd's Rep 617 disputes arose between the owners and cargo interests concerning an incident when the vessel *Joanna V* grounded and required salvage assistance. The owners declared general average. The salvors requested security, and the vessel was delayed until cargo interests provided such security. Relevant bills of lading provided for disputes to be the subject of arbitration in London. After an initial abortive attempt to commence arbitration, in October 1999 a London arbitration was commenced against the

receivers. As no arbitrator was appointed by the receivers, the owners' arbitrator became the sole arbitrator by virtue of section 17(2) of the 1996 Act. The receivers objected to the jurisdiction of the arbitrator, but they appeared and defended the claim under that reservation. In February 2001 a hearing took place. In March 2001 the arbitrator (Mr Donald Davies) published his award. He held that he had jurisdiction under the bills of lading. He rejected a contention that there had been a submission of the claim advanced in the arbitration to the courts of China. On the merits he determined that the receivers were liable to pay general average and damages for detention. In July 2002 the owners sought an order from the English court enforcing the award. Aikens J granted an order enforcing the award, subject to the right of the receivers to apply to set aside that order. In November 2002 the receivers requested that the court consider exercising its powers to extend the time within which it would be open to the receivers to challenge the award on the question of jurisdiction. Thomas J refused to extend time. In reaching that decision, he examined the application of principles set out in *Kalmneft*. The context in which he conducted that examination, however, was described by him in this way:

"21. Under the scheme of the Arbitration Act (as para 140 of the DAC Report on the Arbitration Bill makes clear), if the arbitral tribunal deals with a question of jurisdiction in its awards on the merits, then the decision of the arbitral tribunal on jurisdiction may be challenged under s 67. That section makes it clear that a party may lose the right to object by reason of the operation of the provisions of s 73. Section 73(2) provides:

'Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling:

(a) by any available arbitral process of appeal or review, or

(b) by challenging the award,

does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.'

The time allowed by the Act is a period of 28 days (see s 70(3)).

22. Thus subject to the powers of the Court under ss 79 and 80(5), it is clear under the scheme of the Act that any challenge to an award on the question of jurisdiction must be made within 28 days of the publication of the award; the consequence of a failure to do so is that the party objecting to the jurisdiction loses that right. This is, in my view, clear from the provisions and the scheme of the Act; this is also the view reached by Professor Merkin at paras 17.3 and 17.12 of his work entitled *Arbitration Law*.

...

The position in respect of the award

24. As matters stand at present, unless I exercise the Court's power to extend time, it was not seriously disputed (nor could it be) that the receivers have lost their right to challenge the jurisdiction of Mr Donald Davies to make his award through the operation of the positions of s 67 and s 73. It therefore follows that his decision on the merits was a decision which this Court is bound, under the statutory scheme of the Arbitration Act, to recognise as an award made by an arbitrator with jurisdiction.

25. When I observed that under the scheme of the Act the Court is bound to do so, that is not to say that the Act does not entirely accord with the needs of the commercial community and of international understandings. It is self evident, as para 138 of the DAC Report makes clear, that an arbitral tribunal cannot be the final arbitrator of the question of jurisdiction; as is pointed out in the DAC Report, this would provide a classic case of 'pulling oneself up by one's own boot straps'. However, giving a tribunal power to rule on its own jurisdiction means that the parties cannot delay valid arbitration proceedings indefinitely by making spurious challenges to the jurisdiction of the arbitral tribunal. Nonetheless the protection of the party objecting to the jurisdiction of the tribunal is its right to apply to the Court. That is an unfettered right and in any such application the party challenging the jurisdiction of the arbitrator is entitled to adduce such evidence as it considers necessary to show that the arbitrator had no jurisdiction. The Court is not in any way bound or limited to the findings made in the award or to the evidence adduced before the arbitrator; it does not review the decision of the arbitrator but makes its own decision on the evidence before it; I entirely agree with the observations of Mr Justice Gross in *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd* [2002] EWHC 1993 (Comm); [2003] 1 Lloyd's Rep 190 at paras 22 and 23 that the court's duty is to rehear the matter and in doing so the court is not limited to the evidence before the arbitral tribunal. However, that right to make a challenge before the Court is made subject to a time limit so that a party challenging the jurisdiction of the arbitrator has to make up his mind as to what to do and cannot hold over a challenge until an attempt at enforcement is made.

26. Subject therefore to consideration of the application before the Court to extend time to make a challenge, there can be no doubt that (1) the receivers had long before they issued proceedings in March 2002 lost their right to object to the jurisdiction of Mr Donald Davies, and that (2) there was no other basis for challenge to the award. The award had therefore taken effect as a binding determination of the issues decided on the merits as between the parties."

53. In *Bernuth Lines Ltd v High Seas Shipping Ltd (The Eastern Navigator)* [2006] 1 Lloyd's Rep 537 Christopher Clarke J was concerned with an application under section 68 of the 1996 Act to set aside an award on the basis that the notice of arbitration had not been effectively served. His conclusion was that the application had been effectively served, and thus the application failed. At the end of his judgment, however, he dealt with two matters which would have arisen if he had concluded that the notice of arbitration had not been effectively served. One of these concerned a point concerning section 72 of the 1996 Act. Counsel for Bernuth (Mr Lewis) raised the point for the first time on the morning of the hearing. It was thus dealt with in circumstances where counsel for the respondent (Mr Aswani) had little if any opportunity to research the matter. The arguments advanced at the hearing, and the conclusion which he would have reached if the point had been relevant, were set out by Christopher Clarke J at paras 57 to 59:

"57. Mr Lewis submitted that, since Bernuth took no part in the arbitration, they were entitled to a declaration under section 72(1) that the award was of no effect and could make such an application, without limit of time and without showing, as section 68 would require, that the award would cause substantial injustice. Mr Aswani submitted that the relief available under section 72(1) must have a narrower scope than that contemplated by section 72(2)(a) taken with section 67 since, if all the relief available under section 67 could be obtained under section 72(1), a person who had taken no part in the proceedings, would never proceed under section 67 as applied by section 72(2)(a). If he were to do so he would unnecessarily subject himself to a time limit under section 70(3) and to a restriction on his entitlement to appeal under section 67(4). Further since Mr Lewis did not seek on behalf of his clients to claim under section 67, as opposed to section 72, it could not apply at all.

58. It seems to me that Mr Aswani is on strong ground in saying that section 72(1) must have a more limited scope than section 67(3) at least to the extent that, if an applicant seeks, as Bernuth does, to set aside the award he must proceed under section 67. The distinction between section 72(1) and section 72(2) appears to reflect the distinction between an application for a declaration under section 67(1)(b) and a challenge to an award under section 67(1)(a) with a consequent order under section 67(3). But the distinction between declaring an award to be of no effect because the tribunal did not have substantive jurisdiction and setting it aside would not appear to be major, and it is not immediately apparent why an application under section 72(1) should be subject to no time limit, whereas an application under sections 67 and 72(2)(a) is subject to the time limit for an application under section 67 specified in section 70(3). Section 72(1) seems to be primarily intended to deal with the position at an interlocutory stage, when the court may be prepared to declare that an applicant is not bound by the arbitration agreement and to restrain the respondent from further continuance of the arbitration. Mr Lewis submitted that section 72(1) was the principal provision to be invoked if substantive jurisdiction was challenged and that section 72(2)(a) was inserted as an abundance of caution.

59. Had I reached the conclusion that the arbitration had not been validly commenced because the email of 5 May had not been effectively served or served in accordance with an agreed method of service, I would not have refused to set aside the award on the ground that section 72(1) did not permit it and that section 67 had not been invoked. It would be necessary, on that hypothesis, to look at the substance of the matter. Bernuth brought their application within 28 days of the award. It should more pertinently have been brought under section 67 as applied by section 72(2)(a). If that is so, I can see no relevant prejudice to High Seas in granting to Bernuth the necessary permission to amend their application notice so as to make it an application under section 67. If the proceedings had originally been brought under sections 67 and 72(2)(a) High Seas would have made exactly the same arguments, save that the question of substantial injustice would not arise. I would, therefore, have given Bernuth permission to amend and set aside the award under section 67."

54. It seems clear that the argument before Christopher Clarke J on this point did not involve any reference to paras 295 to 298 of the DAC 1996 report.

55. *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, concerned an application to enforce in England an arbitration award made by an arbitral tribunal sitting in Paris. The applicant

("Dallah") was not able to point to any express agreement by the respondent, the government of Pakistan, to submit disputes to arbitration. It contended, however, that the government was the alter ego of a trust which had agreed that disputes should be settled by arbitration held under the rules of the International Chamber of Commerce in Paris. The government rejected that contention and played no part in the arbitration. The arbitral tribunal sitting in Paris made an award in favour of Dallah both as to its own jurisdiction and on the merits. Aikens J at first instance refused the application. By virtue of the Arbitration Act 1996 section 103(2)(b) and the New York Convention 1958 article V(1)(a), the issue was whether the award was valid under French law. Aikens J concluded that the question he needed to decide for that purpose was whether the government could prove that it was neither a party to, nor bound by, the arbitration agreement between Dallah and the trust. His conclusion was that the government had done so. Successive appeals by Dallah to the Court of Appeal and the Supreme Court failed. In the Supreme Court the judgment of Lord Mance JSC identified four questions which arose. At paras 20 to 30 of his judgment he discussed questions (c) and (d) as follows:

> *"(c) The nature of the exercise which an enforcing court must undertake when deciding whether an arbitration agreement existed under such law, and*
>
> *(d) the relevance of the fact that the arbitral tribunal has itself ruled on the issue of its own jurisdiction*
>
> 20. These questions are here linked. Miss Heilbron's primary submission on question (c) is that the only court with any standing to undertake a full examination of the tribunal's jurisdiction would be a French court on an application to set aside the award for lack of jurisdiction. ...
>
> 21. In Miss Heilbron's submission, any enforcing court (other than the court of the seat of the arbitration) should adopt a different approach. It should do no more than 'review' the tribunal's jurisdiction and the precedent question whether there was ever any arbitration agreement binding on the Government. The nature of the suggested review should be 'flexible and nuanced' according to the circumstances. Here, Miss Heilbron argues that the answer to question (d) militates in favour of a limited review. She submits that the tribunal had power to consider and rule on its own jurisdiction (Kompetenz-Kompetenz or compétence-compétence), that it did so after full and close examination, and that its first partial award on jurisdiction should be given strong 'evidential' effect. In these circumstances, she submits, a court should refuse to become further involved, at least when the tribunal's conclusions could be regarded on their face as plausible or 'reasonably supportable'.
>
> ...
>
> 23. In its written case Dallah also argued that the first partial award gave rise, under English law, to an issue estoppel on the issue of jurisdiction, having regard to the Government's deliberate decision not to institute proceedings in France to challenge the tribunal's jurisdiction to make any of its awards. This was abandoned as a separate point by Miss Heilbron in her oral submissions before the Supreme Court, under reference to the Government's recent application to set aside the tribunal's awards in France. But, in my judgment, the argument based on issue estoppel was always doomed to fail. A person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him. The party initiating the arbitration must try to enforce the award where it can. Only then and there is it incumbent on the defendant denying the existence of any valid award to resist enforcement.
>
> 24. Dallah's stance on question (d) cannot therefore be accepted. Arbitration of the kind with which this appeal is concerned is consensual-the manifestation of parties' choice to submit present or future issues between them to arbitration. Arbitrators (like many other decision-making bodies) may from time to time find themselves faced with challenges to their role or powers, and have in that event to consider the existence and extent of their authority to decide particular issues involving particular persons. But, absent specific authority to do this, they cannot by their own decision on such matters create or extend the authority conferred upon them. ...
>
> ...
>
> 25. Leaving aside the rare case of an agreement to submit the question of arbitrability itself to arbitration, the concept of compétence-compétence is 'applied in slightly different ways around the world', but it 'says nothing about ... judicial review' and 'it appears that every country adhering to the compétence-compétence principle allows some form of judicial review of the arbitrator's jurisdictional decision': see *China Minmetals Materials Import and Export Co Ltd v Chi Mei Corporation* 334 F 3d 274 (2003), page 288, where some of the nuances (principally relating

to the time at which courts review arbitrators' jurisdiction) were examined. ...

...

26. An arbitral tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal. This leaves for consideration the nature of the exercise which a court should undertake where there has been no such submission and the court is asked to enforce an award. Domestically, there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under section 67 of the Arbitration Act 1996, just as he would be entitled under section 72 if he had taken no part before the arbitrator: see eg *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68. The English and French legal positions thus coincide: see the *Pyramids* case (para 20 above).

27. The question is whether the position differs when an English court is asked to enforce a foreign award. ...

28. It is true that article V(1)(e) of the Convention and section 103(2)(f) of the 1996 Act recognise the courts of 'the country in which, or under the law of which' an award was made as the courts where an application to set aside or suspend an award may appropriately be made; and also that article VI and section 103(5) permit a court in any other country where recognition or enforcement of the award is sought to adjourn, if it considers it proper, pending resolution of any such application. But article V(1)(a) and section 103(2)(b) are framed as freestanding and categoric alternative grounds to article V(1)(e) of the Convention and section 103(2)(f) for resisting recognition or enforcement. Neither article V(1)(a) nor section 103(2)(b) hints at any restriction on the nature of the exercise open, either to the person resisting enforcement or to the court asked to enforce an award, when the validity (sc existence) of the supposed arbitration agreement is in issue. The onus may be on the person resisting recognition or enforcement, but the language enables such person to do so by proving (or furnishing proof) of the non-existence of any arbitration agreement. This language points strongly to ordinary judicial determination of that issue. Nor do article VI and section 103(5) contain any suggestion that a person resisting recognition or enforcement in one country has any obligation to seek to set aside the award in the other country where it was made.

29. None of this is in any way surprising. The very issue is whether the person resisting enforcement had agreed to submit to arbitration in that country. Such a person has, as I have indicated, no obligation to recognise the tribunal's activity or the country where the tribunal conceives itself to be entitled to carry on its activity. Further, what matters, self-evidently, to *both* parties is the enforceability of the award in the country where enforcement is sought. Since Dallah has chosen to seek to enforce in England, it does not lie well in its mouth to complain that the Government ought to have taken steps in France. It is true that successful resistance by the Government to enforcement in England would not have the effect of setting aside the award in France. But that says nothing about whether there was actually any agreement by the Government to arbitrate in France or about whether the French award would actually prove binding in France if and when that question were to be examined there. Whether it is binding in France could only be decided in French court proceedings to recognise or enforce, such as those which Dallah has now begun. I note, however, that an English judgment holding that the award is not valid could prove significant in relation to such proceedings, if French courts recognise any principle similar to the English principle of issue estoppel (as to which see *The Sennar (No 2)* [1985] 1 WLR 490). But that is a matter for the French courts to decide.

30. The nature of the present exercise is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. ...

56. In his speech Lord Collins JSC discussed the position in England at paras 95 to 98:

"95. The position in England under the Arbitration Act 1996 as regards arbitrations the seat of which is in England is as follows. By section 30(1) of the 1996 Act, which is headed 'Competence of tribunal to rule on its own jurisdiction' the arbitral tribunal may rule on its own substantive jurisdiction, including the question whether there is a valid arbitration agreement. By section 30(2)

any such ruling may be challenged (among other circumstances) in accordance with the provisions of the Act. Section 32 gives the court jurisdiction to determine any preliminary point on jurisdiction but only if made with the agreement of all parties or with the permission of the tribunal, and the court is satisfied (among other conditions) that there is good reason why the matter should be decided by the court. By section 67 a party to arbitral proceedings may challenge any award of the tribunal as to its substantive jurisdiction but the arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court is pending in relation to an award as to jurisdiction. The equivalent provisions in Scotland are in the Arbitration (Scotland) Act 2010, schedule 1, rules 19, 42 (not limited to jurisdiction), and 67.

96. The consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators. This can arise in a variety of contexts, including a challenge to the tribunal's jurisdiction under section 67 of the 1996 Act, or in an application to stay judicial proceedings on the ground that the parties have agreed to arbitrate. Thus in *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68 Rix J decided that where there was a substantial issue of fact as to whether a party had entered into an arbitration agreement, then even if there had already been a full hearing before the arbitrator the court, on a challenge under section 67, should not be in a worse position than the arbitrator for the purpose of determining the challenge. This decision has been consistently applied at first instance (see, eg, *Peterson Farms Inc v C&M Farming Ltd* [2004] 1 Lloyd's Rep 603) and is plainly right.

97. Where there is an application to stay proceedings under section 9 of the 1996 Act, both in international and domestic cases, the court will determine the issue of whether there ever was an agreement to arbitrate: *Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522 (English arbitration); and *Albon v Naza Motor Trading Sdn Bhd (No 4)* [2008] 1 Lloyd's Rep 1 (Malaysian arbitration). So also where an injunction was refused restraining an arbitrator from ruling on his own jurisdiction in a Geneva arbitration, the Court of Appeal recognised that the arbitrator could consider the question of his own jurisdiction, but that would only be a first step in determining that question, whether the subsequent steps took place in Switzerland or in England: see *Weissfisch v Julius* [2006] 1 Lloyd's Rep 716, para 32.

98. Consequently, in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought. The fact that jurisdiction can no longer be challenged in the courts of the seat does not preclude consideration of the tribunal's jurisdiction by the enforcing court: see, eg, *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2007] 1 Lloyd's Rep 193, para 104 and *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, page 48, per Kaplan J."

57. Lord Hope DPSC, Lord Saville and Lord Clarke JJSC all agreed with Lord Mance and Lord Collins JJSC.

58. In *Terna Bahrain Holding Co WLL v Al Shamsi* [2013] 1 Lloyd's Rep 86 the applicant ("Terna") sought an injunction restraining the respondents ("the Bin Kamils") from pursuing or continuing proceedings in Sharjah, on the grounds that the disputes in question had been resolved in favour of Terna by an arbitration award. The Bin Kamils in response sought an extension of time for the making of applications under sections 67 and 68 of the 1996 Act in relation to the award. Popplewell J refused to extend time. At paras 27 to 34 of his judgment he described the applicable principles in this way:

"27. The principles regarding extensions of time to challenge an arbitration award have been addressed in a number of recent authorities, most notably in *AOOT Kalmneft v Glencore International AG* [2002] 1 Lloyd's Rep 128, *Nagusina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147, *L Brown & Sons Ltd v Crosby Homes (North West) Ltd* [2008] BLR 366, *Broda Agro Trading (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2011] 1 Lloyd's Rep 243, and *Nestor Maritime SA v Sea Anchor Shipping Co Ltd* [2012] 2 Lloyd's Rep 144, from which I derive the following principles:

(1) Section 70(3) of the Act requires challenges to an award under sections 67 and 68 to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the Act, and which is enshrined in section 1(a). The

party seeking an extension must therefore show that the interests of justice require an exceptional departure from the timetable laid down by the Act. Any significant delay beyond 28 days is to be regarded as inimical to the policy of the Act.

(2) The relevant factors are:

(i) the length of the delay;

(ii) whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so;

(iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;

(iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;

(v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration, or the costs incurred in respect of the arbitration, the determination of the application by the Court might now have;

(vi) the strength of the application;

(vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.

(3) Factors (i), (ii), and (iii) are the primary factors.

28. I add four observations of my own which are of relevance in the present case. First, the length of delay must be judged against the yardstick of the 28 days provided for in the Act. Therefore a delay measured even in days is significant; a delay measured in many weeks or in months is substantial.

29. Secondly, factor (ii) involves an investigation into the reasons for the delay. In seeking relief from the Court, it is normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. In the absence of such explanation, the court will give little weight to counsel's arguments that the evidence discloses potential reasons for delay and that the applicant 'would have assumed' this or 'would have thought' that. It will not normally be legitimate, for example, for counsel to argue that an applicant was unaware of the time limit if he has not said so, expressly or by necessary implication, in his evidence. Moreover where the evidence is consistent with laxity, incompetence or honest mistake on the one hand, and a deliberate informed choice on the other, an applicant's failure to adduce evidence that the true explanation is the former can legitimately give rise to the inference that it is the latter.

30. Thirdly, factor (ii) is couched in terms of whether the party who has allowed the time to expire has acted reasonably. This encompasses the question whether the party has acted intentionally in making an informed choice to delay making the application. In Rule 3.9(1) of the Civil Procedure Rules, which sets out factors generally applicable to extensions of time resulting in a sanction, the question whether the failure to comply is intentional is identified as a separate factor from the question of whether there is a good explanation for the failure. This is because in cases of intentional non compliance with time limits, a public interest is engaged which is distinct from the private rights of the parties. There is a public interest in litigants before the English court treating the court's procedures as rules to be complied with, rather than deliberately ignored for perceived personal advantage.

31. Fourthly, the court's approach to the strength of the challenge application will depend upon the procedural circumstances in which the issue arises. On an application for an extension of time, the court will not normally conduct a substantial investigation into the merits of the challenge application, since to do so would defeat the purposes of the Act. However if the court can see on the material before it that the challenge involves an intrinsically weak case, it will count against the application for an extension, whilst an apparently strong case will assist the application. Unless the challenge can be seen to be either strong or intrinsically weak on a brief perusal of the grounds, this will not be a factor which is treated as of weight in either direction on the application for an extension of time. If it can readily be seen to be either strong or weak, that is a relevant factor; but it is not a primary factor, because the court is only able to form a provisional view of the merits, a view which might not be confirmed by a full investigation of the challenge, with the benefit of the argument which would take place at the hearing of the application itself if an extension of time were granted.

32. The position, however, is different where, as has happened in the current case, the application for an extension of time has been listed for hearing at the same time as the challenge application itself, and the court has heard full argument on the merits of the challenge

application. In such circumstances the court is in a position to decide not merely whether the case is "weak" or "strong", but whether it will or will not succeed if an extension of time were granted. The court is in a position to decide whether the challenge is a good or a bad one. If the challenge is a bad one, this should be determinative of the application to extend time. Whilst it may not matter in practice whether the extension is allowed and the application dismissed, or whether the extension is simply refused, logical purity suggests that it would be wrong to extend time in those circumstances: there can be no justification for departing from the principle of speedy finality in order to enable a party to advance a challenge which will not succeed.

33. Conversely, where the court can determine that the challenge will succeed, if allowed to proceed by the grant of an extension of time, that may be a powerful factor in favour of the grant of an extension, at least in cases of a challenge pursuant to section 68. In such cases the court will be satisfied that there has been a serious irregularity giving rise to substantial injustice in relation to the dispute adjudicated upon in the award. Given the high threshold which this involves, the other factors which fall to be weighed in the balance must be seen in the context of the applicant suffering substantial injustice in respect of the underlying dispute by being deprived of the opportunity to make his challenge if an extension of time is refused. Where the delay is due to incompetence, laxity or mistake and measured in weeks or a few months, rather than years, the fact that the court has concluded that the section 68 challenge will succeed may well be sufficient to justify an extension of time. The position may be otherwise, however, if the delay is the result of a deliberate decision made because of some perceived advantage.

34. The greater prominence which the merits of the application may play when the court is considering the application for extension of time at the same time as the substantive challenge application should not usually be seen as a reason for the two matters to be listed and heard together. On the contrary, in many cases that would itself frustrate the policy of speedy finality underpinning the Act. It is not uncommon for challenges under s.68 to require a lengthy investigation into the issues in the arbitration, and into the detail of the procedural course of the reference, requiring a substantial hearing for that purpose. In such cases it should be the exception, rather than the norm, for the extension of time application to be postponed to a full hearing of the challenge application."

K. The hearing on 5 July 2013

59. Miss Sara Cockerill QC and Miss Anna Dilnot appeared at the hearing on behalf of the Kingdom, subject to reservation as to the court's jurisdiction. In her oral submissions Miss Cockerill QC stressed the principle identified by Lord Mance in *Dallah* at para 23: a person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him. Citing the 2nd Edition of Mustill and Boyd, *Commercial Arbitration*, Miss Cockerill QC submitted that this principle forms a part of what the authors referred to as "passive remedies". The entitlement not to participate went back many years. If an objector was entitled not to participate, then it could hardly be said that the objector should have paid attention to what was going on. The Kingdom was entitled to be "a polite blank wall". In these circumstances, everything up to service of the application to enforce was irrelevant. Under section 66 of the 1996 Act the Kingdom was entitled to resist enforcement. It sought an extension of time of only one month, and that was not a difficult extension to grant.

60. As to section 72, Miss Cockerill QC submitted that no extension of time was needed, for on its true construction there was nothing in section 72 about time limits. She acknowledged that in *Bernuth* Christopher Clarke J had indicated that the 28-day time limit did apply to applications made under section 72(2), and that a similar time limit would logically apply to an application under section 72(1). Miss Cockerill QC noted that the Club accepted that these observations were obiter. Miss Cockerill QC added that the point on section 72 could properly be regarded as "tail end Charlie" – having arisen only on the morning of the hearing. Textbooks had taken different approaches to section 72, but at least one author, Professor Merkin, took the view that a time limit would arise only in relation to an application under section 72(2). The submission for the Kingdom was that there was no time limit under section 72(2), for time limits under the 1996 Act were intended for those who participated in the arbitration which it was proposed to challenge.

61. In support of these matters Miss Cockerill QC relied upon para 295 of the DAC 1996 report. That explained why it was that those who participated could not complain about being subject to time limits. The corollary to the last sentence of para 295 was that if an objector had not participated, then the imposition of such time limits would not be fair. This was further supported by the distinction in wording found in the statute. Section 67 and

other provisions concerning applications referred to a "party to the proceedings". By contrast, section 72 referred to a person "alleged to be a party". She submitted that the Kingdom's approach gave the least uncomfortable fit. It could not be right to say, as had been asserted on behalf of the Club, that by failing to make a challenge under section 67 within the time limit applicable to parties to proceedings, the Kingdom had lost the right to challenge enforcement under section 66 on the ground that the award was made without jurisdiction.

62. Turning to discretion, Miss Cockerill QC submitted that the witness statements of Mr Meredith and Ms Farren explained the delay on the part of the Kingdom: it had acted as speedily as it could, courteously, and had tried to keep the other side updated.

63. In relation to prejudice, there had never been any real possibility of the court making an order for enforcement at the hearing on 5 July 2013: even without evidence from the Kingdom of Spain the points which arose were complex and difficult. The real complaint was the suggestion that there was a "race to judgment". If the court were able to fix a hearing in October then there would be no prejudice in that regard.

64. There was, submitted Miss Cockerill QC, real strength in the objection to jurisdiction. That was so in relation to the point about characterisation of the Spanish law claim, which the arbitrator had said was difficult. It was also the case in relation to the issue noted by Mr Meredith in his witness statement concerning the question whether the Kingdom was indeed a party to the Spanish law claim.

65. Overall Miss Cockerill QC submitted that there had been minor delay without fault. It was a case of immense size and it would be manifestly unfair to force the Kingdom into an abridged timetable.

66. The Club was represented at the hearing by Mr Christopher Hancock QC and Miss Charlotte Tan. At the start of his oral submissions Mr Hancock QC dealt with section 67, where it was common ground that the relevant factors were those in *Kalmneft*. There had been no engagement in the period from February to April. What was now sought was that evidence should not be lodged until August – a six-month delay was an extreme and substantial delay. An application for an extension of time must be sensitive to the facts of the particular case. In that regard, a right not to participate did not entitle the Kingdom to say that the court should ignore what happened. It was relevant that only recently had the Kingdom instructed experts. For all these reasons an extension of time under section 67 should be refused.

67. Turning to section 72, Mr Hancock QC submitted that the speech of Lord Mance in *Dallah* did not give the Kingdom support. In para 28 Lord Mance had contemplated that entitlement under section 72 where an objector had taken no part before the arbitrator was an entitlement, as with section 67 "on an application made in time for that purpose". If the objector were out of time then the right had been lost.

68. While acknowledging that in *Bernuth* this point had arisen as a "tail end Charlie", Mr Hancock QC submitted that the approach identified by Christopher Clarke J made sense. Section 72(1) was directed to the interlocutory stage, while section 72(2) was concerned with the position after the award. As to the point about terminology, the position in relation to section 67 was that a person who said there was no jurisdiction was denying being a party. It had to be the case that section 72(1) was subject to the same time limit as that in section 72(2), for otherwise objectors would evade the requirement of section 72(2)(a). It would be odd if the statute, having taken care to specify that for the purposes of section 72(2) the duty in section 70(2) did not apply, had intended that the same should be true as regards section 70(3) but failed to say so. There was, submitted Mr Hancock QC, no policy justification for saying that a party disputing jurisdiction need not respect the time for challenges.

69. Turning to the overlap between sections 66 and 73, Mr Hancock QC noted that section 66 said that the right to raise an objection as to jurisdiction might have been lost, and cross-referred to section 73. If under section 66 the Kingdom had lost the right to object, it would be odd if the Kingdom could escape from this by relying on section 72.

70. At this point the time allotted for the hearing had been exhausted. I adjourned the application until later in the day so that other cases could be dealt with. The hearing resumed at 15.00. In the interim I had been able to advise the parties that the Commercial Court would list a two-day hearing on 3 and 4 October 2013.

71. Mr Hancock QC then continued with his oral submissions, recapitulating that the principle identified in *Dallah* did not entitle the Kingdom to ignore facts which were known, merely because they had been made known during the currency of arbitration proceedings which they were not participating in. On the merits, Mr Hancock QC noted that the arbitrator had reached his conclusion "without much hesitation", and that the point about the parties to the Spanish law claim was new – previously the Kingdom had said the contrary.

72. Recapitulating on section 72, Mr Hancock QC stressed that the statutory wording referred to "the same right", equating the objector to the

position of someone who had to apply within 28 days. In exercising that right, the objector was to proceed "by an application under section 67". If section 70 were not to apply, there would have to be a disapplication, and there was none as regards section 70(3). In response to questions from me, Mr Hancock QC submitted that the approach which he was contending did not run counter to the policy identified in *Dallah*. That case was not concerned with the present issue.

73. Finally, on delay, Mr Hancock QC submitted that it was unreasonable not to take advice earlier. A party could not rely on internal arrangements which delay the matter for more than a couple of weeks. Moreover the Kingdom had been on notice that there would be an application to enforce, yet it took the view that it need do nothing until given notice of enforcement proceedings.

74. In her oral submissions in reply Miss Cockerill QC stressed that section 66(3) had the plain object of showing that it would be possible to challenge jurisdiction at the enforcement stage. This was consistent with the approach adopted in the 4th Edition of Merkin and Flannery, Arbitration Act 1996: "... the right of a party to rely upon want of jurisdiction at enforcement stage will be dependent upon his not having participated in the arbitration proceedings (which is his right under section 7) or upon his having participated after having registered an objection". It was also consistent with what the DAC 1996 report said at para 298: the provision concerning the loss of the right to object could not be applied to an objector who had chosen to play no part at all in the arbitral proceedings.

75. Miss Cockerill QC referred to *People's Insurance*, and submitted that the approach identified by Thomas J in paras 21 and 22 was plainly directed to the circumstances of that case, involving an objector who had participated. Someone who had taken no part was not within section 67 at all. If an objector had participated without prejudice to jurisdiction, then it was fair that such an objector should comply with the time limit for section 67.

76. Turning to *Bernuth*, Miss Cockerill QC noted that it had not been submitted to Christopher Clarke J in that case that there was no time limit under section 72(2).

77. Miss Cockerill QC also responded to what had been said by Mr Hancock QC in relation to *Dallah*, where she submitted that he had sought to have his cake and eat it, as to delay, and as to merits.

78. At the conclusion of oral argument it seemed to me important to give an immediate decision if that were possible. I concluded that I could give an immediate decision because, even assuming that Mr Hancock QC's construction of the statute were correct, it seemed to me that in the exercise of my discretion it would be in the interests of justice to grant such extensions as would be necessary to ensure that the Kingdom could deploy its full armoury of objections to enforcement of the award and the award itself. Accordingly I stated that for reasons which I would give in due course, insofar as an extension of time was needed by the Kingdom I granted it. I then gave directions designed to ensure that there would be orderly preparation for the hearing on 3 and 4 October 2013.

L. Exercise of discretion

79. I now set out my reasons for concluding that even if the statute were to be construed as Mr Hancock QC had contended, I should nevertheless grant any extension that was needed by the Kingdom of Spain in order to deploy its full armoury when objecting to enforcement and to the award. As a matter of general principle, it seemed to me that Mr Hancock QC's contentions involved an unacceptable limitation on the principle identified by Lord Mance and Lord Collins JJSC in *Dallah*. The objector was entitled not to participate in the arbitral proceedings where it took the view that those proceedings were invalid. It is difficult to see why the position should be any different merely because a tribunal – which the objector regarded as an illegitimate body – had purported to make a ruling that it had jurisdiction. Adapting the wording used by Moore-Bick LJ at para 16 of his judgment in *Dallah* in the Court of Appeal, this issue is concerned with matters which, if established, undermine the legitimacy of the award as giving rise to a binding obligation created in accordance with the will of the parties as expressed in the arbitration agreement. The *Dallah* principle is, to my mind, so fundamental that it should not be whittled down unless the interests of justice so require. The contention for the Club is that the Kingdom's inaction following the arbitrator's award, but prior to notice of the application to enforce, must count against the Kingdom when seeking extensions of time. In the circumstances of the present case this contention seems to me to be an impermissible whittling down of this important principle.

80. Turning to the particular factors relied upon, I accept that such delay as did occur after notice of the application to enforce is explicable by reference to the relevant regulation and protocol. It would be wrong to penalise the Kingdom when Spanish law required it to follow those procedures. On the merits, there is nothing obviously unsound in the main points taken by the Kingdom.

81. My assessment of all these factors is dependent upon the circumstances of this particular case. I do not rule out the possibility that in other cases the *Dallah* principle may not, for some

particular reason, carry as much weight as I consider that it carries in the present case. As to the *Kalmneft* principles, the present case does not appear to me to warrant criticism in accordance with those principles, even as adopted and supplemented in *Terna*. Nor do I ignore the new approach generally in CPR 3.9: nothing in the present case appears to me to give rise to the concerns identified by Jackson LJ in *Fred Perry*.

M. Issues concerning the 1996 Act

82. For the reasons given earlier, it is not necessary for me to decide the issues of construction canvassed at the hearing. I have, however, now had the opportunity to reflect upon them. It seems to me that what was said by the DAC 1996 report at paras 295 to 298 gives a key which unlocks the semantic difficulties identified in argument. A concern of the committee was to ensure on the one hand that arbitral proceedings should not be delayed, and awards should not be evaded, by raising points on jurisdiction which could and should have been discovered and raised at an earlier stage. On the other hand, a person who disputes the arbitral tribunal's jurisdiction cannot be put in a position where the law runs roughshod over a genuine entitlement to ignore an invalid arbitral proceeding. The reconciliation is that those who participate in the arbitral proceedings (including participating under reservation) must accept that their ability to challenge an award will be subject to strict time limits, while those who do not do so will be entitled to await an application to enforce. In the case of section 69, an appeal will only be appropriate if any objection to jurisdiction has been waived or has failed, and thus an objector who has previously objected to jurisdiction can properly be described, for the purposes of section 69, as a party.

83. These considerations lead me to conclude that the provisions in section 72 should be construed with at least a degree of generosity. In particular, it does not seem to me that there is any necessity to confine section 72(1) to the position before the issue of an award. The remedies contemplated by section 72(1) are a declaration or an injunction. Both these remedies are discretionary, and if there are circumstances in any particular case which would make it inappropriate to grant a declaration or injunction then the court will consider those circumstances before concluding whether the remedy should be granted.

84. As regards section 72(2), there is, by inference from the failure to refer to section 70(3) in the final words of section 72, a clear intention that the time limit under section 70(3) will apply. That, however, does not to my mind necessarily result in any injustice to an objector who has played no part in the arbitral proceedings. That objector will retain the right to seek a declaration or injunction under section 72(1), a right which for the reasons given above will be subject to a discretion as regards the granting of a remedy. If in addition the objector wishes to take the steps which would be open to a party to the arbitral proceedings – ie someone who has participated – then it does not seem unjust to require that the time limit be complied with, or if it has not been complied with that an extension should then be sought. The court when considering whether to grant any extension will be able to give consideration to any particular factors which arise from the application of the *Dallah* principle.

N. Conclusion

85. I ask the parties to seek to agree any consequential order that may be needed in the light of these reasons. I take this opportunity to express my thanks to counsel and solicitors for the considerable amount of work which was done in a short space of time in order for the relevant issues to be argued in an orderly and efficient manner.